

CUL-405138-25-LP1957

INDIAN CASES

CONTAINING

FULL REPORTS OF DECISIONS

OF

The **Privy Council**, the High Courts of **Allahabad**,
Bombay, **Calcutta** and **Madras**, the Chief Courts
of **Lower Burma** and the **Punjab**, the Courts
of the Judicial Commissioners of **Central**
Provinces, **Oudh**, **Sind** and
Upper Burma

REPORTED IN

The following 22 Legal Periodicals:

Allahabad (1) Indian Law Reports, (2) Law Journal; **Bombay** (1) Indian
Law Reports, (2) Law Reporter; **Burma** (1) Law Times, (2) Lower
Burma Rulings, (3) Upper Burma Rulings; **Calcutta**
(1) Indian Law Reports, (2) Law Journal, (3) Weekly
Notes; **Madras** (1) Indian Law Reports, (2) Law
Journal, (3) Law Times, (4) Law Weekly, (5) Weekly
Notes; **Nagpur** Law Reports; **Oudh** (1) Cases,
(2) Law Journal; **Punjab** (1) Law Re-
porter, (2) Record, (3) Weekly Re-
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A large number of extra Rulings not reported elsewhere

VOLUME XXX, 1915.

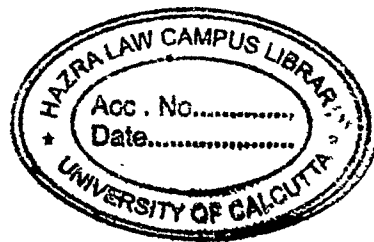
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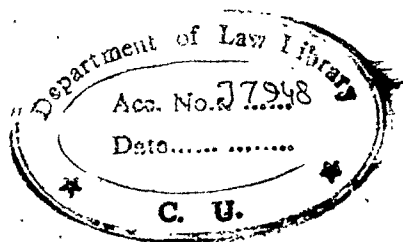
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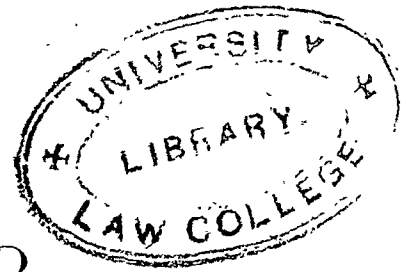
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Comparative Tables showing seriatim the Volumes and Pages of all Indian Law Journals and Reports, for the month of September and October 1915, with the corresponding Volumes and Pages of Indian Cases.

Table 1

ALLAHABAD HIGH COURT.

(A).—37 I. L. R., ALLAHABAD SERIES, FOR SEPTEMBER-OCTOBER, 1915.

Page of Vol. 37 I. L. R., All. 1915.	Names of Parties.	Corresponding Vol. and page of Ind. Cas.		Page of Vol. 37 I. L. R., All. 1915.	Names of Parties.	Corresponding Vol. and page of Ind. Cas.	
		V.	P.			V.	P.
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		V.	P.			V.	P.
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472	Timangowda v. Benepgowda	28	946	513	R. D. Sethna v. Jwalaprasad Gaya Prasad	26	890
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890	Emperor v. Shankar Ramdas ...	31	371	962	Mahadev Raghunath Godbole v. Rama Tukaram Devkote ...	31	305
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		V.	P.			V.	P.
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227	Har Shyam Chowdhury v. Shyam Lal Sahu ...	31	22	298	Panchumoni Dass v. Chandra Kumar Ghose ...	31	319
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933	Nilkanta Rai Chaudhuri v. Lalit Mohan Banerjee ...	29	989	942	Krishna Doyal Gir v. Syed Muhammad Amirul Hassan ...	26	678

(C).—19 CALCUTTA WEEKLY NOTES, 1915—concl.

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953	Nabin Chandra Choudhury v. Bepin Chandra Choudhury ...	29	308	1027	Radha Gobinda Mojumdar v. Kumarkhali Municipality ...	31	10
957	Nilmoney Nag v. Durga Pada Banerji ...	30	1007	1030	Sahodra Mudiali v. Nabin Chand Porai ...	27	258
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972	Ram Subhag Singh v. Emperor ...	30	465	1068	Habiram Das v. Hem Nath Sarma ...	30	690
980	Ujir Sheikh v. Syed Ali Sheikh ...	30	159	1070	Madhusudan Sen v. Rakhal Chandra Das Basak ...	30	697
991	Padarath Halwai v. Pandit Ram Nain Upadhia ...	30	366	1077	Janakinath Hore v. Prabhasini Dasi ...	30	898
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823	Madurai Pillai v. Muthu Chetty ...	22	775				

(A).—38 I. L. R., MADRAS SERIES—*concl'd.*

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850	Sundarambal Ammal v. Yogavanagurukkal ...	23	72	941	Kariadan Kumber v. British India Steam Navigation Co. Ltd. ...	20	546
867	Muthukumara Chetty v. Anthony Udayar ...	24	120	954	Churiyayi Kanaran v. Mattarai Chirutha ...	23	321
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883	Natesa Gramani v. Tangavelu Gramani ...	23	102	972	Yellammal v. Ayyappa Naick ...	22	870
887	Subbaroya Reddiar v. Rajagopala Reddiar ...	23	570	988	Alamelammal v. Suryaprakasaroaya Mudaliar ...	31	491
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(B).—29 MADRAS LAW JOURNAL, FOR SEPTEMBER-OCTOBER 1915.

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(B).—29 MADRAS LAW JOURNAL, 1915—concl'd.

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538	Sri Rajah Inuganti Kasturamma Bahadur Zemindarini v. Cheli- kani Venkatasurayya Garu	30	879	607	Narayanaswamy Aiyar v. Venkata- ramana Aiyar	31	326

(C).—18 MADRAS LAW TIMES, FOR SEPTEMBER-OCTOBER, 1915.

Page of Vol. 18 M. L. T. 1915.	Names of Parties.	Corresponding Vol. and page of Ind. Cas.		Page of Vol. 18 M. L. T. 1915.	Names of Parties.	Corresponding Vol. and page of Ind. Cas.	
		V.	P.			V.	P.
203	Ganga Sahai v. Kesri	30	265	248	Musammal Bilas Kunwar v. Desraj Ranjit Singh	30	299
209	Hakeem Patte Muhamad v. Shaik Davood	30	569	254	Nagoor Meeran Sahib v. Sookulal Sowcar	30	488
216	Padma Krishna Chettiar v. Naga- mani Ammal	30	574	255	Chakkara Kannan v. Kunhi Pok- ker	30	755
218	Kristnamacharya v. Anthakki	31	12	273	Muthuswami Nadan v. Sankara- lingam Chetty	30	675
220	Ullatil Kalathil Nethiri Menon v. Mullalli Gopalan Nair	30	713	277	Secretary of State v. Kannepalli Janakiramayya	30	669
223	Mudduswami Siddappa v. Bhas- karalakshminarasappa	30	853	310	Uppala Kotayya, <i>In re</i>	30	656
226	Shrinivasa Raya v. Ramappa Heb- bara	30	991	312	Palniappa Chetty v. Chidambaram Pillai	30	942
228	Thakurani Tara Kumari v. Chatur- bhuj Narayan Singh	30	833	313	Varadaraja Mudali v. Murugesam Pillai	30	707
236	Jaldu Venkatasubba Rao v. Asiatic Steam Navigation Company	30	840	316	Sundaram Iyer v. Kulathu Aiyar	31	81
243	Abdul Rahim Sahib v. Kullappa Gownden	30	845	322	Parameswaran Nambudripad, <i>In re</i>	31	161
247	Lakshuman Chetty v. Muthiah Chetty	30	785	327	Muruga Chetty v. Rajaswamy	30	699
				336	Appayya Shetty v. Mahammade Beari	30	596

(C).—18 MADRAS LAW TIMES, 1915—concl.

Page of Vol. 18 M. L. T. 1915.	Names of Parties.	Corresponding Vol. and page of Ind. Cas.		Page of Vol. 18 M. L. T. 1915.	Names of Parties.	Corresponding Vol. and page of Ind. Cas.	
		V.	P.			V.	P.
343	Nallagonda Pedda Chenna Reddy v. Asupalloe Budda Reddy ...	31	55	377	Augustus Brothers v. M. A. Fernandez ...	31	59
346	Manicka Mudali v. Muthachi Ka- vandan ...	30	685	381	Sankar Rangayya v. Sankar Ra- mayya ...	31	350
348	Raja of Pithapuram v. Venkata- subba Row ...	31	93	383	Cheepothi Ahmad v. Ambalathan Kandi Ayissa ...	31	74
349	Rama Chetty v. Arunachalam Chettiar ...	31	98	385	Arunacholam Chettiar v. Laksh- mana Iyer ...	31	234
353	Sri Raja Inuganti Kasturamma v. Chelikani Venkatasurayya ...	30	878	387	Vikarama Deo v. Vikrama Deo Maharajulangaru ...	31	272
360	Karri Ramayya v. Villoori Jaganna- dhan ...	30	889	389	Puthia Purayil Seethi v. Mangottil Ryrath Ummayya ...	30	977
364	Janga Venkata Reddy v. Jamal Ahmad Sahib ...	29	394	394	Chidambaramma v. Hussainamma ...	30	101
366	Ayya Raghunatha Thathachariar v. Thiruvengadachariar ...	31	46	398	Narayanaswami Naidu v. Sessa- giri Rao ...	31	104
371	Kathari Narasimha Raju v. Bhu- pati Raju Raghunadha Raju ...	31	52	400	Chinnakaruppan Chetty v. May- yapa Chetty ...	30	753
374	Vaithianatha Iyer v. Vaithialinga Mudaliar ...	31	206	401	Sharooof Sahib v. Raghunatha Sivaji ...	29	579
				402	Suppa Bhattar v. Suppu Sokkaya Bhattar ...	30	962

(D).—2 LAW WEEKLY, FOR SEPTEMBER-OCTOBER, 1915.

Page of Vol. 2 L. W. 1915.	Names of Parties.	Corresponding Vol. and page of Ind. Cas.		Page of Vol. 2 L. W. 1915.	Names of Parties.	Corresponding Vol. and page of Ind. Cas.	
		V.	P.			V.	P.
731	Secretary of State for India in Council v. Bai Rajbai ...	30	303	828	Arunachalam Chettiar, <i>In re</i> ...	30	679
751	Shrinivasa Raya v. Ramappa Heb- bara ...	30	991	830	Bilas Kunwar v. Ranjit Singh ...	30	299
754	Subba Naicker, <i>In re</i> ...	30	781	837	Ganga Sahai v. Kosri ...	30	265
755	Lakshumanan Chetty v. Muthiah Chetty ...	30	785	843	Tara Kumari v. Chaturbhuj Nara- yan Singh ...	30	833
758	Muddusami Siddappa v. Bhaskara Lakshmi Narasappa ...	30	853	850	Veerammal v. Kannu Ammal ...	30	845
763	Secretary of State for India v. Janakiramayya ...	30	609	853	Vasudevan Atisseripad v. Govinda Menon ...	30	818
803	Ratna Pathan v. Para Sundaram ...	30	634	858	Sitaramanujachari v. Kanduri Vellamma ...	30	822
805	Venkata Subba Rao v. Asiatic Steam Navigation Company of Calcutta ...	30	840	861	Parvathi Ammal v. Govindasami Pillai ...	30	827
813	Muruga Chetty v. Rajaswamy ...	30	669	867	Sundaram Iyer v. Kulathu Aiyer ...	31	81
823	Muthuswamy Nadan v. Sankara- lingam Chetty ...	30	675	874	Karri Ramayya v. Villoori Jagan- natham ...	30	889
				881	Putta Lal v. Musammat Parbati Kunwar ...	29	617

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(D).—2 LAW WEEKLY, 1915—concl'd.

Page of Vol. 2 L. W. 1915.	Names of Parties.	Corresponding Vol. and page of Ind. Cas.		Page of Vol. 2 L. W. 1915.	Names of Parties.	Corresponding Vol. and page of Ind. Cas.	
		V.	P.			V.	P.
887	Manicka Mudali v. Muthachi Goundan	30	685	964	Narasimha Raju v. Raghunadha Raju	31	52
890	Augustus Brothers v. Fernandez	31	59	969	Puthia Purayil Seethi v. Ryrath Ummayya	30	977
894	Thekkethil Moosa v. Valiyakath Pathumma	30	924	977	Venkata Subbiah Chetty v. Subba Naidu	31	152
897	Buddha Singh v. Laltu Singh	30	529	989	Velayutham Pillai v. Subbaraya Pillai	31	298
912	Chenna Reddi v. Budda Reddy	31	55	992	Raghunadha Thathachariar v. Thiruvengadachariar	31	46
916	Ramachandra Raju v. Appayya	30	895	999	Cheepothi Ammad v. Ambalathan-kandi Ayissa	31	74
918	Samu Pattan v. Chidambara Odayan	31	179	1002	Arunachalam Chettiar v. Lakshmana-Iyer	31	231
920	Kasturamma v. Venkatasurayya	30	878	1005	Suppa Bha tar v. Suppu Sokkaya Bhattar	30	962
933	Sennimalai Goundan, <i>In re</i>	30	1005	1016	Annamalai Chetty v. Suppia Thevan	31	279
937	Crown Prosecutor v. Govinda-rajulu	30	752	1018	Muhammad Sulfalla v. Vajihuddin Sahib	31	281
939	Abibulla Ravuthan, <i>In re</i>	30	447	1024	Raman Chetty v. Nagappa Chetty	31	285
941	Raman Nayar v. Kunhi Kolandan Musaliar	31	184	1025	Bangarayudu v. Perayya Sastry	30	927
946	Sivarama Aiyar v. Alagappa Chetty	31	211	1031	Naravana-wami Naidu v. Seshagiri Rao	31	104
948	Kyroon Bee v. Administrator-General of Madras	31	38	1034	Antoni Juas Prabhu v. Ramakrishnayya	31	263
952	Segu Chidambaramma v. Saroddi Hussainamma	30	101	1035	Rama Reddi, <i>In re</i>	30	749
958	Bapu Naidu, <i>In re</i>	31	175				
960	Vythinaatha Aiyar v. Vaithilinga Mudaliar	31	206				

Table 7

NAGPUR JUDICIAL COMMISSIONER'S COURT.

11 NAGPUR LAW REPORTS, FOR SEPTEMBER-OCTOBER, 1915.

Page of Vol. 11 N. L. R. 1915.	Names of Parties.	Corresponding Vol. and page of Ind. Cas.		Page of Vol. 11 N. L. R. 1915.	Names of Parties.	Corresponding Vol. and page of Ind. Cas.	
		V.	P.			V.	P.
132	Municipal Committee of Saugor v. Nilkanth	31	62	156	Dhundiraj v. Warubai	30	660
153	Karnidan v. Meghraj	30	981	160	Bhanya v. Naika	31	5
				162	Ahmadali v. Emperor	30	993

Table 8

OUDH JUDICIAL COMMISSIONER'S COURT.

(A).—18 OUDH CASES, FROM JUNE TO AUGUST, 1915.

Page of Vol. 18 O. C. 1915.	Names of Parties.	Corresponding Vol. and page of Ind. Cas.		Page of Vol. 18 O. C. 1915.	Names of Parties.	Corresponding Vol. and page of Ind. Cas.	
		V.	P.			V.	P.
157	Village Co-operative Bank, Anguri Bagh, Fyzabad v. Kali Din ...	31	724	168	Nawab Wala Qadar Husain Ali Mirza v. Muhammad Azim ...		
160	Mankaram Singh v. Baij Nath Singh ...	30	279	188	Khan Ghulam Abbas Khan v. Bibi Um- matul-Fatima, ...	31	728
162	Mahesh v. Goswami Banwari Lal	31	717			31	748

(B).—2 OUDH LAW JOURNAL, FOR AUGUST-SEPTEMBER, 1915.

Page of Vol. 2 O. L. J. 1915.	Names of Parties.	Corresponding Vol. and page of Ind. Cas.		Page of Vol. 2 O. L. J. 1915.	Names of Parties.	Corresponding Vol. and page of Ind. Cas.	
		V.	P.			V.	P.
466	Ram Dayal v. Sumer Singh ...	32	356	502	Suraj Bakhsh v. Musammat Sukhdei ...	32	291
468	King-Emperor v. Tilak ...	32	321				
480	Kundan Lal v. Wajid Husain ...	32	359	546	Ajudhia Saran Singh v. King- Emperor ...	32	326
483	Yar Ali Beg v. Danish Ali ...	32	314	549	Ram Saran v. Prithipal Singh ...	32	370
485	Gauri Shankar Singh v. Bhagwan Din ...	32	337	556	Mumtaz Ali Khan v. Harpal Singh ...	32	376
488	Musammat Husaini v. Ram Charan ...	32	341	562	Ghanshyam Das v. Musammat Hardei ...	32	380
491	Dhamsa Bakhsh Singh v. Jag- mohan Singh ...	32	209	575	Bisheswar Pathak v. Ram Prasad Pathak ...	31	624
495	Abdul Karim v. Muhammad Husain ...	32	345	579	Inayat Ali v. Musammat Jaitun Bibi ...	32	362
497	Abdul Karim v. Muhammad Husain ...	32	347	584	Musammat Sitara Begam v. Mu- hammad Ishaq Khan ...	32	365
498	Jagan Nath v. Kamta Singh ...	32	349	589	Har Sahai v. Dhanpal Singh ...	32	368
500	Raghunath Prasad v. Musammat Ketki ...	32	353				

Table 9

PUNJAB CHIEF COURT.

(A).—16 PUNJAB LAW REPORTER, FOR SEPTEMBER-OCTOBER, 1915.

No. of Vol. 16 P. L. R. 1915.	Names of Parties.	Corresponding Vol. and page of Ind. Cas.		No. of Vol. 16 P. L. R. 1915.	Names of Parties.	Corresponding Vol. and page of Ind. Cas.	
		V.	P.			V.	P.
192	Narain Singh v. Kala Singh ...	32	312	216	Mohammad Nasir Khan v. Farid	22	398
193	Arjan Singh v. Darbara Singh ...	28	113	217	Musammat Kishen Devi v. Shib	25	697
194	Sukh Raj v. Kanhaya Lal ...	28	441		Saran	27	69
195	Musammat Malap Kaur v. Hakim	32	315	218	Maharaj Kishen v. Har Gobind ...	27	833
196	Budhu Ram v. Muhammad Din ...	26	882	219	Agra v. Emperor	26	1005
197	Yaran v. Gulrang	25	831	220	Gul Shah v. Crown	26	1001
198	Hira v. Nihal Singh	25	867	221	Chuhar Singh v. Crown	28	145
199	Mahan Singh v. Narain Singh	25	854	222	Crown v. L. C. E. Shuldham	26	625
200	Rugha v. Mughli	27	381	223	Beja v. Emperor	27	842
201	Lal Singh v. Sham Lal	27	93	224	Emperor v. Bhagwan Das	27	844
202	Amar Singh v. Kishen Singh	27	94	225	Emperor v. Fazal Din	27	664
203	Livingstone v. Feroz Din	27	203	226	Jowala Sahai v. Emperor	27	897
204	Ahmada v. Emperor	27	210	227	Municipal Committee, Jhang v.	26	756
205	Moola v. Emperor	27	200		Muhammad Hayat	27	417
206	Emperor v. Ohuni	27	901	228	Bahadri v. Emperor	27	791
207	Emperor v. Khuda Bakhsh	26	205	229	Nathu v. Bishna	26	745
208	Kohmi v. Emperor	26	323	230	Nawab Ali v. Lal Singh	26	441
209	Muhammad Sirdar v. Emperor	29	993	231	Arjan v. Mandas	26	743
210	Hasta v. Emperor	27	446	232	Gobinda Mal v. Santa	26	543
211	Shadi Beg v. Ahmed Khan	26	667	233	Karar Hassan v. Mustafa Hassan	26	486
212	Nadir v. Crown	26	998	234	Ratti Ram v. Kundan Lal	26	797
213	Phula Khan v. Crown	27	156	235	Med Singh v. Musammat Kabirun-		
214	Mr. M. 1st Grade Pleader, <i>In the</i> <i>matter of</i>	27	154		nissa		
215	Jhaadu-Rani v. Crown			236	Nabi Bakhsh v. Musammat Mehr-		
					Bibi		

(B).—50 PUNJAB RECORD, FOR SEPTEMBER-OCTOBER, 1915.

No. of Vol. 50 P. R. 1915.	Names of Parties.	Corresponding Vol. and page of Ind. Cas.		No. of Vol. 50 P. R. 1915.	Names of Parties.	Corresponding Vol. and page of Ind. Cas.	
		V.	P.			V.	P.
	<i>Civil.</i>				<i>Civil—contd.</i>		
68	Kura v. Madho	31	159	78	Jowala Singh v. Tulsa Ram	31	212
69	Bhamba Ram v. Allah Bakhsh	29	253	79	Alliance Bank of Simla, Ltd. v.	31	215
70	Musammat Fazlan v. Imam-ud-Din	30	517	80	Amritsar Bank in Liquidation	31	722
71	Sham Sundar v. Abdul Ahad	31	241		Jhabban Lal v. Musammat Safdari	31	254
72	Sher Singh v. Salig	29	778	81	Bogam	31	221
73	Wadhawa v. Musammat Hassi	31	199	82	Sawan Mal v. Shib Diyal	31	230
74	Karam Chand v. Ghulam Hassan	31	202	83	Gul Muhammad v. Tota Ram	31	237
75	Prithmi Chand v. Safa Chand	31	209		Fazl-ud-Din v. Kharak Singh		
76	Ram Adin v. Munshi Ram	31	205	84	Musammat Mahan Devi v. Madho		
77	Gaman v. Imam Bakhsh						

(B).—50 PUNJAB RECORD, 1915—concl'd.

No. of Vol. 50 P. R. 1915.	Names of Parties.	Corresponding Vol. and page of Ind. Cas.	No. of Vol. 50 P. R. 1915.	Names of Parties.	Corresponding Vol. and page of Ind. Cas.
	<i>Criminal.</i>	V. P.		<i>Criminal—concl'd.</i>	V. P.
23	Umar Din v. Crown	30 731	27	Crown v. Tek Chand	31 380
24	Crown v. Sheodan	31 386		<i>Revenue.</i>	
25	Bhola Ram v. Crown	31 646			
26	Crown v. Gul Muhammad	31 644	4	Sohna v. Khawaja	31 238

(C).—10 PUNJAB WEEKLY REPORTER, FOR SEPTEMBER-OCTOBER, 1915.

No. of Vol. 10 P. W. R. 1915.	Names of Parties.	Corresponding Vol. and page of Ind. Cas.	No. of Vol. 10 P. W. R. 1915.	Names of Parties.	Corresponding Vol. and page of Ind. Cas.
	<i>Civil.</i>	V. P.		<i>Civil—concl'd.</i>	V. P.
112	Raja v. Allah Ditta	29 802	141	Fazal-ud-Din v. Kharak Singh	31 230
113	Bhura v. Banarsi Das	30 481	142	Tansey v. Rivett	31 73
114	Jawala Singh v. Ladha	31 272	143	Safdar Ali v. Fazil	30 524
115	Ram Lal v. Firm of Arur Chand	30 482	144	Rafi-ud-Din v. Secretary of State for India	31 76
116	F. A. Gregory v. H. Thomson	30 487	145	Safdar Ali v. Ghulam Mohi-ud- Din	30 526
117	Jagan Nath v. Hakim	30 485	146	Ahmad Din Anis-ul-Rahman v. Atlas Trading Company of Delhi	31 80
118	Jas Ram v. Attar Chand	30 491	147	Arura v. Balak Ram	30 528
119	Sultan Singh v. Hashmat Ullah	29 804	148	Tufel Muhammad v. Shahab Din	31 85
120	Miss Hamilton v. Shankar Das	29 791		<i>Criminal.</i>	
121	Parma Nand v. Thikhu	30 817	29	Muhammad Sharif v. Crown	29 826
122	Jahan Khan v. Chandi Shah	29 854	30	Musammal Jatto v. Crown	30 743
123	Ghaus v. Musammal Fajji	29 857	31	Wir Singh v. Crown	30 455
124	Liquidators of the Marwar Bank, Ltd., v. Kanshi Nath	30 657	32	Musammal Budhan v. Ram Rakha Mal	30 452
125	Jhabban Mal v. Musammal Safdri Begam	31 722	33	Amar Singh v. Crown	29 827
126	Wadhawa Shah v. Rattan Chand	30 813	34	Mohabli v. Crown	30 747
127	Musammal Nawab Begam v. Mu- hammad Mirajuddin	30 28	35	Crown v. Water Turner	30 139
128	Prem Shah v. Khan Chand	30 31	36	Crown v. Mohan Lal	30 157
129	Chhuttan v. Hazari Lal	30 22	37	Muhammad Sirdar v. Crown	26 323
130	Makhan Lal v. Ganeshi Lal	30 84	38	Ramji Lal v. Crown	31 643
131	Kishna Mal v. Mohammad Bakhsh	27 616	39	Sikandar v. Crown	31 382
132	Harkishen Lal v. Sarswati Ram	28 286		<i>Revenue.</i>	
133	Budha Khan v. Mohammad	31 287	1	Lal Singh v. Maluk Singh	30 839
134	Shahamad v. Ibrahim	30 100	2	Kanwan v. Nathu Singh	30 815
135	Nur Ahmad v. Ghulam Husain	30 90	3	Lakhmi Das v. Hayat	29 802
136	Narain Das v. Ralli Brothers	31 45	4	Wasaya v. Isa	30 818
137	Muzaffar Khan v. Ghulam Mu- hammad Khan	28 455			
138	Narain Singh v. Kala Singh	Not report- able.			
139	Kamta Parshad v. Industrial Bank of India, Ltd.	31 54			
140	Arjan Singh v. Darbara Singh	32 312			

Table 10

SIND JUDICIAL COMMISSIONER'S COURT.

9 SIND LAW REPORTER, FOR MARCH TO JUNE, 1915.

Page of Vol. 9 S. L. R. 1915.	Names of Parties.	Corresponding Vol. and page of Ind. Cas.		Page of Vol. 9 S. L. R. 1915.	Names of Parties.	Corresponding Vol. and page of Ind. Cas.	
		V.	P.			V.	P.
51	Chandiram Karamsing v. Secretary of State for India ...	31	436	82	Crown v. Kamal ...	30	1000
61	Musammatt Nur Khatun v. Sumar Sawayo ...	31	7	84	Kundandas Nanumal v. Deumal Lilaram ...	30	936
65	F. F. Campbell & Co., Ltd., v. Mithomal Dwarkadas ...	31	50	86	Kanayaram v. Tirithsing ...	31	37
69	Motising Menghasing v. Sobhoma Gindomal ...	30	968	89	Ram Harakh v. Crown ...	30	1001
75	Lunidomal Parmanand v. Crown	30	1003	90	Vishindas Wadhuram v. Hotomal Ditomal ...	31	479
77	Firm of Rajaram Nandlal v. Firm of Abdul Rahim ...	31	450	95	Crown v. Usman ...	32	131
				97	Karachi Municipality v. Bhojraj ...	30	994
				99	Saindino v. Crown ...	30	998

Table 11

CRIMINAL LAW JOURNAL OF INDIA.

16 CRIMINAL LAW JOURNAL, FROM SEPTEMBER TO DECEMBER, 1915.

Page of Vol. 16 Cr. L. J. 1915.	Names of Parties.	Corresponding Vol. and page of Ind. Cas.		Page of Vol. 16 Cr. L. J. 1915.	Names of Parties.	Corresponding Vol. and page of Ind. Cas.	
		V.	P.			V.	P.
609	Raghubar v. Emperor ...	30	433	622	Zeri Khan v. Emperor ...	30	446
610	Ramasamy Gounden, <i>In re</i> ...	30	434	623	Abibulla Rowthan, <i>In re</i> ...	30	447
611	Muthurakka Thevan, <i>In re</i> ...	30	435	624	Patan Din v. Bhagwan Din ...	30	448
611	Krushno Kariko, <i>In re</i> ...	30	435	625	Ajudhi v. Emperor ...	30	449
612	Ghanwara v. Emperor ...	30	436	626	Venkatachalam Chetti v. Chairman, Municipal Council, Erode ...	30	450
614	Sengoda Goundan, <i>In re</i> ...	30	438	626	Kosa Kumaran, <i>In re</i> ...	30	450
614	A. Shakoar Sait, <i>In re</i> ...	30	438	627	Mandru Gadaba, <i>In re</i> ...	30	451
615	Kotaigadu, <i>In re</i> ...	30	439	628	Budhan v. Ram Rakha Mal ...	30	452
616	Victor D. Souza, <i>In re</i> ...	30	440	629	Rosario Quadros, <i>In re</i> ...	30	453
617	Abdul Gani v. Emperor ...	30	441	629	Govinda Chetti v. Perumal Chetti ...	30	453
618	Chinnu, <i>In re</i> ...	30	442	631	Wir Singh v. Emperor ...	30	455
618	Emperor v. Durga Halwai ...	30	442	631	Rangasami Pillai, <i>In re</i> ...	30	455
620	Mr. Hawkins, <i>In re</i> ...	30	444	632	Harumal Parmanand v. Emperor ...	30	456
620	Baroda Kanta Sarkar v. Emperor ...	30	444	634	Uda v. Emperor ...	30	458
622	Pichari Anthu, <i>In re</i> ...	30	446				

16 CRIMINAL LAW JOURNAL OF INDIA, 1915—contd.

Page of Vol. 16 Cr. L. J. 1915.	Names of Parties.	Corresponding Vol. and page of Ind. Cas.		Page of Vol. 16 Cr. L. J. 1915.	Names of Parties.	Corresponding Vol. and page of Ind. Cas.	
		V.	P.			V.	P.
637	Mahomad Ibrahim v. Kattayan ...	30	461	716	Hassan Sahib, <i>In re</i> ...	30	1004
637	Udham Singh v. Emperor ...	30	461	717	Gontla Krishnamma, <i>In re</i> ...	30	1005
640	Dorasami Aiyar, <i>In re</i> ...	30	464	717	Sennimalai Goundan, <i>In re</i> ...	30	1005
640	Mofizuddin Ahmed v. Basanta Kumar Ghose ...	30	464	719	Nilmoney Nag v. Durga Pado Banerjee ...	30	1007
641	Ram Subhag Singh v. Emperor ...	30	465	721	K. Parameswara, <i>In re</i> ...	31	161
656	Murgesan Mudaliar v. Sodiamma ...	30	480	724	Emperor v. Dwijendra Chandra ...	31	164
656	Hira Lal v. Saraswati ...	30	480	735	Bapu Naidu, <i>In re</i> ...	31	175
657	Tikaram v. Emperor ...	30	641	736	Ramalingam Pillai v. Raja of Ramnad ...	31	176
657	Ram Chand v. Jai Dial ...	30	641	736	Chemikkala Chinna Bali v. Em- peror ...	31	176
659	Corporation of Calcutta v. Promo- tho Nath Mullick ...	30	643	737	Machhia v. Emperor ...	31	337
662	Surat Singh v. Ahmad Beg ...	30	646	737	Mukka Muthiriyar, <i>In re</i> ...	31	337
663	Ewaz Ali v. Emperor ...	30	647	738	Emperor v. Bhimappa Ulvappa ...	31	338
665	Silas Moses v. Emperor ...	30	749	740	Gondala Suriah v. Jamal Bee Bee ...	31	340
667	Durga Prasad v. Emperor ...	30	651	740	Emperor v. Rama Dhan Powar ...	31	340
668	Mallapa Mallapa Tavargi v. Emperor ...	30	652	743	Mukka Muthrian, <i>In re</i> ...	31	343
669	Bateshar v. Emperor ...	30	653	745	Emperor v. Hari Bijal ...	31	345
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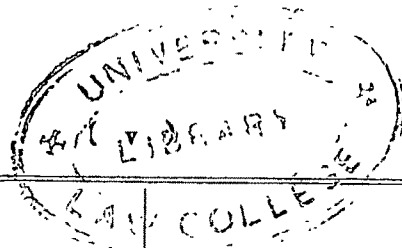
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CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 2840 OF 1912.

July 21, 1914.

Present:—Mr. Justice D. Chatterjee and

Mr. Justice N. Chatterjea.

ASIR MAHOMED SHEIKH AND OTHERS—

DEFENDANTS—APPEL'ANTS

versus

RAJA PROBHA CHANDRA BARUA—

PLAINTIFF—RESPONDENT.

Rent, enhancement of, suit for—Landlord and Tenant Procedure Act (B. C. VIII of 1869), ss. 14, 18, scope of—'Prevailing-rate', how to ascertain.

A rate brought into existence by the landlord pending disputes with the tenants regarding enhancement of rent is not contemplated by the term 'prevailing rate' mentioned in section 18 of Act VIII of 1869. [p. 2, col. 1.]

Appeal against the decree of the Subordinate Judge of Goalpara, dated 22nd July 1912, modifying that of the Munsif of Dhubri, dated the 31st of January 1912.

Baboo Sarat Chandra Roy Chowdhury and Gobinda Chandra Chuckerbutty, for the Appellants.

Sir Rash Behari Ghose, Babus Basanta Kumar Bose and Mohini Mohan Chuckerbutty, for the Respondent.

JUDGMENT.—These appeals arise out of suits for enhancement of rent under section 18 of Act VIII of 1869 B. C. The only ground upon which enhancement has been allowed is that the defendants paid rent below the prevailing rate of rent paid by tenants in the places adjacent. The defendants have appealed to this Court, and several questions have been raised in these appeals.

The main contention, and that which applies to all the appeals, is that the decision of the Courts below as to the prevailing rate is incorrect.

The holdings of the defendants are situated in *Mouzah* Bidyapara. Some of the tenants of Bidyapara pay rent at a higher rate than that paid by the defendants, but they do not form a majority of the tenants of the *mouzah*. The Courts below, however, have taken the rate of rent in the neighbouring *mouzahs*, along with the rate paid by the minority of the tenants of *Mouzah* Bidyapara itself, to be the prevailing rate.

It has been contended that neighbouring *mouzahs* are not 'places adjacent' within the meaning of section 18 of Act VIII of 1869. It is unnecessary, however, to discuss the question, having regard to the view we take of the 'prevailing rate' in the present case. It appears that the plaintiff, who is the proprietor of *Mouzah* Bidyapara and the neighbouring *mouzahs*, held a survey of all these *mouzahs* and demanded enhancement of rents from the tenants.

The tenants of the neighboring *mouzahs* and some of the tenants of *Mouzah* Bidyapara agreed to the enhancement, but the defendants in these cases refused to do so. They were accordingly served with notices of enhancement under section 14 of Act VIII of 1869. These notices were served so far back as 1907, and the present suits were instituted in 1910. Now the enhanced rates paid by the tenants of the neighbouring *mouzahs* and by some of the tenants of Bidyapara

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Mouzah came into existence since the defendants were called upon to pay the enhanced rents. It is true that plaintiff has succeeded in realising rents at the enhanced rates from the other tenants, but that was shortly before the notices of enhancement were served upon the defendants, and the plaintiff cannot by merely delaying the institution of the suits rely upon the rate at which he had succeeded in realising rents since the commencement of the disputes as to rates in the locality. We do not think the prevailing rate mentioned in section 18 of Act VIII of 1869 contemplates a rate brought into existence, so to say, by the landlord pending disputes with the tenants regarding enhancement of rent.

We are accordingly of opinion that the Courts below are in error in relying upon the rates paid by the minority of the tenants of Bidyapara and the tenants of the neighbouring *mouzahs* under the circumstances stated above as the 'prevailing rate' and that the plaintiff has failed to prove the prevailing rate according to law.

In this view it is unnecessary to consider the other questions raised on behalf of the appellants.

In the result, the claim for enhancement is disallowed. The plaintiff will get a decree for rent at the rates admitted by the defendants in each case with interest at the legal rate. Under the circumstances we direct each party to bear his own costs in all the Courts.

Appeals allowed.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 1080 OF 1914.

July 20, 1915.

Present:—Sir Henry Richards, Kt., Chief Justice, and Justice Sir P. C. Banerji, Kt.

PURAN MAL—DEFENDANT—APPELLANT
versus

*TARIF AND OTHERS—PLAINTIFFS
—RESPONDENTS.

Written statement of co-defendant, admission made in, whether admissible in evidence against another defend-

ant—Ex parte decree—Restoration of suit—Order, if can be questioned in appeal from final decree.

A statement made by a defendant in his written statement is not admissible in evidence against his co-defendant. [p. 3, col. 2.]

An order setting aside an *ex parte* decree is not appealable and as such it cannot be questioned in appeal from the final decree passed after restoration. [p. 3, col. 2.]

Second appeal from the decision of the District Judge of Meerut, dated the 23rd May 1914.

FACTS.—The plaintiffs sued for possession of property as reversioners of a widow. They alleged that the widow died on a certain date within one year of the institution of the suit. The widow, it appears, had transferred the property to her brother, Shibba, on 7th November 1888. Shibba transferred a large portion of the property to Puran Mal on 16th May 1896. Defendants Nos. 2 and 3, the daughters-in-law of Shibba, filed a written statement alleging that the widow had died about three years before the institution of the suit. At the hearing all the defendants (including Puran Mal) were absent and the suit was decreed *ex parte*. Puran Mal then applied for the restoration of the suit and this was done. The Court of first instance found on the evidence that the widow had died more than 12 years prior to the suit and it dismissed the claim. The lower Appellate Court, although it disbelieved the plaintiffs' evidence, decreed the claim on the ground that the written statement filed by defendants Nos. 2 and 3 was admissible in evidence against Puran Mal and that Puran Mal had not shown sufficient cause for the restoration of the suit. Puran Mal appealed to the High Court.

Mr. Kailash Nath Katju (with him Dr. Tej Bahadur Sapru), for the Appellant:—The grounds on which the Court below has decreed the claim are both untenable. It is for the plaintiffs to prove that the suit as brought is within time. *Venkata Hanumanulu Garu v. Lchamma* (1). The Court below having disbelieved the evidence produced by the plaintiffs was not justified in relying on the written statement of certain defendants who had no interest in the suit. This written statement was no evidence at all. Moreover, the Court below had no

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authority to question the order setting aside the *ex parte* decrees. *Kunja Mal v. Gauri Shankar* (2); *Tasuddug Husain v. Hayat-un-nissa* (3).

Mr. Baldeo Ram Dave (for Dr. Sunda Lal), for the Respondents:—The written statement was verified on oath and it stands on the same footing as an affidavit. Also the Court below could question the order restoring the suit. *Nand Ram v. Bhopal Singh* (4).

JUDGMENT.—This appeal arises out of a suit brought by an alleged reversioner against the transferors of a deceased Hindu widow. The Court of first instance dismissed the plaintiffs' suit. The lower Appellate Court reversed the decree and decreed the plaintiffs' claim.

The widow was one *Musammāt Hukmo*. She made an alienation of the whole property as far back as the year 1888 in favour of one Shibba. Shibba on the 16th of May 1896 transferred part of the property so alienated to him to the defendant *Puran Mal*. The Court of first instance found that *Musammāt Hukmo* had died some 18 years before the institution of the suit, giving somewhat cogent reasons for its finding. The lower Appellate Court found the utmost difficulty in believing the plaintiffs' story as to the date of the death of *Musammāt Hukmo*. It appears, however, that when the present suit was first instituted, in addition to *Puran Mal* the two daughters-in-law of Shibba were made parties. The plaintiffs in their plaint had alleged that *Musammāt Hukmo* had died a year before the institution of the suit. The two lady defendants in their written statement had said that *Musammāt Hukmo* died $4\frac{1}{4}$ years before the institution of the suit. The ladies do not appear to have taken any further step of any kind in defending the suit, and in the first instance it was decreed *ex parte*. *Puran Mal* subsequently applied to have the *ex parte* decree set aside and was successful. The learned District Judge, after stating that he does not believe the plaintiffs' evidence as to the date of the death of *Musammāt Hukmo*, proceeds as follows: "The fact that *Musammāt Misri* and *Musammāt Manno* said origi-

nally that *Hukmo* died four years ago is to my mind the one piece of untainted evidence in the whole case and I would be prepared to accept it. By their admissions *Musammāt Misri* and *Musammāt Manno* stood to lose that portion of the property of *Har Narain* held by *Musammāt Hukmo* which she had passed to *Shibba*."

It is certainly somewhat suspicious that the *Musammats* who never fought out the case should have been so particular to allege the date of the death of *Musammāt Hukmo*. It is also somewhat remarkable that the plaintiffs at once accepted the date and had their plaint amended. The two *Musammats* had absolutely nothing to gain by putting in their written statement that *Musammāt Hukmo* died $4\frac{1}{4}$ years before the suit. It could not have helped them in any way in making a defence to the suit. Their motive for making the statement is very obscure, unless they intended to help the plaintiff. Why the plaintiffs should have amended their plaint when they were getting an *ex parte* decree is also not very clear. However, in our opinion, the statement made by these ladies in their written statement was not evidence against *Puran Mal*. The ladies were not called as witnesses. It is clear, therefore, that if the statement of the ladies be excluded, in the opinion of both the Courts below the plaintiffs failed to prove the death of *Musammāt Hukmo* within 12 years of the institution of the suit. The onus undoubtedly lay upon the plaintiffs of proving the death of *Hukmo* within 12 years, so as to show that they had a subsisting title at the date of the institution of the suit. The learned District Judge has, however, decreed the plaintiffs' claim on the ground that the trial Court ought never to have set aside the *ex parte* decree. In our opinion the question of the propriety of setting aside the *ex parte* decree was a matter which could not be considered by the learned District Judge in appeal. No appeal is given by the Code from an order setting aside an *ex parte* decree. It cannot be taken exception to later on in a regular appeal, because it did not affect the merits of the case. This has been repeatedly held by this Court. In our opinion the decree of the Court of first instance was correct and ought to be restored. We accordingly allow the appeal, set aside the decree

(2) 3 A. L. J. 30; A. W. N. (1905) 274.

(3) 25 A. 280; A. W. N. (1903) 39.

(4) 16 Ind. Cas. 1; 34 A. 592; 10 A. L. J. 130.

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of the lower Appellate Court and restore the decree of the Court of first instance with costs in all Courts, including in this Court fees on the higher scale.

Appeal allowed.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL ORDER NO. 30 OF 1915.

April 28, 1915.

Present:—Sir Lawrence Jenkins, Kt., Chief Justice, Mr. Justice Woodroffe and Justice Sir Asutosh Mookerjee, Kt.

JOHN INNES MARSHALL—OPPOSITE PARTY—APPELLANT

versus

GRANDHI VENKATA RATNAM—

APPLICANT—RESPONDENT.

Contempt of Court by committing breach of injunction—Injunction on firm—Assistant, liability of, under what conditions.

Where an injunction is issued by a Court restraining the defendant firm from disposing, selling or dealing in any manner with the goods referred to in the plaint, but where the injunction makes no mention of X an assistant in the firm or of servants and agents:

Held, that X not being named in the order cannot be punished for contempt of Court for disobeying the injunction. [p. 7, col. 1.]

Appeal against the following order of Mr. Justice Greaves in a motion for contempt of Court, arising out of a suit brought by Grandhi, dated the 31st March 1915:—

The notice of motion in this case is directed to one J. I. Marshall who is in the employ of the defendant firm, and it asks that he shall stand committed to the Presidency Jail for having committed a breach of an injunction granted by me on the 20th (March) instant restraining the defendant firm, their servants and agents (I am here quoting the words of the motion) from disposing, selling or dealing in any manner with the goods referred to in the plaint herein, over Tuesday the 23rd of March 1915, and for an order on J. I. Marshall to pay to the plaintiff his costs of and incidental to this application. The notice of motion is dated 26th March 1915 and was duly served on Mr. Marshall.

This application arises under the following circumstances:—

On the 30th of January 1914, a contract

was entered into between the plaintiff and the defendants for the sale of 500 cases of matches. Certain of the cases were delivered between the months of March and December 1914, but on that day certain cases still remained undelivered. On the 17th of March of this year, the plaintiff received information to the effect that another consignment of matches of 75 cases marked with the plaintiff's name had arrived in Calcutta and that the defendant firm was trying to dispose of them to somebody other than the plaintiff. Thereupon interviews took place between the defendant firm and the plaintiff's son and the defendant firm expressed their willingness to deliver the goods at a certain price which was higher than the price which the plaintiff considered that he was bound to pay. On the 19th of March, the defendants threatened to dispose of the goods, unless the plaintiff purchased them at the price of 1s. 6½d. per gross. They threatened to sell the goods by 11 o'clock on the 20th of March unless the plaintiff was willing to pay this price. On the same day, the 19th March, a letter was written by the plaintiff's solicitor saying that the defendants could not sell the goods to a third person, as they were the property of the plaintiff. On the 20th March 1915 the plaint was filed in this suit at 12 o'clock, and, at 1.30 on that day, an application was made to me for an injunction, and I granted an *ad interim* injunction over the following Tuesday in these terms, restraining the defendants from selling, disposing of or otherwise dealing with the goods referred to in paragraph 3 of the plaint, and I gave the plaintiff liberty to serve the defendants with the notice of motion for the following Tuesday, for an injunction restraining the defendants from selling, disposing or dealing with the goods pending the hearing of this action and for a Receiver of the goods. I directed the notice of motion to be served before 4 o'clock at No. 3, Commercial Buildings, where the defendant firm carry on business, or if these premises were closed, then on Mr. Cameron who was the manager of the defendant firm at his private address. It appears from the evidence of the plaintiff before me that after the injunction was granted, the plaintiff's son accompanied by one Akshay Kumar Rudra, an Attorney of this Court and assistant of Babu Charu Chandra Bose, Attorney for the plaintiff, went

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to No. 3, Commercial Buildings, and arrived there at about 2-15 P. M. They inquired at the office for Mr. Cameron and were told that Mr. Cameron was not there, and thereupon the plaintiff's son took the Attorney to Mr. Marshall, as he was the next superior officer in the office of the defendant firm. The plaintiff's son and his Attorney stated that they read out a copy of my order to Mr. Marshall in the presence of Mr. Surita, an Advocate of this Court: and that after reading out the same they handed Mr. Marshall a copy of the order, and they state that he read the same in their presence and in the presence of Mr. Surita, that they asked Mr. Marshall to sign an acknowledgment of the receipt of the copy of the said order, but Mr. Marshall refused to do this and said that his firm had already sold the goods. Akshay Kumar Rudra, the Attorney, goes on to say that he attended immediately after at the office of the Jetty Superintendent of the Port Commissioners with the plaintiff's son, and showed a copy of my order to the Deputy Superintendent and read out the same to him and asked him to sign an acknowledgment, which he refused to do saying that he could only act on an order signed by an officer of this Court. Both the deponents state that at the goods shed at the Jetty, they saw several cases of matches marked with the plaintiff's mark, which was pointed out, and the Attorney states that he pointed out the goods to the plaintiff's son and also to one Satya Charan Ray who was the Jetty Sircar of the plaintiff, asking the plaintiff's son to count the number of packages there, which he and the Jetty Sircar accordingly did, telling the Attorney that there were 75 cases of matches lying there. The affidavit of the Attorney further states that on the following day he was informed by the plaintiff's son that 53 cases of matches had been sent to the Howrah Station and the same were lying there at No. 13 Goods Shed, Howrah. There is an affidavit also filed on behalf of the plaintiff by Satya Charan Ray, confirming the counting of the cases of matches, and also stating that after the Attorney and the plaintiff's son had left, one Pran Kristo Coondoo, who was a Sircar in the employ of the defendant Company and whom he knew, came to Jetty No. 2 and gave directions to certain cartmen to take the goods

to Murgihatta Godown-baree. He states that a portion of these goods were, thereafter, removed to Jetty Shed No. 2 by the employee of the defendant Company.

On behalf of Mr. Marshall, three affidavits are filed, one by himself in which he states at paragraph 4 that about 2-30, after office hours, and after the business of the defendant firm was closed for the day, and while he was preparing to leave the office being actually in the act of changing his clothes, a person whom he did not know, accompanied by one Grandhi Subramaniam, called, and saw him at No. 3, Commercial Buildings, stating that he was an Assistant of Messrs. Bose and Company and wanted to see Mr. Cameron. Mr. Marshall states, that he informed him that Mr. Cameron was away from office and he, Mr. Marshall, was the next officer in charge of the office. Mr. Marshall states that the Attorney informed him that he had obtained an injunction restraining Mr. Cameron from disposing of the 75 cases of the matches in question, and that he told him, as was the fact, that they had already been sold and paid for, and then the Attorney asked him to whom they had been sold; he thereupon said that if they wrote and asked him, he would give them information in writing as he did not want to run the risk of being misrepresented if he gave any information verbally. Mr. Marshall then goes on to state that he left the office shortly after with Mr. Surita and one Mr. Moss, who were both present. Mr. Marshall further states that the Attorney produced and handed to him a piece of paper with some type-written matter on it, which bore no signature to show that it was a copy of an actual order. He states that he glanced at the document, but did not read it through before handing it back to him, and he denies that the document was read out to him, and he is supported in this denial by an affidavit of Mr. Surita. In paragraph 6 of his affidavit, Mr. Marshall states that he had nothing whatever to do with the removal of or the endeavour to remove any of the goods in question, and that he never at any time sold or disposed of or otherwise dealt with the goods or any of them in disobedience or contempt or breach of the alleged injunction or order, and he

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states, in paragraph 7, that for the first time he came to hear that the Jetty Sircar, Pran Kristo Coondoo, had been concerned in the removal of the said goods, when he found the statements to that effect in the affidavit of Satya Charan Roy. He states that this removal was not done in pursuance of any order or instruction given by him or by any one belonging to the defendant firm, and he states that he has since ascertained that the Sircar did on the 20th of March remove or cause to be removed some of the goods, but that he did so after office hours in his spare time and at the request of and on behalf of the purchaser, Juggal Kissore Pyne, and in no wise on behalf of the defendant firm.

As before stated, Mr. Surita filed an affidavit which corroborates Mr. Marshall's statement with regard to the interview on the afternoon of 20th March. A further affidavit is filed on his behalf by one Jugal Kissore Pyne, who states that on the 3rd of March he agreed to purchase from the defendant firm 75 cases of matches at Rs. 1-7-6 per gross. He states that the purchase was completed by him at the office of the defendants on 20th March and that he paid a sum of Rs. 5,507-13-0, as referred to, as the price of the matches, and that he thereupon handed the gate pass in respect of the goods, to obtain delivery from the Port Commissioners' Jetty. He states that the purchase price was paid and the whole transaction was completed by sometime between 12 noon and 12-30 on Saturday, and that he thereupon immediately arranged with one Pran Kristo Coondoo, the defendant firm's Jetty Sircar, for an extra charge of Rs. 3 to remove the goods from the Jetty to his godown at Suken's Lane, and that he gave him the gate pass. He states that sometime about 4 or 4-30 in the afternoon, he returned to his godown and there found that in the interval 53 cases out of 75 cases had been brought from the Jetty and stored there, and he never heard about any injunction until 22nd March.

Now, it is urged before me on behalf of Mr. Marshall that there has been no breach of the terms of the injunction, inasmuch as he has not sold, disposed of or otherwise dealt with the goods, and considerable

discussion took place before me with regard to the absence from my order of the words "permitting the disposal of or dealing with the goods"; and it was urged on behalf of Mr. Marshall that in the absence of these words, he had committed no breach of injunction and that he was not guilty of any contempt of Court. In my opinion the absence of these words makes no difference—See *Harding v. Tingey* (1).

Now it seems, to me abundantly clear from the facts stated in the affidavits that if Mr. Marshall had applied his mind to the injunction and communicated with the Jetty Superintendent or with the purchaser of the goods, or in any case, if he had communicated the name of the purchaser to the plaintiff, the removal of the goods in question could not have taken place, and that in that case these proceedings would not have been brought. Of course, when it comes to a matter affecting the liberty of the subject, he is entitled to have the terms of the injunction considered with the greatest strictness and have everything that could possibly be urged or said in his favour considered on his behalf and given effect to, and it would clearly be wrong to send Mr. Marshall to prison having regard to the facts and circumstances of this case, but I cannot think that he performed the duty, which is incumbent on every good citizen to perform, of assisting the process of the Court in whatever form it comes before him. That the goods were dealt with despite the injunction or after it had been granted was due to his action or rather inaction; he has, therefore, committed contempt of Court and accordingly although I make no order for committal, I direct Mr. Marshall to pay the costs of this motion.

Messrs. Zorab and Hyam, for the Appellant.

Messrs N. Sircar and C. C. Ghose, for the Respondent.

JUDGMENT.

JENKINS, C. J.—This is an appeal from an order of Mr. Justice Greaves, who has been treated before us as an order finding that there had been a contempt by the appellant Marshall which merited, if not imprisonment, at any rate the payment of the costs of the

(1) (1864) 12 W. R. 684; 34 L. J. Ch. 13; 10 Jur. (N. S.) 872; 10 L. T. 323.

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motion. The notice of motion called upon J. I. Marshall, an assistant of the defendant firm, to take notice that on Monday, the 29th of March 1915, an application would be made on behalf of the plaintiff for an order that he, J. I. Marshall, do stand committed to the custody of the Superintendent of the Presidency Jail for having committed a breach of the injunction granted by Mr. Justice Greaves on the 20th March 1915, restraining the defendant firm, their servants and agents from disposing, selling or dealing in any manner with the goods referred to in the plaint. That notice of motion is erroneous, for the injunction makes no mention of Mr. Marshall or of servants and agents. It necessarily follows from this that the procedure which had been adopted was misconceived. The proceeding against Mr. Marshall, if any, should have been for assisting in a contempt of Court. But the case need not be disposed of on that ground, because on the merits it has not been made out that Mr. Marshall in any way assisted in a contempt of Court. He did nothing. He did not dispose of, sell or deal with the goods nor did he in any way assist in disposing, selling or dealing with them after service on him of the injunction. All that he did was done prior to the injunction. It has been suggested before us that he is in some way responsible for the delivery which is said to have taken place after the injunction. But on the facts it appears, that the delivery was prior to the injunction. There was no contempt or participation in contempt on Mr. Marshall's part. In my opinion the order of the learned Judge is erroneous and must be set aside and the motion dismissed with costs of the hearing before Mr. Justice Greaves and before us.

WOODROFFE, J. — I agree.

MOOKERJEE, J. — I agree.

Order set aside.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 29 of 1912.

CIVIL MISCELLANEOUS PETITION No. 2458
OF 1913.

April 8, 1915.

Present:—Mr. Justice Oldfield and
Mr. Justice Tyabji.

AMMANI—DEFENDANT No. 4—APPELLANT

versus

JAGANNATHA REDDI AND OTHERS—

PLAINTIFF AND DEFENDANTS NOS. 1 TO 3

—RESPONDENTS.

Transfer of Property Act (IV of 1882), s. 54—Sale by unregistered document followed up by delivery of possession—Subsequent vendee under registered sale-deed—Notice of prior sale—Priority—Registration Act (XVI of 1908), s. 50.

Mere delivery of possession in pursuance of an unregistered deed of sale will be effective to pass title to the vendee but such delivery must be with the consent, express or implied, of the seller, and in connection with and to give effect to the contract of sale. [p. 8, col. 1.]

But to give such sale priority (where the competition is between the purchaser and a subsequent vendee claiming under a registered document) it is essential that the subsequent vendee should at the time of his sale have notice of the prior unregistered sale-deed and possession thereunder. [p. 9, col. 2.]

Per Tyabji, J.—In the case of immoveable property of less than Rs. 100 in value, an oral transfer (without any document) but followed by delivery of possession confers on the transferee an indefeasible title to the interest transferred. [p. 11, col. 1.]

A sale or mortgage by a written but unregistered instrument, if followed by delivery of the property, transfers the ownership of or an interest in the property but the title so created is liable to be defeated by the vendor subsequently selling or mortgaging the same property by a registered instrument. [p. 11, col. 1.]

The right of an unregistered transferee is not defeated by a registered transferee who had notice of the prior unregistered transfer. [p. 11, col. 1.]

Bimaraz v. Papaya, 3 M. 46; *Krishnamma v. Suranna*, 16 M. 148; 3 M. L. J. 54; *Fuzluddeen Khan v. Fakir Mahomed Khan*, 5 C. 336; 4 C. L. R. 257; 5 Ind. Jur. 134; *Narain Chunder Chuckerbutty v. Dataram Roy*, 8 C. 597; 10 C. L. R. 241; *Khiali Ram v. Him-mata*, 5 A. L. J. 607; A. W. N. (1908) 99; 30 A. 238, referred to

Second appeal against the decree of the District Court of South Arcot, in Appeal Suit No. 10 of 1914, preferred against that of the District Munsif of Kallakurichi at Tirukoilur, in Original Suit No. 654 of 1909.

Mr. T. Pattabhiram Iyer, for the Appellant.

Mr. T. R. Venkatarama Sastri, for the Respondents.

This second appeal and the civil miscellaneous petition coming on for hearing,

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on the 22nd and 30th October 1913 and having stood over for consideration till the 4th November 1913, the Court delivered the following

JUDGMENT.

OLDFIELD, J.—The 4th defendant, the appellant, relied on an oral sale on the 4th May 1901, the date of her unregistered document, Exhibit I, executed by the 1st defendant; the plaintiff on a registered sale-deed, Exhibit A, executed on the 5th May 1908 by the 1st and 2nd defendants. The question is whether on the latter date the plaintiff's vendors had any title to convey; and the answer to it depends under section 54 of the Transfer of Property Act on whether the 4th defendant's oral sale included a delivery of the property sold, that is, whether the 1st defendant placed the 4th defendant in possession.

The 4th defendant relied primarily on an alleged delivery to her of the property at the Monigar's house at the time of the execution of Exhibit I and her alleged enjoyment from that date. The learned District Judge has found some difficulty in applying the authorities he cited to these allegations. But their result seems to us plain, that proof of a formal delivery of the property by the seller is unnecessary, if there is proof that possession passed to the buyer and that it did so with the assent, express or implied, of the seller and in connection with and to give effect to the contract of sale.

In this case the 4th defendant relied on the delivery to her in the Monigar's house at the execution of Exhibit I and on enjoyment from its date or, in the alternative, on enjoyment from some later date as given in connection with the sale. Our attention has been called to the District Judge's observation that there is really no evidence that the 4th defendant obtained possession on the date of Exhibit I. But, as he also set out fully the evidence as to what happened in the Monigar's house and as to enjoyment, we understand him to mean only that there was no evidence of value. His conclusion on the former point is not stated distinctly. But it is clear from the tenor of his judgment that he concurred in the District Munsif's decision that the delivery in the Monigar's house (whatever its effect) and enjoyment from the date of Exhibit I were not proved.

The first point for decision is then, whether the 4th defendant was placed in possession at any later date before the 5th May 1908. The learned District Judge, no doubt, referred at the end of his judgment to her failure to prove that the land was delivered to her. But he had already referred to the ample evidence on the plaintiff's side that she had been in possession for "only three or four years prior to November 1910" and, as the plaintiff admitted the 4th defendant's possession, this must be taken as expressing his conclusion. His judgment is dated the 8th August 1911, and there is, therefore, no finding on the essential point, whether possession was obtained by the 4th defendant before or after Exhibit A. If she did not prove that it was so obtained, she must fail. If she did prove this, it will be necessary for the District Judge to decide in the light of the foregoing whether the transfer of possession to her fulfilled the other requisites above referred to.

We accordingly call for findings on the following issues:—

(1) Is it proved that the 4th defendant obtained possession before the 5th May 1908?

(2) If she did so, did she do so with the assent, express or implied, of the 1st defendant, and in connection with, and to give effect to, the contract of sale between them?

On the first of these issues no fresh evidence is necessary since the question was tried fully in the Court of first instance.

We have been asked in Civil Miscellaneous Petition No. 2458 of 1913 to admit in evidence here or to direct the admission by the District Court at the remand hearing of a document tendered there but not admitted at the hearing of the appeal. There is nothing before us to explain the 4th defendant's failure to make this document evidence at the trial in the Court of first instance. The only affidavit is one by the clerk of the 4th defendant's Vakil to the effect that the document was tendered in the District Court; but there is nothing as to the clerk's means of knowledge. In the circumstances the document cannot be admitted, and Civil Miscellaneous Petition No. 2458 of 1913 must be dismissed with costs.

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* It is not clear that the point raised by the second issue remanded has been considered by either Court. On it any fresh evidence, which may be adduced, should be taken and considered.

The findings should be submitted within six weeks from the date of this order and ten days will be allowed for filing objections.

TYABJI, J.—I agree.

In compliance with the above order of this Court, the District Judge of South Arcot submitted the following

FINDINGS —

My finding on the 1st issue remanded is that the 4th defendant did obtain possession of the southern half of the field, *i. e.*, the suit land, and was in possession of it at least from 1902, the date of the earliest *katchat*, Exhibit III, that she was probably in possession prior to that date and that she probably got into possession shortly after the execution of Exhibit I.

With regard to the 2nd issue, I see no reason for not accepting the 4th defendant's evidence that she took possession shortly after the execution of Exhibit I with the express consent of 1st and 2nd defendants given at the time when Exhibit I was executed; but if it is held that it is open to me to record such a finding, on the ground that the general tenor of my predecessor's judgment shows that he found that permission to occupy the suit land was not given at the time when Exhibit I was executed, then my finding on the 2nd issue remanded is that it must be presumed that the 4th defendant got into possession of the suit land about 1902, if not earlier, with the implied consent of both the 1st and 2nd defendants as their vendee, in the absence of any explanation on behalf of her vendors, on whose evidence the plaintiff relies, as to how she got into possession except as their vendee.

In the result my findings on both the issues remanded are in 4th defendant's favour.

This second appeal coming on for hearing on the 30th April 1914 after the receipt of the findings called for by order of this Court dated 4th November 1913 and having stood over for consideration till the 27th July 1914, the Court delivered the following

JUDGMENT.

OLDFIELD, J.—The learned District Judge's findings on the issue remanded are in 4th defendant's favour. It is now, however, argued that they do not entitle her to a decree, unless it is proved that plaintiff, claiming under a registered document, had notice of the prior unregistered conveyance to her. The question of notice was not raised at the last hearing of the appeal, and, therefore, no issue regarding it was remanded. But in the circumstances of the case and in view of the course of pleading we think that plaintiff should be permitted to raise it. *Krishnamma v. Suranna* (1) is authority in favour of plaintiff's contention and in spite of the considerations referred to in the judgment which my learned brother is about to deliver, is binding on us. The question of fact involved has not been considered by either of the lower Courts, and we must, therefore, remand the following issue for a finding:—

"Whether at the date of Exhibit A, the plaintiff had notice of the transfer to the 4th defendant by Exhibit I."

Fresh evidence may be taken. The finding should be submitted within six weeks and seven days will be allowed for filing objections.

TYABJI, J.—The plaintiff and 4th defendant are rival claimants to a piece of land, which is "of a value less than Rs. 100." On the 4th of May 1901, the 4th defendant purchased the land from its last admitted owners and was according to the finding, which we accept, put into possession of it. The sale-deed evidencing this transaction is unregistered (Exhibit 1). Seven years after, on 5th May 1908, the plaintiff became the ostensible purchaser of the same land by a registered instrument, Exhibit A.

The plaintiff relies upon section 50 of the Indian Registration Act to oust the 4th defendant.

Section 50 of the Registration Act, omitting the portions that are not material and incorporating in it section 18, clause (a), to which it refers, runs as follows:—

"Every document.....which purports or operates to create.....any right, title or interest.....of a value less than

(1) 16 M. 148; 3 M. L. J. 54.

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Rs. 100 to or in immoveable property (in this case Exhibit A.).....shall, if duly registered, take effect as regards the property comprised therein against every unregistered document (in this case Exhibit I) relating to the same property, and not being a decree or order, whether such unregistered document be of the same nature as the registered document or not."

The 4th defendant resists the plaintiff's claim on the strength of the following paragraph of section 54 of the Transfer of Property Act:—

"In the case of tangible immoveable property of a value less than one hundred rupees, such transfer (*i. e.*, a sale) may be made by delivery of the property."

The interpretation of these sections of the law is settled by a long series of decisions. In *Bimaraz v. Papaya* (2) decided prior to the passing of the Transfer of Property Act, it was pointed out that section 48 of the Registration Act prevents an oral agreement or declaration (followed by possession) from being postponed in effect to a registered document. So that an oral sale followed by delivery of possession is not defeated by a subsequent sale through a registered document. But section 48 of the Registration Act does not (so it was held) similarly save the operation of a sale made not orally but by an unregistered document. The startling result is referred to in the decision: an unregistered written instrument not requiring registration, followed by possession, has less effect than an oral declaration or agreement so followed.

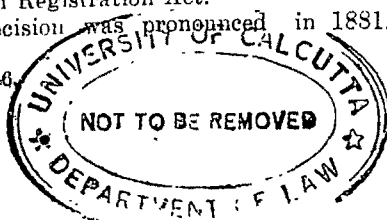
This result is the more startling because (as it is said in the case cited) a written instrument is but an oral declaration committed to writing. Hence where there is a written instrument followed by delivery of possession, *ex hypothesi*, there are three stages: (1) the oral declaration (2), the written instrument and (3) delivery of possession. But the Court apparently proceeded on the basis that the existence of the second stage prevents its being said that there is an oral declaration followed by delivery of possession within the terms of section 48 of the Indian Registration Act.

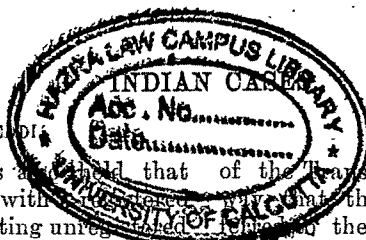
That decision was pronounced in 1881.

(2) 3 M. 46.

The next year the Transfer of Property Act was passed. The effect of the two Acts was considered in a very elaborate manner by a Full Bench of Calcutta in *Narain Chunder Chuckerbutty v. Dataram Roy* (3) and of Madras in *Krishnamma v. Suranna* (1). In these cases it was argued in effect that assuming that the interpretation of the Registration Act, section 50, demanded the startling result which was referred to in *Bimaraz v. Papaya* (2), that difficulty was removed by the Transfer of Property Act section 54, inasmuch as section 54 does not refer either to an oral declaration or to an unregistered document, but provides for a transfer of property by delivery of possession alone without referring to the consideration whether immediately prior to the delivery of possession there was merely oral agreement or a documentary instrument. In other words, accepting the interpretation put in *Bimaraz v. Papaya* (2) upon sections 48 and 50 of the Registration Act, it was argued that the Legislature had by section 54 of the Transfer of Property Act provided that an unregistered instrument followed by delivery shall not have less effect than an oral declaration so followed. This argument was supported on the ground that the Transfer of Property Act completes the transfer by delivery alone, that after the ownership of any property is vested in one person, another person cannot without the consent of the then owner transfer its ownership to a third: and that in this way the provisions of section 54 of the Transfer of Property Act protected a person with an unregistered written instrument to whom the property had been delivered no less effectively than section 48 of the Registration Act protected one to whom the properties were orally transferred. See Mr. Justice Prinsep's dissenting judgment in *Narain Chunder Chuckerbutty v. Dataram Roy* (3) and *Krishnamma v. Suranna* (1). This argument, however, has not found acceptance. It has been held that the title given by section 54 of the Transfer of Property Act to an unregistered holder is liable to be defeated under the rule of priority by a valid later sale or mortgage evidenced by a duly registered document. See *Krishnamma v. Suranna* (1),

(3) S C. 597; 10 C. L. R. 241.





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On the other hand, it was held that if the subsequent transferee with notice of the existing unregistered deed has notice of the existing unregistered deed, then the registered deed gives its holder no priority. *Fuzludeen Khan v. Fakir Mahomed Khan* (4), *Narain Chunder Chuckerbutty v. Dataram Roy* (3), *Bimaraz v. Papaya* (2), *Khali Ram v. Himmata* (5).

The rules of law as propounded in the decisions above referred to may be stated in the following terms:—

In the case of immoveable property of a less value than Rs. 100 (1) an oral transfer (without any document) followed by delivery of possession confers upon the transferee an indefeasible title to the interest transferred [section 48 of, Registration Act, *Bimaraz v. Papaya* (2), *Krishnamma v. Suranna* (1)].

(2) A sale or mortgage evidenced by a written but unregistered instrument, if followed by delivery of the property, transfers the ownership of or an interest in the property, but the title or interest so created is liable to be defeated, by the vendor subsequently selling or mortgaging the same property by a registered instrument [section 50 of the Registration Act, *Bimaraz v. Papaya* (2), *Krishnamma v. Suranna* (1)].

(3) The right of the unregistered transferee is not defeated by a registered transferee who had notice of the prior unregistered transfer. [*Krishnamma v. Suranna* (1), *Fuzldeen Khan v. Fakir Mahomed Khan* (4).]

Though the law seems now to be settled by the decisions after so much doubt and difference of opinion, I cannot help joining in the desire expressed by more than one of the learned Judges who have had to interpret sections 48 and 50 of the Registration Act and section 54 of the Transfer of Property Act that the Legislature should make the law explicit so as to make it not only free from doubt, but also easy of reference. It may be assumed that the interpretation put upon the Acts by the Judges whose opinion has prevailed has been accepted by the Legislature, in spite of the anomaly referred to in *Bimaraz v. Papaya* (2) and by Prinsep, J., in *Narain Chunder Chuckerbutty v. Dataram Roy* (3) and the hardship caused by interpreting section 54

of the Transfer of Property Act in such a manner that though ownership may be transferred to the vendee under the section, yet the title of the transferee is so precarious as to depend upon the honesty or vigilance of an entire stranger, and of a person who has no interest left in the property transferred. But in any case it is not satisfactory that the rules of law relating to transfer of property should have to be discovered by a laborious examination of decisions. If the title obtained by delivery of the property under section 54 of the Transfer of Property Act is subject to be defeated in the manner above referred to and that defeasance can itself be prevented by notice, it is surely laying a trap for the unwary to leave these important provisions of the law unexpressed in the Act.

The law being as I understand it, the 4th defendant's title to the property depends upon the question whether the plaintiff had notice of the sale to the 4th defendant prior to Exhibit A on which the plaintiff relies.

There is no finding on this question. It is true that the District Judge refers to the fact that "the 1st defendant as P. W. No. 4 says that the plaintiff knew of his having executed the sale-deed, Exhibit I, to 4th defendant and of his alleged subsequent refusal to sell the land to her." This fact and the fact that the 4th defendant has been found to have been in possession may furnish evidence of notice (as pointed out in the cases to which I have referred), but as the rights of the parties depend entirely on this issue, it will be desirable to have it considered after the parties have had an opportunity of adducing evidence on it. I, therefore, agree in the order proposed by my learned brother.

In compliance with the above order of remand, the District Judge of South Arcot submitted the following

FINDING.—I am asked to submit a finding on the following issue:—

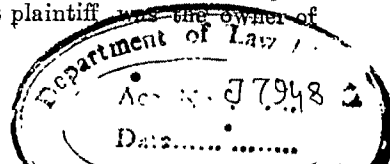
"Whether at the date of Exhibit A, the plaintiff had notice of the transfer to the 4th defendant by Exhibit I."

* * * * *

I find on the evidence of D. W. No. 4 and D. W. No. 5 as well as on the evidence of plaintiff's own witness P. W. No. 4 coupled with the fact that plaintiff was the owner of

(4) 5 C. 336; 4 C. L. R. 257; 5 Ind. Jur. 137.

(5) 30 A. 238; 5 A. L. J. 607; A. W. N. (1908) 99.



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the land just south of the suit land and must have known of 4th defendant's possession of the suit land for many years prior to Exhibit A, that the plaintiff had notice of the transfer to 4th defendant by Exhibit I prior to the date of Exhibit A.

This second appeal coming on for final hearing after the return of the finding of the lower Appellate Court called for by order of this Court dated 27th July 1914, the Court delivered the following

JUDGMENT.—We accept the lower Appellate Court's finding; 4th defendant's appeal is allowed; the suit as against her is dismissed with costs throughout. Her costs will be recovered from the plaintiff and defendants Nos. 1, 2 and 3. The plaintiff has throughout claimed in the alternative possession or a refund of half the purchase-money paid by him from defendants Nos. 1, 2 and 3. Defendants Nos. 1, 2 and 3 have not opposed this claim. The plaintiff must, therefore, be given a decree for Rs. 43 with interest at 6 per cent. from 6th May 1908 to date of realisation. Defendants Nos. 1, 2 and 3 will pay the plaintiff's costs throughout.

Appeal allowed; Miscellaneous petition dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 288
OF 1902.

June 2, 1911.

Present:—Mr. Justice Chitty and Mr. Justice N. Chatterjee.

NALINI SUNDARI GUPTA AND ANOTHER—
OPPOSITE PARTY—APPELLANTS

versus

BEJOY KUMAR ROY CHOWDHURY—
PETITIONER—RESPONDENT.

Probate, revocation of—Non-citation—Special notice, non-service of, effect of.

The Probate of a Will cannot be revoked on the mere ground of non-citation without a consideration of the other questions arising therefrom. [p. 13, col. 1.]

Kunja Lal Chowdhury v. Kanash Chandra Chowdhury, 7 Ind. Cas. 740; 14 C. W. N. 1068, followed.

Appeal against the decision of the District Judge, Rangpur, dated the 6th April 1909.

Babus Dwarka Nath Chakravarti, Hem Chandra Mittra and Sarat Kumar Mittra, for the Appellants.

Babu Surendra Chandra Sen, for the Respondent.

JUDGMENT.—This appeal arises out of an application made by one Bejoy Kumar Roy Chowdhury for revocation of Probate of the Will of one Kashi Nath Gupta. Kashi Nath Gupta made his Will in August 1883 and died on the same day. He left a widow named Nalini Sundari Gupta, the appellant-opposite party in this case, a daughter, Sarat Sasi by another wife Niroda Sundari Gupta, and his mother Bama Sundari. Bama Sundari applied for Probate of her son's Will, but died before the order on her application was made. An order in this matter was passed on the 31st March 1884. The next proceedings were the two applications one by Prosonno Chandra Sen, the father of Nalini Sundari, and the other by Umesh Chandra Mojumdar, the brother of Niroda Sundari, for Letters of Administration with the Will annexed. Both these applications were refused on the 2nd April 1884. The matter was then brought up to this Court, but the appeal was dismissed on the ground that no Letters of Administration could be granted, the estate then being in the custody of the Court of Wards. In 1889 the present petitioner, Bejoy Kumar Roy Chowdhury, was born. He is the son of Sarat Sasi and so grandson of Kashi Nath. On the 24th April 1893, Probate of the Will of Kashi Nath was granted to Nalini Sundari as executrix. There had been another application by Sarat Sasi, who was then a minor, through her husband for Letters of Administration with the Will annexed, which was disposed of on the same day, that application being dismissed. It appears that Probate was granted to Nalini Sundari in consequence of a compromise which was arrived at between her and Basanta Kumar, the husband of Sarat Sasi. It was agreed between them that the objection to the Probate should be withdrawn, and the Will was proved in common form by the examination of one witness. The petitioner attained

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his majority on the 25th July 1907. Previous to this his mother Sarat Sasi had died on the 18th June 1906. He filed the present petition for revocation of the Probate on the ground that he had not been cited in the Probate proceedings of 1893. The petitioner is the reversioner to the estate of Kashi Nath Gupta and he would, therefore, be entitled apart from any Will to succeed to that estate, after the decease of Nalini Sundari, the testator's widow.

The learned District Judge has granted the application and disposed of the objections of Nalini Sundari Gupta in a somewhat perfunctory manner. He holds that, because the petitioner was not cited, the Probate must, therefore, be revoked and he has not gone into any other questions though Nalini Sundari, the opposite party, had put in a petition raising a number of issues. We think that the learned Judge was in error and that he ought to have considered the other questions arising, before he could revoke the Probate on the ground that the petitioner was not cited. We may refer to the case of *Kunja Lal Chowdhury v. Kailash Chandra Chowdhury* (1). In that case it was held that though an infant has a right in such cases to apply after he comes of age for revocation of Probate obtained by consent, yet he may be barred by acquiescence and delay for a long time or by subsequent ratification of the disposition of the Will from putting the executor to the proof of the Will in solemn form or from contesting its genuineness. In the present case it is alleged that the petitioner did, as a matter of fact, accept the two-annas share which was bequeathed by the Will to Sarat Sasi and her heirs, that he had been in enjoyment of that share and he cannot now dispute the Probate or the genuineness of the Will. This and other circumstances must be inquired into by the District Judge before he can pass an order in favour of the petitioner. The Judge must inquire whether the petitioner is debarred in any way from applying to have the proceedings re-opened. If, after taking such evidence as may be offered on that point, he still decides in favour of the petitioner, we think that he ought to give the opposite party an opportunity of proving

the Will in solemn form in the presence of the petitioner. There seems to be no reason why this should not be done without instituting fresh proceedings in the matter of Probate.

We accordingly allow this appeal, set aside the order of the District Judge and remand the case to him for determination of the various points after taking fresh evidence.

The costs of this appeal will abide the result of the proceedings before the District Judge. We fix the hearing fee in this appeal at five gold mohurs.

Appeal allowed ; Case remanded.

SIND JUDICIAL COMMISSIONER'S COURT

FIRST CIVIL APPEAL No. 17 of 1911.

September 30, 1914.

Present:—Mr. Pratt, J. C., and

Mr. Fawcett, A. J. C.

KARACHI MUNICIPALITY—DEFENDANT

No. 1—APPELLANT

versus

SHAMOO LADHA AND THE SECRETARY OF STATE—PLAINTIFF AND DEFENDANT

No. 2—RESPONDENTS.

Limitation Act (IX of 1908), s. 28, Sch. I, Art. 144—Grant to Municipality—Adverse possession against Municipality for more than 12 years, effect of.

The plaintiff sued the Karachi Municipality seeking a declaration of his title as against the Municipality regarding a portion of land forming a corner space adjoining a public street alleging to have acquired the rights of the Municipality to the land by adverse possession for more than 12 years before suit. By its Resolution dated the 3rd November 1873, the Government had granted the beneficial interest in all waste lands within the Karachi Municipal District to the Karachi Municipality including the exclusive right of possession for ever, subject only to the right of resumption if required for a public purpose:

Held, that the possession of the Municipality was not that of an agent or a servant of the Government but in its own right as a beneficial owner, and that consequently the right of the Municipality to possession was extinguished by adverse possession for 12 years under section 28 read with Article 144 of the Limitation Act. [p. 15, col. 1; p. 16, col. 2.]

Mr. Rupchand Bilaram, for the Appellant.

Mr. Wadhoomal Oodharam, for the Respondent, Shamoo.

Mr. E. Raymond, (Government Pleader), for the Secretary of State.

(1) 7 Ind. Cas. 740; 14 C. W. N. 1068.

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JUDGMENT.

PRATT, J. C.—On the issue remanded the lower Court has found—there was transferred by Government to the Municipality, on or about 1873, the exclusive right of possession for ever over the land in suit, subject to the right of resumption if required for a public purpose; there was also transferred the right to grant a lease for a long term, subject to and in accordance with certain rules to be sanctioned by Government.

Objections to this finding have been filed by the second defendant, the Government Pleader. The Secretary of State contends that he is prejudiced by the terms of the issue and that it should have been wide enough to include the question as to whether title vests in Government or in the Municipality. But the issue does cover this question for the antecedent title of Government is admitted and, therefore, the only question that remains is whether any of those admitted rights of ownership have been transferred to the Municipality. The object of joining the second defendant in the suit was to obtain the best evidence on this point and to safeguard the interests of Government. The Government Pleader admits that he has had every opportunity of adducing evidence as to the present title claimed by Government and it is, therefore, difficult to understand on what the allegation of prejudice rests.

The further evidence produced consists of two Government Resolutions intermediate between the last two referred to in the remand order, *i. e.*, the ambiguous Government Resolution of 1873 and Government Resolution of 1910, in which the transfer of a beneficial interest to the Municipality was admitted. These two Government Resolutions are (1) of 1898 and (2) of 1909.

The Government Resolution of 1898 arose out of a reference by the Commissioner-in-Sind who pointed out that the practice of the Municipality granting leases of waste lands had been in force since 1883 and recommended that Government, with a view to assure the title of grantees of waste land in Karachi, should formally transfer all such land to the Municipality. There was much correspondence on this reference. Government took the advice of its law officers and referred the matter to the Government of India. Finally in accordance with suggestions made

by the Government of India, Government issued this Government Resolution drawing a distinction between lands granted prior to the Government Resolution of 1873 and lands granted subsequent to that date. As to the former lands the Government Resolution states: "The Commissioner-in-Sind accepts the conclusion that the Municipality retains no right in the lands leased before the 3rd November 1873" (the date of the Government Resolution of 1873). This accords with the conclusion arrived at in the remand order.

As to the latter lands *i. e.*, lands leased after the 3rd November 1873, the Government Resolution states that "full proprietary rights" have not been transferred to the Municipality, but that "as pointed out by the Honorable Advocate-General, the Municipality is entitled to all the benefits arising from the lands in question except such as would arise from the sale of the lands themselves. The retention of the proprietary right in the State is in consonance with the stipulation that Government may re-possess themselves of such of the lands as may be required for a public purpose."

Here is a clear admission that while Government are the owners of the land, still some of the rights of ownership have been transferred to the Municipality, and these rights included the right of possession subject to dispossession by Government if the land were required for a public purpose.

Government, therefore, recognized that a beneficial interest in the land had been transferred to the Municipality and in the 2nd Government Resolution, that of 1909, rules were sanctioned regulating the disposal of the land by the Municipality. The preamble to these rules is as follows:—

"Whereas Government has granted the beneficial interest in waste lands within the Karachi Municipal District to the Karachi Municipality under Government Resolution 6072, dated 3rd November 1873, the following rules are made for the disposal of the said lands."

This clear admission of a transfer of an interest to the Karachi Municipality was repeated in the Government Resolution of 1910 referred to in the remand order.

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On the face of these admissions it is idle to contend that the possession of the Municipality is that of an agent or servant of Government. The Municipality are in possession and have a right as against Government to retain possession, subject only to dispossession by Government when the land is required for a public purpose.

It is contended for the Municipality that the transfer on the 3rd November 1873 was prior in date to the enactment of the Bombay District Municipal Act, VI of 1873; that the Municipality on that date was incorporated under Act XXVI of 1850, and had no power to hold land. Mr. Rupchand suggests, therefore, that the grant was ineffectual as the Municipality was not a competent transferee.

Mr. Rupchand points out that no express power to hold land is conferred by Act XXVI of 1850. On the other hand it is unusual to find such a power expressed in Indian Acts. In English Statutes of Incorporation the power has to be expressly conferred in order to avoid the Statutes of Mortmain, but there is no such necessity in India. For instance, the power of a Company to hold land is expressly conferred by section 16 of the Companies Consolidation Act, 1908, but there is no such power in the corresponding section 41 of the Indian Companies Act VI of 1882. No doubt, a statutory Corporation can only exercise such powers as are expressly or impliedly conferred by the statute creating it: *Ashbury Railway Carriage and Iron Co. v. Riche* (1). But the implication is, I think, clear in Act XXVI of 1850, for sections 6 and 2 require the Municipality to make tanks and roads and that must imply the power of acquiring land for the purpose of opening up roads and making tanks. The power to hold land was not expressly conferred upon District Municipalities until 1884: see section 15 of Bombay Act II of 1884, but it was similarly implied in Bombay Act VI of 1873, for section 17 declared that certain immoveable property vested in them. I feel no doubt, therefore, that the Municipality were competent transferees of the interest

vested in them by the Government Resolution of 1873.

Mr. Rupchand next contends that the plaintiff only claims a lease and that as lessee his possession cannot be adverse. The word used in the plaint, however, is *sanad* or grant and paragraph 2 of the plaint expressly claims ownership of the land. Plaintiff claims that the Municipality have granted their rights to him or in the alternative to have acquired those rights by prescription.

The rights transferred by Government have been extinguished and are now vested in the plaintiff. The plaintiff having the right of possession, the site is not one to which section 122 (2) of the Municipal Act applies, *i. e.*, it is not "an open space not being private property." The expression private property does not imply that all the rights of ownership are vested in a private person—otherwise a lessee from Government for 999 years would be liable to eviction by a Municipality.

I would, therefore, confirm the decree of the lower Court and dismiss this appeal. Plaintiff to recover his costs in both Courts from defendant No. 1. Defendant No. 2 to bear his own costs.

FAWCETT, A. J. C.—The lower Court's finding on the issue remanded by this Court is that there was transferred by Government to the Municipality, in or about 1873, the exclusive right of possession for ever over the land in suit, subject to the right of resumption if required for a public purpose; there was also transferred the right to grant a lease for a long term, subject to and in accordance with certain rules to be sanctioned by Government.

This finding is attacked both by the Government Pleader and Mr. Rupchand for the Municipality.

In my opinion, however, nothing which has been urged by them upsets the conclusion as to the effect of the Government Resolution of 1873, which has been come to by the two learned Judges, Mr. Waley Cohen and Mr. Crouch, in the Court below, and which after full consideration and much discussion was adopted by Government themselves. Thus in paragraph 3 of Government Resolution No. 2410, dated 5th April 1898, Government adopt the view of

(1) (1875) 7 H. L. 653; 44 L. J. Ex. 185; 33 L. T. 451; 24 W. R. 794.

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the Advocate-General that "the Municipality is entitled to all the benefits arising from the lands in question, except such as would arise from the sale of the lands themselves", and Government have in 1910 made the further express admission referred to in this Court's previous judgment. This construction of the Resolution of 1873 is supported by Rule VIII of those contained in that Resolution, and no sufficient reason is shown for treating it as an erroneous one. On the other hand the construction which Mr. Wadhmal asked the Court to put on it, viz., that it transferred full proprietary rights to the Municipality, is clearly opposed both to the language used and the principle that a grant from the Crown is construed most strictly against the grantee and most beneficially for the Crown, so that nothing will pass to the grantee by the clear and express words (Broom's Legal Maxims, 7th Edition, page 450).

The main contention of the Government Pleader and Mr. Rupchand was that, notwithstanding the transfer of the right of possession and to grant leases to the Municipality, the proprietary right remained in Government, and the Municipality in regard to these lands occupied the position merely of an agent or trustee for Government.

But the extent of the beneficial interest transferred to the Municipality shows beyond any doubt that it cannot be regarded as a mere agent, and though, no doubt, it holds the lands as a trustee, it is trustee, not for Government, but for the purposes of the proper management of the Karachi Municipal affairs in accordance with the provisions of the Bombay District Municipal Act, 1901. Assuming that the ultimate proprietary right to the land remained vested in Government, this, in my opinion, makes no difference in this case. On this point I concur with the remarks of the learned Judge in his reasons for his finding, viz., "The Municipality cannot transfer the full rights of ownership, but having been given possession of all waste lands with the expressed intention on the part of Government that they shall retain possession, and having expressly been given authority to grant long leases on certain conditions, they can, so long as they act within the rules sanctioned by Government, give a perfectly good title to their leases."

To put it in another way, the Municipality is "a person entitled to the possession of" the waste lands in question within the meaning of section 8 of the Specific Relief Act. It could, therefore, have sued the plaintiff or his predecessor-in-title for possession of this piece of land in its own name, by virtue of the right to such possession conferred on it by Government, cf. *Coverdale v. Charlton* (2) and the remarks of James, L. J., in *Rolls v. Vestry of St. George, Southwark*, (3) that that case decided "that something more than easement passed to the local board, and that they had some right of property in and on and in respect of the sort which would enable them as owners to bring a possessory action against trespassers". Any such suit must under Article 144 of the Limitation Act be brought within 12 years of the time when the possession of the plaintiff or his predecessor-in-title became adverse to the Municipality. If that period has expired, then the right of the Municipality to this property has become extinguished under section 28 of the Limitation Act. The plaintiff in his suit merely seeks a declaration of his title as against the Municipality, and not as against Government, and it is open to him to claim this limited declaration under section 42 of the Specific Relief Act. Any proprietary or other right that may be vested in the Crown cannot affect the decision of this question as between the plaintiff and the Municipality, nor can it affect the operation of section 28 and Article 144 of the Limitation Act in regard to the right of the Municipality to possession of the land in suit.

In this particular case, it was admitted by the Pleader for the Municipality at the trial that the plaintiff, or his father, had a shop on the land for 12 years prior to 1900. The land is a corner space adjoining a public street, and such an occupation of the site must, I think, be taken to be adverse to the Municipality. There is no allegation by the Municipality that the occupation was permissive, and the evidence points the other way. In the circumstances I think it clearly

(2) (1878) 43 L. J. Q. B. 123; 4 Q. B. D. 104; 40 L. T. 89; 27 W. R. 257.

(3) (1880) 14 Ch. D. 785 at pp. 795, 796; 49 L. J. Ch. 691; 43 L. T. 140; 28 W. R. 867; 44 J. P. 630.

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must be taken to have given notice of adverse possession which, if the Municipal authorities had exercised due diligence, should have led to inquiries by them and knowledge of the encroachment long before 1908. Even if the witness Nathan is correct in his statement that the shop first came into existence in 1897 or 1898, plaintiff has still acquired a prescriptive title as against the Municipality.

Sub-section (2) of section 122 of the Municipal Act does not, in my opinion, help the Municipality in this case. As plaintiff has acquired a prescriptive title as against it, the land is "private property," at any rate *qua* the Municipality. An estate less than freehold of the kind known in English Law as "chattels real," is nonetheless "private property," *cf.* Chapter V, of Volume I, of Stephen's Commentaries on the Laws of England.

Mr. Rupchand further contended that the Municipality could not in 1873 hold any rights in lands, as no such power is conferred on them by Act XXVI of 1850, which was then in force. But this contention proceeds on the English rule of law that corporations cannot lawfully hold lands without the license of the Crown or the authority of Parliament. As stated in the Encyclopædia of the Laws of England, Volume 9, page 441, this rule is based on the Mortmain Acts, which do not apply to India, *cf.* *Broughton v. Mercer* (3), and in any case, as the transfer was one not merely with the license of the Crown, but by the Crown, the rule in question would not invalidate this transfer. There is no reason, therefore, for holding that Government could not legally transfer the beneficial interest in the lands which it did (under powers conferred on it by the Government of India) in the Government Resolution of 1873. The Act of 1850 also seems clearly to imply that a Corporation under that Act might legally hold lands, though this is not expressly stated.

I, therefore, concur in the order contained in the learned Judicial Commissioner's judgment.

Appeal dismissed.

(3) 14 B. L. R. 442.

BOMBAY HIGH COURT.

FIRST CIVIL APPEAL No. 206 OF 1912.

April 14, 1915.

Present:—Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Batchelor.

SULEMAN HAJI USMAN AND ANOTHER—
PLAINTIFFS—APPELLANTS

versus

SHAIKH ISMAIL SHAIKH OOSMAN

AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 92—Suit regarding public charity—Collector's consent, conditional, effect of.

Where on an application to the Collector for consent under section 92 of the Civil Procedure Code, the Collector, while doubting whether the section applied to the case, declared his consent only if the Court thought that the section applied, and the suit was dismissed on the ground that there was no proper consent:

Held, that inasmuch as the Collector had not even come to a conclusion that the suit was one which should have been filed, his consent was no consent and the District Judge was right in dismissing it on that ground. [p. 19, col. 1.]

The provisions of section 92 of the Civil Procedure Code must be regarded as imperative. [p. 18, col. 1.]

First appeal from the decision of the District Judge of Thana, in Suit No. 10 of 1912.

Mr. *Baladurji* (with him Messrs. *Pandya & Co.*), for the Appellants.

Mr. *I. K. Yajnik*, for Appellant No. 1.

Mr. *Coyajee* (with him Mr. *S. M. Kaikini*), for the Respondents.

JUDGMENT.—This was a suit brought in the name of the two plaintiffs, Suleman Haji Usman and Jusub Jan Mohammad, purporting to be disciples of a certain Pir, for relief regarding an alleged Darga of the Pir Saheb, said to be in the possession of the defendants, for a declaration that the Darga was the owner of all the moveable and immoveable property in the possession of the defendants; that the defendants were unfit to act as trustees; for a perpetual injunction against the defendants; and that the plaintiffs or other persons might be appointed trustees in their place, and put in possession of the property.

Under the authority of a Government Resolution, the Collector of Thana was invested with the powers of the Advocate-General under section 539 of the Code of Civil Procedure of 1882, and by virtue of section 157 of the Code of Civil Procedure of 1908, the powers conferred operate under the present Code in respect of sections 91 and

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92. We are here concerned with section 92. Sub-section (2) of that section provides that "save as provided by the Religious Endowments Act, 1863, no suit claiming any of the reliefs specified in sub-section (1) shall be instituted in respect of any such trust as is therein referred to, except in conformity with the provisions of that sub-section." This being a suit in respect of such a trust claiming reliefs specified in sub-section (1), it can only be supported if brought in conformity with the provisions of section 92. It is sought to show that these provisions have been complied with by a communication from the Collector in reply to a petition addressed to him by the 1st plaintiff alone. That petition states that "the petitioner as a member of the Muhammadan community, and especially a disciple of His Holiness Pir Mowlanasaheb, wants to file a civil suit against the said heirs according to the Civil Procedure Code, sections 92 and 93. Your Honour's consent is necessary for the institution of the suit. The suit is to be filed in the name of the petitioner and another member of the Muhammadan community and disciple of the Pir Sahab, Jusub Jan Muhammed." The Collector's reply is as follows:—"The Collector doubts whether section 92 of the Civil Procedure Code applies to this case, but if the Court holds that it does, the Collector hereby declares his consent to the filing of a suit to claim any of the reliefs specified in section 92, which the Court may deem fit to grant."

In some High Courts it was considered, until the year 1908, that the provisions of section 539 were permissive and not imperative, but that has never been the view of this High Court, and the Legislature by the enactment of sub-section (2) of section 92 has made it clear that section 92 must be regarded as imperative.

The Collector under section 93 stands in the position with regard to his Collectorate of the Advocate-General in the Presidency town, and the suit which requires his consent is a suit which he, if he thought fit, would be competent to file in his own name as a public officer, whose duty it is to protect public charities as the representative of the Crown in that capacity, and he has no right to consent to the institution of a suit by two persons claiming to have an interest in the trust, unless it is such a suit as he would consider himself to be justified in filing at

the relation of such two persons in his own name. The duties of the Collector have been described by the Calcutta High Court in *Sajedur Raja Chowdhuri v. Gour Mohun Das Baishnav* (1). It is there stated that—

"The Collector is required to exercise his judgment in the matter before giving his consent [to the institution of a suit]. This view is borne out by the observations of Lord Eldon in *Ex parte Skinner* (2)...The Collector in giving his consent has to exercise his judgment in the matter, and see, not only whether the persons suing are persons who have an interest in the trust, but also whether the trust is a public trust of the kind contemplated by the section, and whether there are *prima facie* grounds for thinking that there has been a breach of trust."

The observations of Lord Eldon in *Ex parte Skinner* (2) were as follows:—

"It appears to me that such a petition as the present, supposing it to be properly within the scope of the Act of Parliament, can derive no sanction from the signature of the Solicitor-General, he being competent to act as, and in the place of, the Attorney-General, only when there is no such officer as an Attorney-General. The intention of the Legislature in framing the Act was to guard charitable trusts from abuse, and, for that purpose, to prevent such proceedings from being instituted as are too frequently instituted for no other reason than because it is known that the costs will be payable out of the charity funds. It was with this view that the Legislature provided for the signature of the Attorney-General, or, in case of there being no Attorney, of the Solicitor-General; and I desire to have it understood, that no petition under the Act ought to receive that signature, except upon the same deliberation that it would be thought fit to afford to the case if it were presented in the shape of an information."

We may point out with reference to the powers of the Advocate-General, which are vested in the Collector, that it is an invariable practice in this Presidency for the Advocate-General, where he does not file the suit himself, to endorse his consent upon the plaint. If the Collector had followed this practice he would perhaps have more clearly

(1) 24 C. 418 at p. 428.

(2) (1817) 2 Mer. 453 at p. 456; 1 Wils 14; 35 E. R. 1013.

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realised his responsibilities in the matter. The plaint is, to a certain extent, his plaint as it is launched under his sanction. It should only be such a plaint as he would feel justified in filing himself.

In the present case we agree with the learned District Judge that the Collector has not acted in the manner provided by the section. He has not indicated on the proceedings that the suit is filed with his consent, and in that respect has not followed the practice of the officer whose powers he is to discharge. But more important than that, he has not even come to a conclusion that the suit is one which ought to be filed.

He doubts whether section 92 of the Civil Procedure Code applies to this case, but if the Court holds that it does, the Collector "hereby declares his consent to the filing of the suit to obtain any of the reliefs specified in section 92 which the Court may deem fit to grant;" that is to say, instead of consenting to the institution of a suit for certain definite reliefs, of which he approves, he leaves it to the Court to decide whether such a suit ought to be filed or not. We are of opinion that he has not discharged the powers conferred upon him as intended by the Legislature, and we, therefore, hold that the suit has not been filed in conformity with the provisions of section 92, and that the learned District Judge was right in dismissing it on that ground.

We are not, however, satisfied that the Judge was justified in awarding two sets of costs to the defendants who had one and the same defence, and his award of costs has not been seriously defended by the learned Counsel who appears for the respondents. We affirm the decree and dismiss the appeal with costs. There must be only one set of costs against the plaintiffs throughout.

Decree affirmed.

SIND JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL NO. 17 OF 1911.

November 4, 1914.

Present:—Mr. Pratt, J. C., and Mr. Crouch, A. J. C.

KARACHI MUNICIPALITY—DEFENDANT
—APPELLANT

versus

SHAMOO LADHA—PLAINTIFFS—

RESPONDENTS.

Rules of the Sind Judicial Commissioner's Court, Appendix VI—Pleader's fees, power to grant special—Circumstances to be considered for granting such fees.

Where the defendants made the plaintiff's suit a test case in order to decide an important question bearing upon their right of disposal of waste lands and the intricacy of the trial was chiefly due to defendants' ignorance of their own title:

Held, that it was a fit case for granting Pleader's special fees assessed under clause (g) of Appendix VI of the Rules of the Judicial Commissioner's Court. [p. 20, col. 1.]

A low valuation of his claim by a party is only one of the circumstances which the Court will consider in the exercise of its discretion to grant special fees. [p. 19, col. 2.]

Goverdhandas v. Naraindas, 7 Ind. Cas. 601; 4 S. L. R. 37 (F. B.), distinguished.

Mr. *Rupchand Bilaram*, for the Appellant.

Mr. *Wadhuml Oodharam*, for Respondent No. 1.

JUDGMENT.—This is an application by plaintiffs-respondents to be allowed Pleader's fees as between Pleader and client under clause (g) of Appendix VI of the Rules of the Court. The fee of Rs. 30 allowable under rule (a) is inadequate having regard to the intricacy of the case, but Mr. Rupchand contends that under the authority of *Goverdhandas v. Naraindas* (1), the plaintiffs are not entitled to enhanced fees because they might have put a higher valuation on the injunction which they sought. The valuation made by the plaintiff would regulate the fee under clauses (a) and (b) of Appendix VI, but in no way affect the fee under clause (g). The case of *Goverdhandas v. Naraindas* (1) only rules that the low valuation is one of the circumstances which the Court will consider in the exercise of its discretion to grant special fees. It also proceeded on the ground that the conduct of the defendants had not contributed to the cost of the litigation. That is not the case here.

The length and the intricacy of the trial was chiefly due to the defendants' ignorance (1) 7 Ind. Cas. 601; 4 S. L. R. 37 (F. B.).

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of their own title. This was the chief difficulty in the suit and it was for this reason that it became necessary to remand the appeal and join Government as a party—moreover the defendants made plaintiffs' suit a test case in order to decide an important question bearing upon their right of disposal of waste lands. We, therefore, think this case a fit one in which to order Pleader's fees to be assessed under clause (g) of Appendix VI of the Rules of the Court.

Order accordingly.

LOWER BURMA CHIEF COURT.

SECOND CIVIL APPEAL No. 236 OF 1913.

March 4, 1915.

Present:—Mr. Justice Twomey.

LAL MOHAMED—PLAINTIFF—APPELLANT

versus

MRA THA AUNG AND ANOTHER—

DEFENDANTS—RESPONDENTS.

Contract Act (IX of 1872), s. 25—Gift—Revocation, power of, exercise of—Pleadings—Fraud should always be specifically pleaded.

If the donor has the power of revocation, an exercise of that power cannot be inferred from the mere fact that he conveyed the property to a stranger; an express act of revocation would at least be necessary. [p. 21, col. 1.]

The explanation to section 25, Contract Act, provides that nothing in the section shall affect the validity, as between a donor and donee, of any gift actually made. The same rule applies as between a donee and the persons claiming through the donor. [p. 21, col. 2.]

A plea of fraud will not be heard unless it is expressly and specifically advanced in the pleadings. [p. 20, col. 2.]

Mr. J. N. Lentaigue, for the Appellant.

Mr. Agabeg, for the Respondents.

JUDGMENT.—The plaintiff-appellant, Lal Mohamed, sued for possession of a paddy land holding, measuring 56'55 acres, sold to him for Rs. 3,000, in 1911 by a registered conveyance executed by Mi Shwe Ban We, the owner, who died in December 1911. The defendants-respondents are Mra Tha Aung and Mi Hla Pru, husband and wife, who are the son-in-law and daughter respectively of the vendor, Mi Shwe Ban We, and who are in possession of the holding. The plaintiff sued also for a year's rent of the land alleging that the defendants were his tenants,

The defence was that at the time of the conveyance the vendor had no saleable interest in the land, as she had previously in 1904 made over the northern moiety of it by the way of gift to her daughter, the 2nd defendant, and in 1906 sold the remaining southern moiety to her son-in-law, Mra Tha Aung, for Rs. 360.

The plaintiff has been unsuccessful in both the lower Courts. Both Courts decided that the deceased Mi Shwe Ban We had no saleable interest in the land, having already disposed of it as pleaded in the written statement. But they went out of their way in impugning the genuineness of the plaintiff's conveyance. The District Court thought that the suspicion of fraud in this instrument was very strong and the payment of the alleged consideration doubtful. The Divisional Judge said: "I have no hesitation whatever in finding that plaintiff got a false document drawn up and got it executed by the deceased so as to bolster up a claim to the land." Both Judges overlooked the fact that the written statement of the defendants, which contains a detailed exposition of their case, makes no allegation of fraud but relies on only Mi Shwe Ban We's title. The lower Courts committed a serious error in making out for the defendants a defence of fraud which they had never pleaded, and from the judgments it seems probable that the view taken by the Judges on this point materially influenced them in deciding the real issues of the case against the plaintiff-appellant. No rule of practice is better established than that a plea of fraud will not be heard unless it is expressly and specifically advanced in the pleadings. The finding of fraud must be entirely eliminated. But I note that this finding rests on very slender foundations. There was no obligation on the plaintiff-appellant to produce the alleged previous mortgage document of 1262 B. E. As regards his statement that the particulars of holding as entered in the conveyance of 1911 were taken from the mortgage of 1262 B. E., the most that can be said is that it is a suspicious circumstance which may or may not be susceptible of an innocent explanation. The Judges disbelieved the evidence as to the payment of Rs. 1,200 in cash to Mi Shwe Ban We, but the grounds of their disbelief are not cogent. The mere fact that Mi Shwe Ban We after the conveyance showed no

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signs of prosperity is of little significance. She may have used the money to pay off other creditors. It would be most fair to conclude that she had not received the purchase-money merely because the purchaser was unable to show how she had disposed of it. Mi Shwe Ban We was an old woman at the time but there is no evidence beyond the bare statement of her daughter, the 2nd defendant-respondent, that she was in her dotage. There are no grounds for holding that she was not in full possession of her faculties. Even if fraud had expressly been pleaded by the defendants, I think it should be held to be unproved and the ordinary presumption in favour of fair dealing would prevail.

Turning now to the substantive defence, I see no reason to dissent from the finding of the lower Courts that the gift of the northern part of the holding 25'60, acres, to the 2nd defendant was proved. The land was made over to the defendant and a report was duly made to the Revenue Surveyor by the donor, Mi Shwe Ban We. It is urged that she could under the Dhammathats revoke the gift and she must be held to have exercised this power by actually selling it seven years later to the plaintiff-appellant. I am not prepared to hold that the gift in this case is governed by the Dhammathats at all. As in the Upper Burma case of *Maung At Gyi v. Ma U Me* (1), the mother treated the property as her own absolutely with an absolute power of disposal and the daughter claims it as her own in virtue of an exercise of that power in her favour. No question of inheritance or succession is involved. Nor has it been proved in this case any more than in the Upper Burma case that when a Burmese Buddhist father or mother makes a gift to a child, it is an implied incident that the gift is revocable at the parent's Will.

Moreover, if the donor had the power of revocation, an exercise of the power could not be inferred from the mere fact that the donor conveyed the property to a stranger; an express act of revocation would at least be necessary.

Mr. Lentaigue argues that the gift is

invalid as it was not effected by a registered instrument under section 25, Contract Act. No instrument was necessary before the introduction of the Transfer of Property Act from 1st January 1905. The explanation to section 25, Contract Act, provides that nothing in the section shall affect the validity, as between donor and donee, of any gift actually made. The same rule applies as between the donee and the persons claiming through the donor, like the plaintiff-appellant in this case. I think it is clear that the conveyance to the plaintiff-appellant is of no effect as regards the area given to the 2nd defendant in 1904.

The alleged sale of 25'60 acres in 1906 stands on a different footing. The Transfer of Property Act was then in force and the transaction would, therefore, be ineffectual without a registered conveyance. At the eleventh hour the defendants made an effort to overcome this serious difficulty by producing evidence that this area was given by Mi Shwe Ban We to her son, Mg. Lon, in 1904 when she gave the other area to her daughter, and that the real vendor in the sale of 1906 was Mg. Lon though the transaction was carried out in the name of his mother as vendor as the land still stood in her name. This plea is clearly an afterthought; it is not suggested in the written statement that Mi Shwe Ban We sold the land on behalf of her son, and the defendants should not have been permitted to raise this inconsistent plea. Moreover Mg Lon's evidence was discredited by the lower Courts and it does not agree with the evidence of Nga So Maung who was called to corroborate Nga Lon. According to So Maung, Mg. Lon after receiving the land by gift from his mother let it out to a native of India for two years; but Nga Lon himself says nothing about this. If Mi Shwe Ban We had made a gift of 4 *doons* to Nga Lon at the same time that she gave the similar area to Mi Hla Win Pru, it is most unlikely that she would refrain from reporting the former transaction to the Revenue Authorities as she did the latter. It must be held, therefore, that at the time of conveyance to the plaintiff-appellant Lal Mohamed, in 1911, the vendor, Mi Shwe Ban We, had a good subsisting title to the whole of the holding of 56'55 acres except the area, 25'60 acres, which she had given to her

(1) U. B. R. (1892-96), Vol. II, p. 400.

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daughter in 1904. The plaintiff-appellant's claim for rent remains to be decided. On this point, I agree with the lower Courts. It is clear that Mrs. Tha Aung disputed the plaintiff-appellant's claim to rent and though the plaintiff-appellant produced oral evidence that Mrs. Tha Aung had agreed to pay rent, I think it is very unlikely that he did so. He thought, no doubt, that he could maintain his title to the whole holding as against Lal Mohamed and in the circumstances the lower Courts were probably justified in refusing to believe the evidence of a tenancy.

The decrees of the lower Courts are set aside and a decree will be granted in favour of the plaintiff-appellant for possession of the area claimed by him *minus* the area, 25'60 acres, given to Mi Hla Win Pru in 1904. The District Court should cause the area, 25'60 acres, to be demarcated in a compact block adjoining Mrs. Tha Aung's other land on the north.

The claim to rent is dismissed.

Looking to the excessive nature of the plaintiff-appellant's claim I direct that the parties shall pay their own costs throughout.

Decree set aside.

PUNJAB CHIEF COURT.

FIRST CIVIL APPEAL NO. 2374 OF 1913.

June 26, 1915.

Present:—Mr. Justice Chevis and
Mr. Justice Leslie Jones.

CHHUTTAN AND OTHERS—PLAINTIFFS—
APPELLANTS

versus

HAZARI LAL AND OTHERS—DEFENDANTS—
RESPONDENTS.

Custom—Succession—Self-acquired property—Statements in riwaj-i-am opposed to general custom, effect of—Gaur Brahmins of Palwal Tahsil of Gurgaon district—Collaterals and daughter—Pleadings.

It is a well-established general custom in the Punjab that as regards self-acquired property, *i. e.*, property which has not descended from the common ancestor, a daughter or her son succeeds in preference to collaterals. [p. 22, col 2; p. 23, col. 1.]

Statements in the *riwaj-i-am* when opposed to the general custom can carry very little weight unless supported by instances. [p. 23, col. 1.]

Among *Gaur Brahmins* of Tahsil Palwal, District Gurgaon, collaterals do not exclude a daughter and her sons from self-acquired property. [p. 22, col. 2.]

An appellant cannot argue a point not raised in his memorandum of appeal. [p. 23, col. 2.]

First appeal from the decree of the District Judge, Gurgaon, dated the 15th September 1913, dismissing the claim.

Lala Sangam Lal, for the Appellants.

Mr. Kirkpatrick, for the Respondents.

JUDGMENT.—The plaintiffs are collaterals in the third degree of Gokal, and claim to succeed to his property to the exclusion of Gokal's daughter and her sons. The parties are *Gaur Brahmins* of the Palwal Tahsil of the Gurgaon District. Gokal died, so it appears, about 1885, and the estate was then held by his widow, *Musammam Ram Devi*, on whose death in 1912, the present dispute between the plaintiffs and the daughter of Gokal arose. The daughter died during the pendency of the suit, and her sons are now defendants in her stead. The lower Court finds that the parties are governed by custom, that the property is not ancestral *qua* the plaintiffs, and that no special custom is proved by which collaterals can exclude a daughter and her sons from self-acquired property. So the lower Court has dismissed the suit. The plaintiffs appeal.

Though Mr. Kirkpatrick does not admit that the parties are governed by custom, it may be assumed that they are.

The first two grounds of appeal attack the finding of the lower Court as to the property not being ancestral *qua* the plaintiffs. Counsel for the plaintiffs has not thought fit to say a word in support of these grounds, and we need only say briefly that the lower Court's decision on this point seems perfectly correct.

Grounds 5 and 6 complain of proceedings having taken place in September to the prejudice of the plaintiffs, but here again Counsel has not thought it worth his while to address us, so we take it that there has been no real prejudice.

Mr. Sangam Lal's arguments are—

(1) that by general custom of the Province collaterals exclude a daughter even as regards self-acquired immoveable property;

(2) that in this particular case plaintiffs have proved that by custom of Gurgaon Brahmins a collateral excludes a daughter from all kinds of immoveable property.

As to what the general custom is, we consider it well-established that as regards

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self-acquired property, *i.e.*, property which has not descended from the common ancestor, a daughter or her sons succeed in preference to the collaterals. There is ample authority for this. The authorities are to be found in Rattigan's Digest and we need not cite them here.

So the plaintiffs, in order to succeed, must prove a special custom. No doubt the *rivaj-i-am* (see page 7 of the paper-book) prepared in 1879 is in favour of the plaintiffs, but no instances are there quoted. We do not say that statements in a *rivaj-i-am* can never carry any weight unless supported by instances, but we certainly do consider that such statements, *when opposed to the general custom*, can carry very little weight unless supported by instances. Certain instances have been cited by the plaintiffs' witnesses, but on examination they are of no value. The instances are as follows:—

(1). *Kallu* was succeeded by his brother to the exclusion of his daughter, see evidence of Babu, P. W. No. 1. But the property was in part at least ancestral according to this witness, and according to Nathan Singh P. W. No. 5, it was wholly so.

(2). *Bhura* was succeeded by his collaterals. This case is cited by Babu, P. W. No. 1, and apparently by Nathan Singh, P. W. No. 5. Neither witness mentions the existence of a daughter, and Nathan says the land was ancestral.

(3). *Nauba* was not succeeded by his daughter. Here again the land was ancestral, see evidence of P. W. No. 5, Nathan.

(4). *Devi Ram* left a son and a daughter. Of course the son succeeded, excluding his sister. This is not a case of exclusion by a collateral.

(5). *Baldeo* was succeeded by his nephew to the exclusion of his daughters, see evidence of Madho, P. W. No. 2, who says the property was partly ancestral and partly self-acquired.

(6). *Todha's* daughter was excluded by collaterals. But the land was ancestral, see evidence of Chhajjan, P. W. No. 4.

(7). *Ganeshi's* property went to his collaterals on his widow's death. See evidence of Shib Lal, P. W. No. 6, who says Ganeshi's sister's sons were excluded. Of course a sister or her son cannot ordinarily succeed.

(8). *Sandhi's* widow made a gift to her

daughter's sons, which the collaterals got upset. But the land was ancestral, see evidence of P. W. No. 6.

(9). *Musammatt Dhan Kaur's* case is cited by P. W. No. 6, who says *Musammatt Dhan Kaur* herself acquired land which went to her husband's brother, and not to her daughter's son, whom she tried in vain to adopt—So Shib Lal, P. W. No. 6, deposes. We can only say that if the version given by him is correct, the daughter's son was apparently foolish not to assert his rights to his grandmother's self-acquired property.

(10). *Jisukh's* daughter was excluded by a collateral. This case is cited by Nathan Singh, P. W. No. 5, who says the land was partly ancestral.

It will be seen that these instances can carry very little, if any weight. If in certain cases the estate comprised a little self-acquired land it is no wonder if the daughter did not trouble to contest the claim of the collateral.

But Counsel urges that some of defendant's witnesses also support the alleged custom. Sher Sahai (page 27) says he has some acquired property which will go to his nephew if he does not make a gift in his daughter's favour. Apparently he thinks the self-acquired property must go with the rest of the estate, but it does not at all follow that his opinion is correct. Ram Narain, D. W. No. 1, (pages 26-27) cites three instances in which a daughter succeeded by gift, and Counsel relies on this as showing that but for the gift the daughter would not have succeeded. But even though a daughter may be the heir there is nothing strange in her father making a gift in her life-time. The object of such a gift is to accelerate the succession, not to divert it. We agree with the lower Court that plaintiffs have failed to prove their right to exclude the daughter's sons.

In conclusion we note that Counsel wished to argue a point not raised in his memorandum of appeal, *viz.*, that Sukh Ram, nephew of Gokal who died in 1902, was the last male owner. This argument was put in as an additional ground of appeal long after the period of limitation for appealing had expired and as it entirely varies the grounds on which plaintiffs claim possession of the property, we declined to hear Counsel in support

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of this ground. We merely note that if Sukh Ram ever succeeded to the property it is remarkable that plaintiffs did not claim the estate on his death; also that in the presence of Gokal's widow Sukh Ram's succession would be entirely opposed to custom, and that according to the plaint it was not Sukh Ram who succeeded on Gokal's death, but Gokal's widow who succeeded on the usual life-tenure and died eight months prior to institution of suit.

We uphold the decree of the lower Court dismissing the suit, and dismiss the appeal with costs.

Appeal dismissed.

SIND JUDICIAL COMMISSIONER'S
COURT.

FIRST CIVIL APPEAL NO. 52 OF 1912.

December 16, 1914.

Present:—Mr. Pratt, J. C., and Mr. Crouch,
A. J. C.

GHUMANMAL MURIJMAL AND OTHERS—
DEFENDANTS—APPELLANTS

versus

PAPURBAI AND ANOTHER—PLAINTIFFS—
RESPONDENTS.

Partnership assets, lands purchased out of—Presumption.

It cannot be laid down as an universal rule, that when lands are bought by partners in trade, and are paid for out of the partnership assets, they of necessity become part of the joint estate of the partners. There are different purposes for which the lands may have been bought. [p. 24, col. 2.]

If land is purchased out of the partnership assets and not used for the purpose of partnership business, the question is an open one and is to be determined on the general evidence. [p. 25, col. 1.]

Bank of England case, (1861) 130 R. R. 276; 3 D. F. & J. 645; 30 L. J. Bk. 25; 45 E. R. 1029, followed.

Appeal against the decree of the first Class Sub-Judge, Sukkur.

Mr. *Hardasmal Ghurbamal*, for the Appellants.

Mr. *Lalchand Hassomal*, for the Respondents.

JUDGMENT.—The plaintiff, widow of Laru, has sued Laru's brother, Ghuman, and his sons for partition of an estate consisting of a field, shops and houses. The defendants raised several and inconsistent defences. They said that Laru had made a verbal Will appointing defendants to be owners of all his property and declaring plaintiff No. 1 to be entitled only to maintenance during her life-time; that the estate was not purchased for the firm of Laru and Ghuman;

that in that firm Laru had only 1/5th share; and that as Laru died in 1900, the partnership was dissolved in that year and the plaintiff's only remedy was a suit for an account for that dissolved partnership and that the remedy was barred by limitation.

The lower Court has found that there was no Will; that Laru and Ghuman were partners until the death of Laru on the 15th March 1900; and that Laru's share in the partnership was 26½ out of 54 annas; and that the property was acquired out of partnership assets. On all these points the findings of the lower Court have not been challenged. But the lower Court found that although the whole estate exclusive of two fields had been purchased out of partnership assets, yet the estate so purchased was held by Laru and Ghuman as co-owners and decreed plaintiff's claim for partition and possession of her husband's share. It is on this point alone that Mr. Hardasmal in his careful and able argument has attacked the judgment of the lower Court. His contention is that the mere fact that the land was purchased out of the partnership property raises a presumption that the land is partnership property. But in the case of a purchase of land it cannot be said that there is a presumption either way, for much depends upon the purpose for which the land was purchased. The law on this point was laid down in *Bank of England case* (1). Turner, L. J., said at page 284: "It cannot, I think, be laid down as an universal rule, that when lands are bought by partners in trade, and are paid for out of the partnership assets, they of necessity become part of the joint estate of the partners. There are different purposes for which the lands may have been bought. They may have been bought for the purpose of being used and employed in the trade ... or they may have been bought, not for the purpose of being used or employed in the trade, but for the purpose of a mere speculation on account of the partnership Again they may have been bought without reference to the purposes of the trade or the benefit of the partnership, with the intention of withdrawing from the trade the amount employed

(1) (1861) 130 R. R. 276; 3 D. F. & J. 645; 30 L. J. Bk. 25; 45 E. R. 1029.

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in the purchase, and converting that amount into separate property of the partners, or they may have been bought on account of one or more of the partners, he or they becoming debtors to the partnership for the amount laid out in the purchase..... Where land purchased is not merely paid for out of the partnership assets, but is bought for the purpose of being used and employed in the partnership trade, it is scarcely possible to conceive a case in which there could be sufficient evidence to rebut the trust, ...but where the land is not purchased for these purposes, the question becomes more open, and we have to consider whether the circumstances attending the purchase show that it was made on account of the partners individually, or of any one or more of them in whose name the land may have been bought."

It follows, therefore, that if land is purchased out of the partnership assets and not used for the purpose of partnership business, the question is an open one and is to be determined on the general evidence. Here the partnership business was a grocer's shop and the land was not necessary for the purpose of this business. Mr. Hardas-mal points to a *potamel* of a prior partnership of the brothers and two others which was dissolved in 1887, and there some land is shown as part of the partnership assets. But even if this be the same land the admission of the principal defendant, Wadhmal, shows that in 1887 the old shop was demolished, fresh accounts kept, and a new business started in a new shop on different lines altogether. There were then only two brothers who were interested, and it seems more probable that they treated the landed property that had been acquired as property of which they were the co-owners. This inference receives support from the fact that the defendants have not produced any account of the partnership from 1887 to 1900 and further from the fact that the plaintiff, widow of one of the brothers, retained physical possession of some property. It is scarcely open to the defendants to allege that the property was held in any other way, because throughout the proceedings in the lower Court Wadhmal stoutly maintained that the landed property had no connection whatever with the shop.

There is only one other point raised in the appeal, and that is the question of the non-joinder of Shinho, who is the grandson of Ghuman. Shinho was originally a party but was dropped by the plaintiff on the 13th October 1911. The defendants raised no objection at that time and the Sub-Judge says that the matter was only incidentally referred to in the concluding arguments of the defendants' Pleader a year later. Under the circumstances the defendants must be held under Order II, rule 7, to have waived the objection as to his non-joinder. It does not, however, appear that Shinho was really a necessary party. The property was not ancestral and the finding of the lower Court is that it was Ghuman alone of the defendants' branch who had such share in it.

As to the cross-objections—the joint property was shown in the schedule annexed to the plaint and no objection was raised in the written statement that this was property in which Ghuman was not interested.

The decree, therefore, should be for the whole of this property with the exception of the two fields bought after the death of Laru. We accordingly vary the decree of the lower Court by including the portions of Survey Nos. 12, 15, 17, 207, 208, 209 and 1 and measuring 10 *ghantas*, 3 acres, 2 acres—13 *ghantas*, 23 *ghan'as*, 37 *ghantas*, 29 *ghantas*, and 2 acres respectively.

The decree is otherwise confirmed and the appeal is dismissed with costs. Cross-objections allowed with costs.

Decree varied; Cross-objections allowed.

SIND JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION APPLICATION NO. 11 OF 1913.
February 24, 1915.

Present:—Mr. Pratt, J. C., and Mr. Fawcett,
A. J. C.

Sayed PINIAL SHAH AND ANOTHER—
APPLICANTS—
versus

Seth ABDULLA AND OTHERS—OPPONENTS.
*Sind Encumbered Estates Act (XX of 1896), ss. 7, 8,
9—Suit on mortgage—Mortgagor getting protection
order under s. 9, effect of.*

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Section 9 (1) of the Sind Encumbered Estates Act is not limited to proceedings pending, or decrees asked for, against the debtor, but extends to all proceedings pending at the time an order of management is published under section 7 in respect of the debts and liabilities mentioned in section 8. Consequently a suit in respect of a mortgage-debt against such a debtor must be stayed, even though no personal relief is claimed against him on account of his insolvency. [p. 26, col. 2.]

Application against the order of the Joint Sub-Judge, Hyderabad.

Mr. *Tahilram Moniram*, for the Applicants.

Mr. *Motiram Ramchand*, for Opponents Nos. 2 and 3.

JUDGMENT.

PRATT, J. C.—This is an application for revision of an order made by the Joint Subordinate Judge of Hyderabad under section 9 of the Sind Encumbered Estates Act, XX of 1896.

The plaintiffs sued to recover the amount due on a mortgage bond executed by the first defendant, Abdullah, on the 30th September 1909. Two years later, the mortgagor became insolvent and the property mortgaged vested in the Receivers appointed in his insolvency. The Receivers sold it to one Bhai Sobhraj. The two Receivers and Bhai Sobhraj were, therefore, joined as defendants Nos. 2, 3 and 4 in the suit.

During the pendency of the suit a manager was appointed of the estate of the first defendant, Abdullah, on account of his debts and an order of management published under section 7 (2) of the Sind Encumbered Estates Act.

The Sub-Judge then made an order staying the suit under section 9 (1) of the Act.

That section requires that all proceedings pending in Civil Courts in respect of debts and liabilities mentioned in section 8 shall be stayed. Section 8 refers *inter alia* to all debts and liabilities to which the debtor is subject. The mortgage-debt was clearly such a debt and the order of stay was, therefore, one which the Sub-Judge was required to make by section 9. The case of *Nanchand v. Yenawa* (1) does not help the appellant, for even if the decree is not against the debtor yet the suit is one in respect of the debt.

It is urged that the name of the first defendant could have been expunged from the record. But no such application was made before the stay order. And if made it is doubtful if it could have been granted,

for as regards the personal remedy it seems that the Receiver does not represent the insolvent, see the judgment of Hayward, A. J. C., in *Jethalal Kalianji v. Gangaram Naomal* (2).

I would, therefore, confirm the order of the lower Court and dismiss this application with costs.

FAWCET, A. J. C.—I concur in the proposed order.

I feel some doubt whether the defendant Abdullah was a necessary party to the suit, in view of his being an adjudicated insolvent. In England he would not be entitled to redeem so long as he was bankrupt (Halsbury's Laws of England, Volume 21, page 142, section 27 (1), and the same result is, I think, effected in India by section 16 (2) (a) read with section 2 (1) (e) of the Provincial Insolvency Act, 1907, under which defendant's right of redemption becomes vested in the Receiver. If so, he has no present interest in the right of redemption, and it may be said that he is not, therefore, a necessary party under Order XXXIV, rule 1, Civil Procedure Code. And in any case his interest would perhaps be sufficiently represented by defendants Nos. 2 and 3 (the trustees of his estate) under Order XXXI, rule I, Civil Procedure Code. But neither this nor the fact that appellants now drop all claim for personal relief against the mortgagor, really affects the case, because section 9 (1) of Act XX of 1896 is not limited to proceedings pending, or decrees asked for, against the debtor, but extends to 'all proceedings then pending . . . in respect of the debts and liabilities mentioned in section 8.' The mortgage-debt, in respect of which Abdullah is sued, clearly remains a debt to which he is subject in spite of his insolvency and the sale of the mortgaged property, and falls, therefore, under section 8. Accordingly, I think the view taken by the Sub-Judge was quite correct. No doubt the stay of plaintiff's suit may be rather hard on him, but it would clearly also be hard on the purchaser of the mortgaged property, if this property were sold for the realization of the mortgage-debt before it was seen whether the debt could not be wholly or partly satisfied under a liquidation scheme, as provided for in Chapter IV of

(1) 23 B. 630; 6 Bom. L. R. 582.

(2) 29 Ind. Cas. 30; 8 S. L. R. 325.

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Act XX of 1896. And the right to put the mortgaged property to sale only accrues after the mortgagor has failed to pay the mortgage-debt held due from him: so there is nothing illogical in the suit being stayed so that the manager may have an opportunity of dealing with this claim against the mortgagor, along with others.

Appeal dismissed.

CALCUTTA HIGH COURT.

FIRST CIVIL APPEAL NO. 267 OF 1912.

July 15, 1915.

Present:—Mr. Justice Fletcher and

Mr. Justice Richardson.

RAM KRISHNA BOSE AND ANOTHER—

DEFENDANTS—APPELLANTS

versus

Mohanta BHAGWAN RAMANUJA

DAS—PLAINTIFF—RESPONDENT.

High Court Procedure—Bench, jurisdiction of, to set aside judgment of another Bench—Appeal, re-hearing of, application for, to be made to same Bench that heard appeal.

Where on an appeal being heard *ex parte* and decreed by one Bench of the Calcutta High Court another Bench of the Court, on an application made to them, set aside that judgment and directed the former Bench to re-hear the appeal:

Held, that the whole procedure was *ultra vires*, for one Bench of the High Court had no jurisdiction to set aside the judgment of another Bench and direct the re-hearing of the appeal, and that if there were grounds for setting aside the judgment of the former Bench, the application for re-hearing the appeal ought to have been made to that very Bench that heard the appeal, and to no other Bench. [p. 27, col. 2.]

Appeal against the decree of the Subordinate Judge, Cuttack, dated the 28th of March 1912.

Sir Rash Behari Ghose, Babus Provash Chundra Mitter and Satish Chundra Bose, for the Appellants.

Mr. C. R. Das, Babu Broja Lal Chakrabarty, for Babu Dwarka Nath Chakrabarty and Babu Kalikinkar Chakrabarty, for the ont.

JUDGMENT.

FLETCHER, J.—This is an appeal from a decision of the learned Subordinate Judge of Cuttack, dated the 28th March 1912. The appeal was heard by us *ex parte* and it was decreed on the 28th May of the present year. Subsequently another

Bench of this Court on an application made to them set aside our judgment and directed us to re-hear the appeal. With all deference, I doubt the jurisdiction of another Bench of this Court to set aside our judgment and direct us to re-hear the appeal. If there were grounds for setting aside our judgment, the application ought to have been made to us. I understand from Sir Rash Behari Ghose, that he mentioned the matter to the Chief Justice who also expressed his doubt as to the jurisdiction of another Bench to do so. However, Sir Rash Behari Ghose, on behalf of the appellants, has not pressed the point and is willing that the appeal should be re-heard by us.

The point that we dealt with on the last occasion was a point of law arising on the findings of fact made by the learned Subordinate Judge in his judgment. On that occasion, Sir Rash Behari Ghose on behalf of the appellants accepted the findings of fact made by the learned Subordinate Judge and argued that the learned Judge had arrived at a wrong conclusion on a point of law. We accepted the argument put forward by Sir Rash Behari Ghose and decreed the appeal. On the appeal coming on before us for re-hearing, both sides agree that, on the findings of fact made by the learned Judge at the Court below, his judgment cannot stand. But the learned Counsel for the plaintiff-respondent has asked us to dissent from the findings of fact made by the learned Subordinate Judge on which his judgment is based. The defendants, who are the appellants before us, claim through their grandfather who had got a lease of the property for 18 years in the *benami* of Bishnu Priya. That lease expired in 1880. The story put forward by the plaintiff is that there was a verbal lease or arrangement between one Hari Ballav Sur and the former Mohant, Hayagriba, in the year 1287. The evidence shows that the late Mohant, Hayagriba, was gathered to his fathers before the date of the lease. An attempt was made by some of the plaintiff's witnesses to place this verbal arrangement at an earlier date before the death of Hayagriba. That was the case which the plaintiff invited the learned Judge to express his opinion on and when that case failed as false the learned Judge clearly and rightly

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refused to enter into a consideration of the case that this man Hariballav had entered into some arrangement other than that set up resulting in his possession of the property as a licensee. In that, I think, the learned Subordinate Judge was quite right. The documentary evidence read to us leaves no doubt on my mind that Hariballav was connected with the property solely as a relative or guardian of the two present defendants. The documentary evidence seems to me to be conclusive on that. This story about the verbal lease to Hariballav on his entering into possession of the property as licensee in his own right, I am satisfied, is wholly untrue. On the evidence, I am clearly of opinion that the learned Subordinate Judge came to a correct conclusion. That being so, the learned Judge was right when he held that the said suit was barred by limitation. We pointed out in our former judgment that on that finding, the learned Judge was not entitled to give to the plaintiff the relief that he has given. For the second time I must express my dissent from the result arrived at by the learned Judge of the Court below. The appeal must, therefore, be decreed and the plaintiff's suit dismissed with costs in both Courts.

RICHARDSON, J.—I agree.

Appeal decreed.

PUNJAB CHIEF COURT.
FIRST CIVIL APPEAL No. 738 of 1911.
May 26, 1915.

Present:—Mr. Justice Chevis and
Mr. Justice Shadi Lal.

Musammam NAWAB BEGAM AND OTHERS—
PLAINTIFFS—APPELLANTS

versus

MUHAMMAD MIRAJUDDIN

AND OTHERS—DEFENDANTS—RESPONDENTS

Adverse possession—Tenant in possession—Additions made without permission of landlord—Agreement to retain rent in part payment of amount spent.

Where the father of the plaintiff came into possession of the land in dispute as a tenant and was allowed by the proprietors to build some stables thereon, and appropriated the rent towards the cost of the building in accordance with an agreement

recorded in the *jamabandi*, but in making subsequent additions did not obtain the permission of the landlords:

Held, that in the circumstances of the case there was no overt act amounting to a denial of the landlords' title. [p. 29, col. 1.]

First appeal from the decree of the Court of the Assistant Collector, first Grade, acting as District Judge, Lahore, dated the 7th May 1910, dismissing the claim.

Mr. *Fazl-i Husain*, for the Appellants.

Khawaja Ziaud-Din and Pandit Ram Bhaj Datta, for the Respondents.

JUDGMENT.—The land in dispute is situate in the civil station of Lahore and has been recorded in the Revenue Records as the joint property of the defendants. On an application for partition having been made by some of the recorded owners, the plaintiff, Muhammad Bakhsh [intervened and opposed the application on the ground that he was the sole owner thereof and that the entries in the Revenue Records did not represent the real state of affairs. As there was a dispute as to the title in the land sought to be partitioned, the Revenue Officer proceeded to determine it as though he were a Civil Court, and after recording the evidence adduced by the parties he came to the conclusion that the plaintiff had not established his title by adverse possession. Against that decision this appeal has been preferred, and a preliminary objection has been raised by Mr. Ram Bhaj Datta that as the respondents Ranjha, Ramzan and Fateh Din had died more than six months before the dates on which the respective legal representatives were brought on the record, the appeal should abate. We think that considering the facts that the appellant, the representative of the deceased plaintiff, is a *pardah nashin* lady and that it was difficult for her to obtain the necessary information within six months for making the applications, the delay has been sufficiently accounted for and that a case for extending the prescribed period has been established. We, therefore, overrule the preliminary objection and proceed to decide the appeal.

Upon the merits, it is clear, and the fact is admitted that the defendants were the owners of the land, and the question for determination is whether the plaintiff has acquired title thereto by adverse possession for twelve years. The

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onus of establishing such title is obviously on the plaintiff and after examining the evidence carefully, we concur with the Court of first instance that it has not been discharged. Now the entries in the Revenue Records and the oral evidence prove conclusively that Sheikh Wazir, father of Muhammad Bakhsh, came into possession of the land as a tenant and that he was allowed by the proprietors to build some stables thereon. It appears that in making subsequent additions to the building the tenant did not obtain the permission of the landlords, but we do not in the circumstances of the case regard it as an overt act amounting to a denial of their title. The entry in the *jamabandi* of 1886-87 shows that the annual rent was fixed at Rs. 24, and as the tenant had spent money in constructing the building, it was agreed that the rent should be retained in part payment of the amount spent by him on the building. It is to be noticed that the provision to that effect is recorded in the annual papers of 1898-99, and we consider it hard to believe that the entry, which has been repeated in all the subsequent *jamabandis*, was made without the consent of the plaintiff or that he was not aware of it.

The evidence of the defendants Ranjha and Ghulam Muhammad, upon which great reliance has been placed by the learned Counsel for the appellant, does not, in our opinion, support the theory of adverse possession. It must be remembered that there were about fifteen persons who were jointly entitled to the land, and it seems that as all of them could not come together and agree as to the amount of rent, the dispute as to its enhancement between the tenant and the landlords was never finally settled. It may be that the plaintiff and his father, who having erected building on the land appropriated the rent towards the payment of the costs thereof, were regarded by the public as the ostensible owners of the land, but we do not think that they openly repudiated the title of the real owners and asserted their right of ownership to the knowledge of all the co-sharers. The vague and inconclusive statement of Ranjha does not bear the construction which the appellants' Counsel wants to place upon it, and in view of the

entries as to tenancy made at the Settlement of 1891-92 we are unable to hold that there was an assertion of adverse title before that year as the appellant wants to make out. Nor do we find sufficient evidence to prove adverse possession subsequent to that year and for a period of twelve years prior to the institution of the suit.

Upon an examination of all the material placed on the record, we think that the oral evidence is insufficient to rebut the presumption raised by the entries in the Revenue Records and we hold that the plaintiff has failed to prove his ownership. This is the only point before us and the questions whether the tenant is liable to ejectment, and, if so, whether he is entitled to compensation, do not arise in this case, and we, therefore, consider it unnecessary to pronounce any opinion thereupon.

We accordingly confirm the decree of the lower Appellate Court and dismiss the appeal with costs.

Appeal dismissed.

CALCUTTA HIGH COURT.
FIRST CIVIL APPEAL NO. 73 OF 1913.
July 13, 1915.

Present:—Mr. Justice Fletcher and
Mr. Justice Walmsley.

KIRANBALA DEBI—PLAINTIFF—
APPELLANT

versus

KALI CHARAN SINGHA AND OTHERS—
DEFENDANTS—RESPONDENTS.

Property, suit for recovery of—Waiver—Estoppel by conduct—Adoption, validity of.

The plaintiff's late husband brought a suit against one Chhaya Kumari and Nilkanta to set aside the adoption of Nilkanta, by the former. The suit was decreed by the primary Court but on appeal to the High Court the judgment was set aside, the question of the adoption being left open until the death of Chhaya Kumari. Afterwards an application was made to the District Judge under section 31 of Act VIII of 1890 for leave to raise certain moneys to pay off debts due from the son of Nilkanta, then a minor, by granting a *putni* of a certain portion of the estate, and the plaintiff's husband appeared before the District Judge and expressed his desire to take the *putni* lease at a premium of Rs. 10,000;

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Held, (1) that this was a clear case of waiver, by the plaintiff's husband who with full knowledge of his rights obtained the *putni* which recognised the validity of the adoption of Nilkanta; [p. 31, col. 1.]

(2) that the plaintiff was estopped from questioning the adoption of Nilkanta, as she was still in possession of the property comprised in the *putni*, and claimed through her late husband. [p. 30, col. 2.]

That whether the adoption of Nilkanta be or be not valid the plaintiff cannot succeed in this suit. [p. 31, col. 1.]

Appeal against the decree of the Subordinate Judge of Berhampore, dated the 9th of October 1912.

Babus Brojo Lal Chakravarti, Upendra Nath Bagehi and Nagendra Nath Sen, for the Appellant.

Sir S. P. Sinha, Babus Mohini Mohan Chatterjee, Sarat Coomar Mitter and Kali Kinkur Chakravarti, for the Respondents.

JUDGMENT.—This is an appeal by the plaintiff against the judgment of the learned Subordinate Judge of Berhampore dismissing her suit. The plaintiff brought her suit to recover certain properties that represent one-half of the estate originally belonging to one Shibaram Singh. Shibaram died on the 9th of August 1836 leaving a widow, Chhaya Kumari, aged about 14 years and a daughter, Foodan Kumari by a former wife. Foodan was many years older than the widow. She was married to Chait Lal Singh and had two sons, Ram Lal and Behari Lal. On the death of Shibaram his widow succeeded to his properties. By a subsequent arrangement with Foodan Kumari and Chait Lal Singh, Chhaya Kumari was left in possession of 8-annas share of the property, except one *mehal* which was made over to Ram Lal. The other 8-annas share in the property was made over to Foodan Kumari and Chait Lal Singh.

The present suit relates to the 8-annas share of the property retained by Chhaya Kumari. The defendants Nos. 2 to 6 are in possession of the property No. 11 in schedule *ka* to the plaint under a purchase from Chhaya Kumari. The rest of the properties sued for are in the possession of the defendant No. 1. He claims them as heir of his father Nilkanta who, it is alleged, was adopted by Chhaya Kumari. Nilkanta was a son of Gopal Sundari, a daughter of Foodan Kumari. The plaintiff is the widow of Shayama Charan Singh who was the son of Annapurna, another daughter of Foodan. It

is not denied that if no son had been adopted to Siva Ram, the present plaintiff in the events that have happened would be entitled to the estate of Shibaram.

The plaintiff questions the alleged adoption of Nilkanta on the following grounds, *first*, that there was no such adoption in fact, *secondly*, even if there were, Shibaram gave no authority to Chhaya Kumari to adopt and, *thirdly*, the adoption would be void even if authority had been given to Chhaya Kumari, as Nilkanta's natural mother could not have married Shibaram if she had been a maiden.

The learned Judge in a very comprehensive judgment has dealt with all the matters raised in the suit. He has held, *first*, that the adoption was valid and, *secondly*, that the plaintiff is estopped from questioning the adoption of Nilkanta. A large part of the argument has been addressed to us as to whether or not the adoption of Nilkanta was valid.

In the circumstances of the present case we need not enter into this question. For we are of opinion that the plaintiff is estopped from questioning the adoption of Nilkanta. The facts relating to such estoppel may be briefly stated:—In 1878 the plaintiff's late husband brought a suit against Chhaya Kumari and Nilkanta to set aside the adoption of Nilkanta. The suit was decreed in the primary Court, but on appeal to this Court the judgment was set aside, the question of the adoption being left open until the death of Chhaya Kumari. The plaintiff's husband was, therefore, fully aware of his rights. At the end of the year 1895 an application was made to the District Judge under section 31 of Act VIII of 1890 for leave to raise certain moneys to pay off debts due from the defendant No. 1, then a minor. The first proposal was to raise the money by mortgage, but it was subsequently altered to a proposal to grant a *putni* of a certain portion of the estate. The proposal dragged on for a considerable time. On the application coming on the 2nd of March 1898, the District Judge granted time to enable the husband of the plaintiff to come in as he might contest the validity of the adoption of the father of the defendant No. 1.

On the 10th of March 1898 the plaintiff's husband appeared before the District Judge and expressed his desire to take the *putni* lease at a premium of Rs. 10,000. The

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learned Judge sanctioned the proposal, subject to a condition that the plaintiff's husband together with a surety should give security to pay the expenses of any suit (up to Rs. 2,000) which might be brought by any other reversioner to question the title of the defendant No. 1. In pursuance of this order the *putni* lease (Exhibit D) and the security bond (Exhibit E) were executed. This seems to us to be a clear case of waiver by the husband of the plaintiff. With full knowledge of his rights he obtained the *putni* (Exhibit D) which recognises the validity of the adoption of Nilkanta and the plaintiff, his widow, is still in possession of the property comprised in the *putni*. That being so, it is now too late for the plaintiff, who claims through her husband, to question the adoption.

The doctrine of estoppel by conduct has been applied in many cases in India to invalid adoptions. The facts in this case raise a clear case of estoppel against the plaintiff. To hold otherwise would be lamentable. The defendant No. 1 has married the daughter of the plaintiff's late husband. If the plaintiff can question the adoption of Nilkanta, then the marriage of the defendant No. 1 will be invalid and the defendant No. 1 will be left as belonging to no family and with a wife to whom he is not legally married. We agree with the learned Judge in the Court below that the facts proved establish a clear case of estoppel against the plaintiff. Whether the adoption of Nilkanta be or be not valid the plaintiff cannot succeed in this suit. The appeal, therefore, fails and must be dismissed with costs. There will be two sets of costs, one to the defendant No. 1 respondent and the other to the defendants Nos. 1 to 6 respondents.

Appeal dismissed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL NO. 2108 OF 1913.

June 23, 1915.

Present:—Mr. Justice Chevis and
Mr. Justice LeRossignol.

PREM SHAH AND OTHERS—PLAINTIFFS—
APPELLANTS

versus

KAHN CHAND AND OTHERS—DEFENDANTS—
RESPONDENTS.

Mortgage—Joint Hindu family—Partition—subsequent

to mortgage—Suit for mortgage-money—Mortgagee, whether can claim lien on the property.

K, owner of only $\frac{1}{4}$ th share, mortgaged $\frac{1}{2}$ of three shops and a *haveli* which formed a part of the estate. After the mortgage there was a suit between the co-sharers which was settled by arbitration and two *kholas* valued at Rs. 940 were awarded to K. On a suit brought by the mortgagee to recover the mortgage-debt:

Held, that the only part of the estate against which the mortgagee could proceed was that which fell to the mortgagor on partition. [p. 32, col. 2.]

Byjnath Tall v. Ramooddeen Chowdhry, 1 I. A. 106; 21 W. R. 233; *Beli Ram v. Musammam Shahzada Begam*, 101 P. R. 1894, followed.

Second appeal from the decree of the Divisional Judge, Jhelum, dated the 28th May 1913, varying that of the District Judge, Jhelum, dated the 28th May 1912, decreeing the claim in part.

Mr. Manohar Lal, for the Appellants.

Pandit Rambhaji Datta, for the Respondents.

JUDGMENT.—The facts and genealogical tree of this case are as follows:—

HUKM CHAND = Musammam Amir Devi.

Kahn Chand.

Prithmi Chand
= Musammam Satbharai.

Hukm Chand, having died Kahn Chand took Rs. 3,000 in satisfaction of all claims on the estate and left the family. The estate was then divided between Prithmi Chand and his mother, Amir Devi, each taking $\frac{1}{2}$. This was in 1906. In 1910 Amir Devi died and her share went to her two sons $\frac{1}{2}$ and $\frac{1}{2}$. So Kahn Chand then owned a $\frac{1}{4}$ th share, and Prithmi Chand $\frac{3}{4}$ ths.

In 1911 Kahn Chand (though only owner to the extent of $\frac{1}{4}$ th) mortgaged $\frac{1}{2}$ of three shops and a *haveli*, which formed a part of the estate in favour of plaintiff, who now sues for Rs. 1,579-3-3, principal and interest, and claims a lien on the mortgaged property and other property of the mortgagor.

After the mortgage there was a suit between the co-sharers, which was settled by arbitration. The $\frac{1}{2}$ share which was left by Musammam Amir Devi was valued at Rs. 9,880, so Kahn Chand's share was priced at Rs. 4,940, and as it was found that he had already disposed of parts of the estate valued at Rs. 4,000, his remaining share was valued at Rs. 940 in lieu of which two *kholas* were awarded to him, the rest of the estate being made over to

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Prithmi Chand. It may be noted that Prithmi Chand had effected a sale in favour of his wife *Musammât Satbharai*, apparently both the brothers were profligate.

The first Court gave the plaintiff a decree for Rs. 1,579-3-3, against Kahn Chand, executable against his share of the estate as it stood at the date of the mortgage, leaving it to the executing Court to determine what that share was. The learned Divisional Judge on appeal held that the estate was at the date of the mortgage the estate of a joint Hindu family, and that one member could not pledge any of the estate without the consent of the others. So he reduced the decree to a simple money-decree against Kahn Chand.

The plaintiff appeals, asking for a decree with lien on the mortgaged property.

We think the Divisional Judge is undoubtedly wrong in regarding the family as a joint Hindu family at the time of the mortgage. There had clearly been a rupture before then, Kahn Chand leaving the family, and Prithmi Chand and his mother taking shares, the share of the mother descending to the two sons $\frac{1}{2}$ and $\frac{1}{2}$ on her death. The property, no doubt, was not divided till after the date of the mortgage, but there was no joint Hindu family in existence. But by the subsequent partition the mortgaged property fell to the share of Prithmi Chand, Kahn Chand getting only 2 *kholas*, and the question now is whether the mortgagee can still claim a lien on the mortgaged property. For the plaintiff it is urged that he was no party to the partition. For Prithmi Chand and his wife it is urged that they were no parties to the mortgage, and reliance is placed on the Privy Council ruling reported as *Byjnath Lall v. Ramooodeen Chowdhry* (1) and followed in *Beli Ram v. Musammât Shahzada Begam* (2). These rulings clearly lay down that in the absence of fraud a mortgagee can only pursue his remedy against that portion of the estate which has on partition fallen to his mortgagor. These rulings are applicable to the present case, and we have no hesitation in following them. For the plaintiff it is urged that the partition in the present case was fraudulent,

but this is a totally new plea, which we cannot entertain at this stage of the proceedings. It is also urged that the plaintiff has never admitted the partition. But the partition was distinctly alleged by the defendants and never denied by the plaintiff. The only point argued in the lower Courts was whether a partition subsequent to the mortgage was binding on the mortgagee. The only part of the estate, therefore, against which the mortgagee can proceed is that which fell to the mortgagor on partition. But Counsel for plaintiff frankly says that he does not want a decree against that part of the estate, as such a decree would be useless, Kahn Chand having since sold two *kholas* which fell to his share on partition. We are, therefore, unable to give the plaintiff any further relief, though he has our sympathy. We dismiss the appeal, but pass no order as to costs.

Appeal dismissed.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 1013 OF 1914.

July 13, 1915.

Present:—Justice Sir John Woodroffe, Kt.,
and Mr. Justice Newbould.

INDRA NARAIN SARKAR AND OTHERS—
PLAINTIFFS—APPELLANTS

versus

BEDESWARI DASSYA—DEFENDANT—

RESPONDENT.

Mortgage suit—Balance due—Effect—Payment alleged, proof of.

Where in a mortgage suit it is found by the first Court that the sum alleged to have been paid by the mortgagor has not been paid, it being admitted by the mortgagor that there is a balance due, and on appeal, the District Judge has dismissed the suit, on the ground that the plaintiff-mortgagee has not produced the original deed upon which it is alleged that an endorsement of payment was made:

Held, (1) that in the face of the admission that there is some money still outstanding on the mortgage, the suit should not have been entirely dismissed; [p. 33, col. 1.]

(2) that the onus of proving the payment alleged by the defendant is upon the latter. [p. 33, col. 1.]

Appeal against the decree of the District Judge of Dinajpur, dated the 14th of February 1914, reversing that of the Subordinate Judge of Jalpaiguri, dated the 30th of May 1913.

(1) 1 I. A. 106; 21 W. R. 233.

(2) 101 P. R. 1894.

IKRAM ULLAH-KHAN v. MUHAMMAD YUNIS ALI KHAN.

Babu Kali Kinkar Chakravarti, for the Appellants.

Babu Brojo Lal Chakravarti, for the Respondent.

JUDGMENT.—This is a suit brought upon a mortgage. Amongst other defences, a plea was taken that a certain sum specified had been paid; it was admitted, however, that there was a balance due.

The first Court found that the sum alleged to have been paid had not been paid. On appeal, the District Judge, on the ground that the plaintiff had not produced the original deed upon which it was alleged that an endorsement of payment had been made, dismissed the suit.

It is conceded that this was an error, it being admitted that as there was some money still outstanding on the mortgage, the suit should not have been entirely dismissed. Had the matter rested there, it might have been possible for us to have dealt with the question ourselves. But on reading the judgment I think it would be advisable that we, while setting aside the judgment and decree of the lower Appellate Courts, should send the case back for re-decision. The onus of proving the payment alleged by the defendant was upon her. The first Court in the first instance found that the evidence of payment which she had produced was untrustworthy; and the lower Appellate Court does not appear to have dealt at all with this first part of the case, and it merely rested its decision upon the fact that the plaintiff had not produced his deed. Under these circumstances, we set aside the judgment and decree of the lower Appellate Court and remit the case to the District Judge for a fresh decision on the facts.

The appellant in this Court will be entitled to his costs of this appeal.

Decree set aside ; Case remanded.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 1132 OF 1914.

April 6, 1915.

Present:—Mr. Justice Tudball.

IKRAM ULLAH KHAN—DEFENDANT—
APPELLANT

versus

MUHAMMAD YUNIS ALI KHAN—
PLAINTIFF—RESPONDENT.

Party wall—Tenant-in-common entitled to build without consent of other tenants-in-common.

One of the tenants-in-common is not entitled to interfere with or build upon the party wall without the consent of the other tenants-in-common. [p. 34, col. 1.]

Watson v. Gray, 14 Ch. D. 192; 49 L. J. Ch. 243; 42 L. T. 294; 23 W. R. 438; 44 J. P. 537; *Kanakayya v. Narasimhulu*, 19 M. 38, followed.

Second appeal from a decree of the Subordinate Judge of Budaun.

Mr. Iqbal Ahmad, for the Appellant.

Mr. Shafi-uz-zaman, for the Respondent.

JUDGMENT.—This appeal arises out of a suit brought by the plaintiff-respondent, in which he asked the Court for a perpetual injunction to restrain the defendant from interfering with his building a certain wall. The parties are owners of adjoining houses. The plaintiff wished to build an upper storey on the room which is marked (A) in the plan attached to the plaint. The defendant objected. Hence the suit. The plaintiff was desirous of building on the two walls running west and east and north and south which divide the two houses. There were other reliefs and other matters in the suit with which, however, we are not concerned on appeal. The question before me is whether or not the plaintiff is entitled to raise the party walls in dispute without interference on the part of the defendant. The Court of first instance dismissed the suit. The plaintiff appealed. His case was that the party walls belonged entirely to himself and that he had a right to build upon them. The lower Appellate Court found, as a matter of fact, that the party walls belonged to the plaintiff and the defendant jointly. To use the lower Court's own expression it found that they were joint owners of these party walls. This is a clear finding that the parties are tenants-in-common of the walls. The lower Appellate Court held that the plaintiff would be entitled to build on that half of the wall which is towards his own house, and it, therefore, decreed the suit accordingly. The

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defendant has appealed. Two points are pressed, *first* of all that the question of the ownership of the wall is *res judicata* by reason of a previous decision and the *second* is that on the findings of fact arrived at by the Court below the plaintiff is still not entitled to build upon the party walls without the defendant's consent. In regard to the question of *res judicata* there is no force in the plea, for the simple reason that the portion of the wall now in dispute between the parties was not in dispute in the former litigation, and, therefore, the decision in the latter cannot operate as *res judicata*. But the defendant, in my opinion, is entitled to succeed on the second plea raised before me. The question of the right of one tenant-in-common of a party wall to build upon the wall or to interfere with it is one which is covered by decisions. The case of *Watson v. Gray* (1) clearly lays down on principle that in such a case as this, one of the tenants-in-common is not entitled to interfere with the party wall without the consent of the other tenant-in-common. The same point was decided in the case of *Kanakayya v. Narasimhulu* (2). In that case one of two tenants-in-common of a party wall raised the height of the wall with a view to raise a superstructure of the wall. The other tenant-in-common, who had not consented to the alteration in the wall but had suffered no inconvenience therefrom, sued to enforce the removal of the newly erected portion. It was held that the plaintiff was entitled to the relief sought and the ruling in *Watson v. Gray* (1) was followed. From the principle laid down in these decisions it is clear that the plaintiff is not entitled to build upon the party walls in suit without the consent of the defendant and that the lower Appellate Court was wrong in issuing an injunction to the latter to prevent him from interfering with the building of the superstructure which the plaintiff wished to raise on the party wall. The appeal is, therefore, allowed. The plaintiff has filed objections against the finding of the Court below that the walls belonged jointly to the parties in suit. The decision is on a question of fact and no error in law has been laid down before

me to vitiate that decision. The objections are, therefore, disallowed with costs. The plaintiff's suit will stand dismissed with costs in all Courts. The original Court dismissed the suit *in toto*. The plaintiff in his appeal to the Court below only pressed the question of his right to build on the party wall.

Appeal decreed.

CALCUTTA HIGH COURT.

CIVIL RULE No. 1116 OF 1914.

January 22, 1915.

Present:—Mr. Justice Holmwood and
Mr. Justice Mullick.

DWARKA NATH DASS AND ANOTHER—
PLAINTIFFS—PETITIONERS

versus

MONMOHAN TOPEDAR—DEFENDANT—
OPPOSITE PARTY.

Pro forma defendant made plaintiff—New party—Limitation Act (IX of 1908), s. 22.

A *pro forma* defendant, who is made a plaintiff, after the period of limitation, is not a new party within the meaning of section 22 of the Limitation Act, 1908. [p. 35, col. 1.]

Nagendrabala Debya v. Tarapada Acharjée, 4 Ind. Cas. 369; 13 C. W. N. 186; 5 M. L. T. 91; 35 C. 1065; 8 C. L. J. 286; *Husainara Begum v. Rahmannessa Begum*, 8 Ind. Cas. 837; 38 C. 342; 13 C. L. J. 3 and *Narsinha Krishnaji v. Vaman Venkatesh Deshpande*, 4 Ind. Cas. 249; 34 B. 91; 11 Bom. L. R. 1102, referred to.

Civil Rule against the order of the Court of Small Causes at Dacca.

Dr. Sarat Chandra Basak and Babu Satis Chandra Chowdhury, for the Petitioners.

Babu Dharendra Lal Kastgir, for the Opposite Party.

JUDGMENT.—This was a Rule calling upon the opposite party to show cause why the order of the Small Cause Court, dismissing a suit for limitation, should not be set aside.

The case is one which clearly falls under section 22 of the Limitation Act; and the question is whether it can be said that a *pro forma* defendant, who was joined at the institution of the suit and who is made a plaintiff after the period of limitation, can be brought within the meaning of section 22 of the Limitation Act as a new plaintiff. On the

(1) 14 Ch. D. 192; 49 L. J. Ch. 243; 42 L. T. 294; 28 W. R. 438; 44 J. P. 537.

(2) 19 M. 38.

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authority of several cases, first of all the case of *Nagendrabala Debya v. Tarapada Acharjee* (1), then that of *Husainara Begum v. Rahmannessa Begum* (2) and lastly that of *Narsinha Krishnaji v. Vaman Vankatesh Deshpande* (3), we are of opinion that the rule, that a party transferred from the side of the defendants to that of the plaintiffs is not a new party to whom the provisions of section 22 of the Limitation Act apply, is an absolute rule and cannot be distinguished in the way in which the learned Pleader for the opposite party has sought to distinguish it upon certain remarks in the case of *Nagendrabala Debya v. Tarapada Acharjee* (1). No such limitation was placed upon it by the Judge who presided over the Bench which issued the Rule in delivering the judgment in the case of *Husainara Begum v. Rahmannessa Begum* (2). On the contrary, he pointed out that the person who was transferred from the category of defendant to the category of plaintiff could not have maintained the action at the time the suit was instituted; and in the Bombay case *Narsinha Krishnaji v. Vaman Vankatesh Deshpande* (3) the rule is stated without any qualification whatever.

With regard to the case of *Nagendrabala Debya v. Tarapada Acharjee* (1) to which one of us was a party, we certainly did not intend to lay down that the circumstance mentioned, namely, that the original plaintiff had a right to enforce his interest as co-sharer, should in any way affect the rule which we laid down in the same terms as it was laid down in the subsequent cases.

We are, therefore, of opinion that this Rule must be made absolute. The case will be remanded to the lower Court for a decision on the merits.

The petitioners are entitled to the costs of this hearing, which we assess at two gold mohurs.

Rule made absolute.

(1) 4 Ind. Cas. 369; 35 C. 1065; 8 C. L. J. 286; 13 C. W. N. 186; 5 M. L. T. 91.

(2) 8 Ind. Cas. 837; 38 C. 342; 13 C. L. J. 3.

(3) 4 Ind. Cas. 249; 34 B. 91; 11 Bom. L. R. 1102.

SIND JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 36 OF 1912.

January 28, 1915.

Present:—Mr. Pratt, J. C., and Mr. Fawcett, A. J. C.

KARIM AND ANOTHER—APPELLANTS
versus

PEOPLE'S BANK OF INDIA AND ANOTHER
—RESPONDENTS.

Negotiable Instruments Act (XXVI of 1881), s. 30—*Collateral agreement as defence—Loss of collateral security by holder of hundi, effect of—Contract Act* (IX of 1872), s. 141.

Where *hundis* were drawn in favour of a Bank and Railway Receipts for goods consigned to the drawee were handed over to the Bank which through mistake handed over the Railway Receipts to the drawee before acceptance of the *hundis*, which were subsequently dishonoured by the drawee:

Held, that the loss of this collateral security did not affect the right of the Bank to recover on the *hundis* from the drawer under section 30 of the *Negotiable Instruments Act*. [p. 36, col. 1.]

Held, also, that the drawer could not set up a collateral agreement as a defence to a claim under section 30 of the *Negotiable Instruments Act*. [p. 36, col. 1.]

Appeal against the decree of the Assistant Judge, Hyderabad.

Mr. Mathradas Ramchand, for the Appellants.

Mr. Kimatrai Bojraj, for Respondent No. 1.

Mr. Lalchand Hassomal, for Respondent No. 2.

JUDGMENT.

PRATT, J. C.—The appellants purchased hides in Hyderabad and consigned them to respondent No. 2, Shamsudin, for sale at Amritsar. In order to purchase the hides they took advances from the People's Bank at Hyderabad and gave the Bank *hundis* drawn on Shamsudin. The Railway Receipts for the consignments of hides were made out in the name of the Bank as consignee and were also given to the Bank. The Bank sent the *hundis* and receipts to its agent at Amritsar who endorsed the Railway Receipts to Shamsudin on his honouring the *hundis*.

Three *hundis*, one for Rs. 2,500 and two for Rs. 2,000 each, were given to the Bank together with three Railway Receipts. By mistake the Bank's agent delivered three receipts to Shamsudin although he had only paid the amount of one *hundi* for Rs. 2,500. Shamsudin then refused to honour the other two *hundis* aggregating Rs. 4,000.

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The Lower Appellate Court has held the appellants liable for this amount to the Bank. The appellants' contention in this second appeal is that either by mercantile usage or by specific instructions the Bank was under a duty to the appellants not to part with the receipts until the *hundis* had been honoured.

But the District Judge has found as a fact that there were no such instructions and the Pleader for the appellants has been unable to point to any authority for or evidence of the alleged mercantile usage.

The *hundis* were given to the Bank either:—

A. As agent to collect the amount from the drawee, or

B. as security for the money advanced by the Bank.

If the transaction has been A, it is conceivable that the Bank were under an obligation not to part with the Railway Receipts until the money was paid. But the lower Court has found as a fact that the relation was not one of agency. The very fact that the money was paid in advance by the Bank negatives the suggestion that the Bank was agent. The transaction was, therefore, B. i. e., the *hundis* were given to the Bank as security for the money advanced.

The Railway Receipts were given not for the protection of the appellants, but as security to the Bank for the acceptance of the *hundis* by the drawee, Shamsudin. The Bank's mistake deprived it of the benefit of part of this security. But the loss of this collateral security in no way affects their right to recover on the *hundis* under section 30 of the Negotiable Instruments Act, for a collateral agreement may not be set up as a defence to a claim under section 30.

I would confirm the decree of the lower Appellate Court and dismiss this appeal with costs.

FAWCET, A.J.C. — I concur. There are, no doubt, cases where a creditor having control of a security is chargeable with what he might have received from it but for his neglect or wilful default [cf. *Peacock v. Purcell* (1) and section 141 of the Contract Act]. But in this case it is clear that the relations of the appellants and the Bank were not such as would make the above principle applicable.

Appeal dismissed.

(17) (1863) 32 L. J. C. P. 266; 14 C. B. (N. S.) 728; 10 Jur. (N. S.) 178; 8 L. T. 636; 11 W. R. 834; 2 N. R. 282; 135 R. R. 875; 143 E. R. 680.

CALCUTTA HIGH COURT.

CIVIL RULE No. 789 OF 1914.

November 19, 1914.

Present:—Justice Sir Asutosh Mookerjee, Kt., and Mr. Justice Chapman.

JOGENDRA NATH SAHA—

PETITIONER

versus

COLLECTOR OF FARIDPUR—

OPPOSITE PARTY.

Bengal Wills and Intestacy Regulation (V of 1799), s. 7, scope of—District Judge's jurisdiction—Gift, claim under, if valid.

Section 7 of the Bengal Wills and Intestacy Regulation empowers a District Judge to assume jurisdiction only when two facts are established, (1) that the person has died intestate, and (2) that there is no claimant to the personal property left by him. [p. 37 col. 1.]

The claimant mentioned in the section does not only mean an heir of the deceased. A person who claims personal property of the deceased, under a gift from the intestate, is a claimant within the meaning of section 7 of Regulation V of 1799. [p. 37 col. 1.]

Civil Rule against an order of the District Judge of Faridpur, dated the 10th June 1914.

Babu Surendra Kumar Bose, for the Petitioner.

Babu Ram Churn Mitra, for the Opposite Party.

JUDGMENT.—We are invited in this Rule to consider the legality of an order made ostensibly under section 7 of Regulation V of 1799. It appears that one Soudamini Peshakar, a woman of the town, died leaving personal property of some value. The Police appeared on the scene immediately after her death. The petitioner claimed the property in dispute, on the allegation of a gift to him by Soudamini who was in his keeping. The Police submitted a report to the Magistrate; he, thereupon, directed the matter to be placed before the District Judge, who initiated the present proceedings under section 7 of Regulation V of 1799. The District Judge has taken evidence and has overruled the claim, on the ground that the gift was in the nature of a *donatio mortis causa* and was not operative in law. On behalf of the petitioner it has been contended that the District Judge had no jurisdiction to take proceedings under section 7. We are of opinion that this contention is well founded and must prevail. That section is in these terms: "The Judges of the Zilla Courts, on

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receiving information that any person within their respective jurisdictions has died intestate, leaving personal property, and that there is no claimant to such property, are to adopt such measures as may be necessary for the temporary care of the property." It has been contended by the learned Government Pleader that the claimant mentioned in the section is a person who claims the property as an heir of the deceased. We are not disposed to put such a narrow interpretation upon the section. There was undoubtedly a claimant in this case, namely, the petitioner, whose claim was found to be *prima facie* good by the Police officer. Before the District Judge can assume jurisdiction under section 7, two facts must be established, namely, *first*, that the person has died intestate, and, *secondly*, that there is no claimant to the personal property left by him. The second condition has obviously not been fulfilled. The Rule must consequently be made absolute and the order of the Court below discharged. The petitioner is entitled to his costs in this Court. We assess the hearing fee at one gold mohur.

Rule made absolute.

SIND JUDICIAL COMMISSIONER'S COURT.

CIVIL MISCELLANEOUS APPLICATION NO. 228 OF 1914.

SUIT NO. 302 OF 1907.

February 10, 1915.

Present:—Mr. Pratt, J. C.

FIRM OF GOPALDAS AND OTHERS—

DECREE-HOLDERS—PLAINTIFFS

versus

PAHLUMAL HEMANMAL AND OTHERS—

JUDGMENT-DEBTORS—DEFENDANTS.

Provincial Insolvency Act (III of 1907), s. 16 (2)—“Pendency of the insolvency proceedings”, meaning of—Proceedings, when terminate—Right of creditor seeking to enforce his right of suit or execution application during insolvency proceedings—Leave of Court, when to be obtained—Limitation Act (IX of 1908), Sch. I, Art. 182—Application for execution without obtaining leave of Court under section 16 (2) of Provincial Insolvency Act, if legal.

A obtained a money-decree against B and C on 10th April 1903, B and C were adjudged insolvents on 1st June 1910 under the Provincial Insolvency Act and by orders of the Insolvent Court on 11th November 1912 and 26th February 1913, respectively, their

discharge was suspended till 11th November 1913. On 12th October 1914, A applied for execution of his decree against B and C relying for the purpose of saving limitation on a prior execution application by him on 7th June 1913 while the discharge of B and C remained suspended. It was contended on behalf of B and C that A's application of 7th June 1913, having been made during the pendency of the insolvency proceedings and the leave of the Court not having been obtained, was not an application in accordance with law and was barred by section 16 (2) of the Provincial Insolvency Act.

Held, that the phrase ‘pendency of the insolvency proceedings’ in section 16 (2) must be construed with reference to the object of the enactment, which was to prevent a general scramble of creditors for the assets, that this object was achieved when the assets were collected and distributed in an orderly manner by the Receiver and that the final dividend having been declared and distributed before the 7th June 1913, the insolvency proceedings were no longer pending so as to operate as a bar under section 16 (2) of the Provincial Insolvency Act. [p. 38, col. 1.]

Held, also, that as the leave referred to in section 16 (2) could be granted after the application was filed and would relate back to the date of the application, the Court might have received the application and then granted the leave, and that as the application also prayed for a relief that the Court was competent to give, it was in accordance with law. [p. 38, cols. 1 & 2.]

Mahammad Azmat Ali Khan v. Lalli Begum, 8 C. 422; 9 I. A. 8; 4 Sar. P. C. J. 310; 6 Ind. Jur. 201; 17 P. R. 1882 (P. C.), followed.

Finding of Davar, J. in Lalchand v. Balkrishna, 21 Ind. Cas. 689; 38 B. 364 note; 15 Bom. L. R. 944 note, dissented from.

Messrs. *Harchandrai & Co.*, for the Plaintiffs.

Messrs. *Raymond and Lobo*, for the Defendants.

JUDGMENT.—This is an application for execution of a decree made on the 10th April 1908 in favour of plaintiffs against three defendants for the payment of money. The present application is dated the 12th October 1914 and relief is sought against the 2nd and 3rd defendants only. These defendants were adjudged insolvents on the 1st June 1910. Order was made on the 27th February 1913 suspending the discharge of defendant No. 2 until the 11th November 1913, and on the 11th November 1912 suspending the discharge of the 3rd defendant for one year.

Various applications were made from time to time to execute the decree and the only one for consideration now is an application made on the 7th June 1913. If this is an application in accordance with law to the proper Court for execution, the present application is in time. If it is not, the present application is time-barred.

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It is contended that the application of the 7th June 1913 is not an application in accordance with law and it is barred by section 16 (2) of the Provincial Insolvency Act, in that insolvency proceedings were then pending and the leave of the Court had not been obtained.

There is no direct authority as to what constitutes the pendency of the insolvency proceedings referred to in section 16 (2) of the Provincial Insolvency Act. I feel sure that the mere fact of the insolvent not being absolutely discharged does not constitute a pendency of an insolvency proceedings. If that were so, the insolvent who never applied for a discharge would gain this advantage that no suit or execution proceedings could ever be filed against him without the leave of the Court. The phrase must be construed with reference to the object of the enactment. The object was to prevent a general scramble of creditors for the assets. This object is achieved when the assets have been collected and distributed in an orderly manner by the Receiver. When the Receiver has declared a final dividend and the distribution of all available assets is complete, there is no longer any reason for preventing creditors from seeking to enforce their rights by suits or execution applications. When a final dividend has been declared and distributed, the insolvency proceeding is no longer pending so as to operate as a bar under section 16 (2) of the Provincial Insolvency Act. It is admitted that this stage had been reached before the orders were made with reference to the discharge of the defendants, *i.e.*, before the 11th November 1912 and the 26th February 1913. The execution application of 7th June 1913 was, therefore, not made during the pendency of the insolvency proceedings.

But even if it were otherwise, I should still hold that it was an application in accordance with law. I do not concur in the finding of Davar, J., reported in a foot-note in *Lalchand v. Balkrishna* (1) that the leave referred to in the section must be leave granted before the suit or application is filed. It seems to me that leave could be granted after the application was filed and that it would relate

(1) 21 Ind. Cas. 689; 38 B. 364 note; 15 Bom. L. R. 944 note.

back to the date of the application. Section 4 of the Pensions Act (Act XXIII of 1871), "No Civil Court shall entertain any suit relating to any pension, etc.," enacts a prohibition which seems to more directly affect the jurisdiction of the Court than section 16 (2) of the Provincial Insolvency Act. Nevertheless the Privy Council in *Mahammad Azmat Ali Khan v. Lalli Begum* (2) held that the Collector's certificate might be filed after the suit was instituted.

So here the Court might have received the application and then granted the leave. The application was, therefore, also praying for a relief that the Court was competent to give and was, therefore, in accordance with law.

I, therefore, order writs of attachment to issue and allow this application with costs.

Application allowed.

(2) 8 C. 422; 9 I. A. 8; 4 Sar. P. C. J. 310; 6 Ind. Jur. 201; 17 P. R. 1882.

CALCUTTA HIGH COURT.

CIVIL RULE NO. 36 OF 1915.

April 7, 1915.

Present:—Justice Sir Asutosh Mookerjee, Kt.,
and Mr. Justice Newbould.

MADHU SUDAN PATITUNDA —
PETITIONER

versus

RASH MOHAN SEN PODDAR AND OTHERS
—OPPOSITE PARTY.

Civil Procedure Code Act (V of 1908), s. 73 (1), 151 —Assets, rateable distribution of—Execution, application for, when assets realised—Court, inherent powers of, in face of express provision—Attachment before judgment, nature of—Attachments, two kinds of, distinguished—High Court, jurisdiction of, to interfere with erroneous order of lower Court.

An order for rateable distribution cannot be made, under sub-section (1) of section 73 of the Code of Civil Procedure, in favour of a person who has not obtained his decree but only an order for attachment before judgment and who is thus incompetent to apply for execution at the time when the assets are realised. [p. 39, col. 2.]

It is only where an application for execution has been made before the realization of assets that section 73 of the Code of Civil Procedure applies. [p. 39, col. 2.]

Butloo Khan v. Gomani Singh, 3 Ind. Cas. 836; 13 C. W. N. 1177, distinguished.

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The doctrine of inherent powers of a Court, recognised by section 151 of the Civil Procedure Code, has no application where there is an express provision of law which covers a case. [p. 39, col. 2.]

Attachment before judgment does not, by itself, create any interest in the property attached. [p. 40, col. 1.]

Jogendra Nath Chatterjee v. Manmatha Nath Ghose, 15 Ind. Cas. 668; 16 C. L. J. 565; 17 C. W. N. 80, referred to.

There is a difference between an attachment effected in execution of a decree and an attachment before judgment, and a person obtaining an attachment before judgment cannot restrict the rights of an attaching creditor who has previously obtained his decree. [p. 40, col. 1.]

Basiram Malo v. Katyani Debi, 10 Ind. Cas. 305; 38 C. 448; 15 C. W. N. 795, followed.

A High Court is competent to interfere with an erroneous order of a Subordinate Court when as a result of that order, though erroneous in law, that Court has assumed a jurisdiction which it did not possess or has declined a jurisdiction which was vested in it by law. [p. 40, col. 2.]

Vishwambhar v. Vasudev, 16 B. 703; *Jogodanund v. Amrita Lal*, 22 C. 787 at p. 783, referred to.

Civil Rule against the decision of the Munsif of Barisal, dated the 18th November 1914.

Babu *Jatindra Nath Fose*, for Babu *Sa at Chandra Dutt*, for the Petitioner.

Babu *Brojendra Nath Chatterjee*, for the Opposite Party.

JUDGMENT.—We are invited in this Rule to set aside an order for rateable distribution of assets held by the Court below. The circumstances under which the order has been made are not in controversy and may be briefly stated.

The petitioner, Madhu Sudan Patitunda, on the 13th July 1914, instituted a suit against his debtor, Pranballabh Poddar, for recovery of money due. The suit was decreed on the 10th August 1914. Two days later the decree-holder applied for attachment of moveable properties belonging to his judgment-debtor. On the 17th August the attachment was effected and the moveables were brought into Court. On the 4th September 1914, the Sens, who are the opposite parties to this Rule and were also creditors of Pranballabh Poddar, instituted a suit for recovery of money due from him. The Sens obtained an order for attachment before judgment in their suit and the attachment was effected on the 8th September 1914. The two suits were instituted before the same judicial officer, with this difference

that in one case he exercised the powers of a Small Cause Court Judge and in the other that of a Munsif. On the 9th September 1914, the moveables were sold at the instance of Patitunda. The Sens obtained a decree in their suit on the 24th October following, and on the 10th November, they applied for execution of the decree they had obtained, by rateable distribution of the assets realised by the sale held at the instance of Patitunda. The question in controversy is, whether an order for rateable distribution can rightly be made. The Court below has held, on the authority of the decision in *Bulloo Khan v. Gomani Singh* (1), that it is competent to the Court to allow rateable distribution in the events mentioned, and has ordered accordingly. That order is now challenged before us on the ground that it was made without jurisdiction.

It is plain that an order for rateable distribution cannot possibly be made in this case under sub-section (1) of section 73 of the Code of Civil Procedure. That section applies only where an application for execution has been made before the assets have been realised. In the case before us, the assets were realised on the 9th September 1914. The application for execution by the Sens was not made till the 10th November 1914. In fact it was not competent to them to apply for execution on the 9th September 1914, when the assets were realised, as they did not obtain their decree till the 24th October 1914. It is thus indisputable that an order for rateable distribution could not be made in their favour under section 73. The Court below, however, has held that section 73 is not exhaustive and that it has inherent power to make an order of this description. In our opinion, there is no room here for the application of the doctrine of inherent powers of a Court which is recognised by section 151 of the Code. We have here, not only an express provision of the law which admittedly does not cover the case of the Sens, we have also an express provision which negatives their claim. Rules 5 to 12 of Order XXXVIII of the Code deal with the subject of attachment before judgment. Rule 10 is in these terms: "Attachment before judgment shall not affect the rights, existing prior to the attachment, of persons not

(1) 3 Ind. Cas. 836; 13 C. W. N. 1177,

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parties to the suit, nor bar any person holding a decree against the defendant from applying for the sale of the property under attachment in execution of such decree." It is well settled, as was ruled by this Court in the cases of *Sewdut Roy v. Sree Canto Maity* (2); *Basiram Malo v. Katyani Debi* (3) and *Jogendra Nath Chatterjee v. Manmatha Nath Ghose* (4), that attachment before judgment does not, by itself, create any interest in the property attached. In the case before us, in view of the provisions of rule 10 of Order XXXVIII of the Code, it was manifestly open to the petitioner to apply for sale of the properties attached by him in execution of his decree and his right in this respect was in no way restricted by the attachment before judgment effected at the instance of the Sens. In our opinion, it is perfectly plain that the Court below was not competent to make an order for rateable distribution. The decision in *Butloo Khan v. Gomani Singh* (1) is clearly distinguishable. In that case, the attachment before judgment had been effected at the instance of four plaintiffs. Three of them obtained an order for rateable distribution under section 73 of the Code; the fourth challenged the propriety of that order. It was ruled by this Court that section 73 did not apply to the case and that the Court below was not competent to make an order for rateable distribution of the sale-proceeds amongst the decree-holders in three of the suits in disregard of the order of attachment in the other suit. In that case, the four rival decree-holders were precisely in the same position, and yet it was held, at the instance of one of them, that the other three could not claim the benefit of section 73. In the case before us, there is a competition between an attachment effected in execution of a decree and an attachment before judgment. The distinction between these two classes of attachments was explained by this Court in *Basiram Malo v. Katyani Debi* (3), which is an authority for the proposition that a person who has obtained an attachment before judgment cannot restrict the rights of an attaching creditor who has previously obtained his

decree. The case of *Jogendra Nath Chatterjee v. Manmatha Nath Ghose* (4) further shows that a person who has effected an attachment before judgment is not competent to apply for reversal of an execution sale under rule 90 of Order XXI of the Code; and the express provision of that rule shows that, in this respect, a person who is entitled to obtain an order for rateable distribution is in the same category as a person whose interest has been affected by the sale. The conclusion appears to us irresistible that the order of the Court below cannot possibly be supported.

This, indeed, has been fully realised on behalf of the opposite party, and the only argument seriously addressed to us has been that the order of the Court below involves an error of law and cannot consequently be revised under section 115 of the Code of Civil Procedure. There is obviously no force in this contention. The order of the Court below is, no doubt, erroneous in law; but the error of law has induced that Court to assume a jurisdiction which it did not possess. It is unquestionably competent to this Court to interfere with an erroneous order of a Subordinate Court, when as a result of that order, though erroneous in law, that Court has assumed a jurisdiction which it did not possess or declined a jurisdiction which was vested in it by law: *Manisha v. Siyali Koya* (5); *Vishvambhar v. Vasudev* (6); *Jogodanund v. Amrita Lal* (7).

The result is that this Rule is made absolute and the order for rateable distribution made by the Court below discharged. The petitioner is entitled to his costs both here and in the Court below. We assess the hearing fee in this Court at two gold mohurs.

Rule made absolute.

(5) 11 M. 220.

(6) 16 B. 708.

(7) 22 C. 767 at p. 783.

(2) 33 C. 639; 10 C. W. N. 634.

(3) 10 Ind. Cas. 305; 38 C. 448; 15 C. W. N. 795.

(4) 15 Ind. Cas. 668 16 C. L. J. 565; 17 C. W. N. 80.

POOSAPATHI RAMACHANDRA v. VENKATA SUBBAYAMMA.

MADRAS HIGH COURT.

CIVIL REVISION PETITION NO. 14 OF 1915.

April 29, 1915.

Present:—Mr. Justice Kumaraswami Sastri.

Sri POOSAPATHI RAMACHANDRA

RAJU GARU—DEFENDANT NO. 2—

PETITIONER

versus

Sri RAJAH VACHAVAYI VENKATA

SUBBAYAMMA JAGAPATHI

BAHADUR GARU AND OTHERS—

PLAINTIFFS AND DEFENDANTS NOS. 1 AND 3 TO 5

—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 115—High Court's powers of interference—Pleadings—New plea set up at close of case—Amendment of plaint—Procedure.

The power of superintendence and the powers given by section 115 of the Civil Procedure Code are intended to give the High Court power to see that the proceedings before lower Courts are properly conducted and the High Court should not refuse to set right matters if by doing so, it would save unnecessary expense or delay or a multiplicity of proceedings. [p. 44, col. 2.]

Where, therefore, in a suit brought to enforce the terms of an agreement entered into by the defendants with the plaintiff's husband, the plaint proceeded upon the footing that it was a valid, subsisting and enforceable contract, and at the close of the arguments the plaintiff's Vakil in reply suggested that even if the contract was void, section 65 of the Contract Act applied, and the Court thinking that the contention was raised in the pleadings directed the defendants to file an additional written statement:

Held, (1) that the Court had no jurisdiction to direct the defendants to file an additional written statement to meet allegations not contained in the plaint and which could, by no stretch of imagination, be held to be covered by the allegations in the plaint; [p. 43, col. 1.]

(2) that the proper course for the Court to adopt was to direct the plaintiff to amend the plaint, then to decide whether the amendments should be allowed, and if allowed to direct the defendants to file written statements, settle proper issues and then proceed to decide the case. [p. 42, col. 2; p. 43, col. 1.]

Petition under section 115 of Act V of 1908 and section 15 of the Charter Act, praying the High Court to revise the order of the Court of the Temporary Subordinate Judge of Vizagapatam, in Original Suit No. 10 of 1913.

Messrs. T. R. Ramachandra Aiyar and T. R. Kri naswami Aiyar, for the Petitioner.

Mr. P. Narayanamurti (with him Messrs. D. Appa Rao, T. Ramachandra Rao and B. Somayya), for the Respondents.

JUDGMENT.—This is a petition filed by the 2nd defendant to revise the order of the

Subordinate Judge of Vizagapatam in Original Suit No. 10 of 1913, wherein he held that the plaintiff was entitled to claim an alternative relief not claimed in the plaint as filed and directed the defendants, after the case was closed and arguments almost over, to file an additional written statement without requiring an amendment of the plaint. Original Suit No. 10 of 1913 was filed by the widow of the Rajah of Tuni against the defendants to enforce the terms of an agreement entered into with her husband (who financed the litigation in connection with the Vizianagram Estate), whereby the plaintiff's husband was entitled to a certain share in the decree that may be passed in the Vizianagram suit either after contest or on compromise. The whole plaint proceeded upon the footing that there was a subsisting, valid and enforceable contract between the parties, under the terms of which the plaintiff was entitled to the relief claimed. Paragraph 35 of the plaint sets out that out of the properties secured by the compromise decree between some of the defendants and the Rajah of Vizianagram the plaintiff was entitled to Rs. 1,68,629 and also to certain shares in the annuity and the house given to defendants Nos. 2, 5 and 6. Paragraph 37 of the plaint sets out the details. There is not a word in the plaint as to the contract having become void or impossible of performance, as to the plaintiff being entitled to any relief under section 65 of the Contract Act. Upon this plaint, written statements were filed and various defences were raised. For the purpose of this petition it is sufficient to refer to two of them. The first defence was that the plaintiff's husband committed a breach of contract and wrongly refused to finance the suit and that consequently he was not entitled to any share in the decree amount as provided for by the agreement. In paragraph 25 of the written statement the defendants also stated that the plaintiff was not even entitled to a refund of the money actually advanced, as her husband wrongly discontinued to make payments which he was bound to make under the agreement. It is also contended that the contract being indivisible and not being in the nature of a loan intended to be repaid, a mere part performance by the plaintiff's husband would not entitle her to any relief what-

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ever even in respect of the part performed by her husband. It is clear from the pleadings that the case, that the contract had become void or become impossible of performance and that consequently plaintiff was entitled to a return of the money actually advanced under the provisions of section 65 of the Contract Act, was never raised or was in the contemplation of the parties. Upon these pleadings issues were settled and one of the issues, was whether the suit agreement provided for the contingency that actually happened; if not, what is the plaintiff's remedy. I find it difficult to see how, having regard to the pleadings and the issues which were presumably settled with reference to the allegations therein, this issue can be said to cover the question as to whether the contract had become void or impossible of performance and whether by reason thereof the plaintiff was entitled under section 65 of the Contract Act to the recovery of the amount actually advanced.

Mr. T. R. Ramachandra Iyer, who appeared for the defendants in the lower Court, states that till he commenced his arguments after plaintiff's Vakil closed his and after all the evidence was taken, neither the Judge nor the parties had the remotest idea that a claim was being made on the footing that the contract had become void or impossible of performance and that the 7th issue above referred to was intended to cover such a claim. Though the practice has been discountenanced by the High Court, the Subordinate Judge asked the parties to file written arguments and written arguments were presented by the plaintiff and defendants. In the written arguments of the plaintiff the contention that the contract had become void or impossible of performance was never raised by her Vakil. When the defendants' Vakil began his reply, he argued that the plaintiff was entitled to no relief under the contract because the compromise was not one effected in pursuance of the terms of the contract, since both the persons whose consent was necessary before the compromise could be legally effected, namely, plaintiff's husband and the late Hon'ble Mr. V. Krishaswami Iyer, were dead at the date of the compromise. After

Mr. T. R. Ramachandra Aiyar closed his arguments, plaintiff's Vakil in reply suggested that, even if the contract was void, the plaintiff would be entitled under section 65 of the Contract Act to a return of the money actually advanced. The Subordinate Judge at this stage of the proceedings was of opinion that the contention put forward in reply by the plaintiff's Vakil was one which was raised in the pleadings and that the plaintiff was entitled to a relief on this ground. He gave the defendants leave to file an additional written statement and allow both parties to adduce evidence on the question.

It seems to me that the procedure adopted by the Subordinate Judge is, to say the least of it, opposed to all rules of practice and procedure. The plaintiff came to Court with an allegation that the contract was a subsisting and enforceable contract and that she was entitled to a certain share in the amount decreed by the compromise decree in the Vizianagaram suit.

There was not a whisper anywhere that she was entitled to any alternative relief. It is clear that till Mr. Ramachandra Aiyar began his arguments after all the evidence was closed on both sides, nobody even thought that such a claim was going to be put forward or was intended to be made. The Subordinate Judge seems to have thought that, because an argument was put forward by the plaintiff's Vakil in reply to the arguments of the defendants' Vakil, which by some stretch of language might be brought under one of the issues raised in the pleadings, it was open to him to call on the defendants to file an additional written statement in the absence of any amendment to the plaint. Assuming that the argument of the plaintiff's Vakil in reply amounts to a statement made by him that his client wanted to raise an alternative ground that the contract was void and, therefore, she was entitled to the benefit of the amount actually advanced, the proper course for the Judge would be to direct the plaintiff to amend her plaint by setting forth clearly the alternative relief which she seeks and the grounds on which she seeks it and after the amendment has

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been made to allow the defendant to file an additional written statement, and to decide first of all as to whether the amendment ought to be allowed and if allowed, to raise additional issues and post the matter for further evidence.

Order VI, rule 7, Civil Procedure Code, enacts that no pleading shall, except by way of amendment, raise any new ground of claim or contain any allegation of fact inconsistent with the previous pleadings of the party pleading the same. There can be little doubt that a claim on the footing that the contract is void, is certainly a new ground in a suit filed to enforce the terms of the contract. It does not follow from the statements made in the plaint that the contract is not subsisting and is not enforceable. It seems to me that the Court has no jurisdiction to direct the defendants to file an additional written statement to meet allegations not contained in the plaint and which could, by no stretch of imagination, be held to be covered by the allegations in the plaint. The difficulty was pointed out by the 2nd defendant in his additional written statement which he filed pursuant to the order of the Court. In paragraph 2, he states that the plaintiff is entitled to no relief under section 65 of the Contract Act as she did not ask for it in the plaint and that, having regard to the fact that no amendment of the plaint was asked for, the defendant had considerable difficulty in knowing what particular case he had to meet. One would have thought that these objections were perfectly reasonable. The Subordinate Judge on reading the written statement expunged the paragraphs on the ground that they were prolix and unnecessary. The position, therefore, is, the Judge has, without any allegations being made in the plaint, resolved to proceed with the case on the footing that the plaintiff claimed an alternative relief and directed the defendants to file an additional written statement stating their objections to the cause of action not set out in the plaint. He pressed into service an issue which neither party ever thought covered the question and proceeded with the trial. Such a procedure is, in my opinion, not only unwarranted, but likely to prejudice the defendants. It is not open to the plaintiff, who has not amended the plaint or set out the specific facts and

grounds under which she claims the alternative relief, to go on adding to her contentions orally as arguments in the suit proceeded on the merits. I have come to the conclusion that the procedure adopted by the Subordinate Judge is irregular and likely to prejudice the defendants. I do not wish it to be understood that the Subordinate Judge has no power to grant an amendment. Cases have been quoted where parties have been allowed to amend the plaint by asking for alternative reliefs, and when the plaintiff has amended the plaint setting out the reasons for asking for same, the Subordinate Judge might well grant the amendment on such terms as to costs or otherwise as he may think necessary.

It has been argued by the Vakil for the respondents that, even if there was an irregularity, the procedure of the Subordinate Judge is one which may be remedied in the appeal against the final decree that may be passed by the Subordinate Judge and that the High Court ought not to interfere in revision. This raises the question of the power of the High Court to interfere in revision under section 115, Civil Procedure Code, and section 15 of the Charter Act. Section 115, Civil Procedure Code, empowers the High Court to call for any case which has been decided by any Court subordinate to such High Court and in which no appeal lies thereto and if such Subordinate Court appears to have failed to exercise a jurisdiction not vested in it by law, or to have failed to exercise a jurisdiction so vested, or to have acted in the exercise of its jurisdiction illegally or with material irregularity, to make such order in the case as it thinks fit. Section 15 of the Charter Act gives the High Court superintendence over all the Courts subject to its appellate jurisdiction.

My attention has been called to cases in some of which High Courts have interfered and in some of which they have declined. For the petitioner reference has been made to several cases. In *Veerabadrán Chetty v. Nataraja Desikar* (1) it was held that the High Court had under section 15 of the Charter Act power to set aside the order of a Subordinate Judge refusing to grant a

(1) 28 M. 28; 14 M. L. J. 329,

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commission. A similar view was taken in *Somasundaram Chettiar v. Manicka Vasaka Desika Gnana Sammanda Pandara Sannidi* (2). In *Nagaraja Pillai v. Vythinatha Iyer* (3), it was held that section 15 of the Charter Act is sufficiently wide to empower the High Court to interfere even though the case may not fall under section 115, Civil Procedure Code. In *Subramania Pattar v. Narayana Pattar* (4), Mr. Justice Seshagiri Aiyar was disposed to give a more liberal interpretation to the powers of the High Court under section 115, Civil Procedure Code. In *Venkatachallam Pattar v. Parasu Pattar* (5), Mr. Justice Oldfield was of opinion that errors of law or procedure may be set right by the High Court under section 115, Civil Procedure Code.

The judgment of Justice Mukerjee in *Rai Yatendra Nath v. Hari Charan* (6) refers to several decisions of the Calcutta High Court and supports the view that a more liberal interpretation ought to be given to the powers of the High Court both under section 115 of the Civil Procedure Code and section 15 of the Charter Act, and that in exceptional cases the High Court has power to interfere and set matters right by the reversal of interlocutory orders. In the particular case the order of the Subordinate Judge directing the trial of certain issues before evidence being let in was set aside. For the respondent, reference has been made to cases where the High Court declined to interfere. In *Ramamurthi v. Kunchuwarthy Venkata Sitaramachandra Row* (7), Justices Sadasiva Aiyar and Spencer held that the Court could not interfere in revision when the aggrieved party has a remedy by suit and doubted the correctness of the decision in *Rudrappa v. Narasing Rao* (8) and in *Venkata Subbia v. Seshachalam* (9), it was held that the Court will not interfere under section 115 of the Civil Procedure Code with an order refusing

an amendment even though the order was erroneous. In *Chidambaram Chetty v. Nagappa Chetty* (10), the Court refused to interfere under section 115 as the aggrieved party had a remedy by way of appeal. A similar view was taken by Justice Sadasiva Aiyar in *Jagannatha Mudaliar v. Vathiyar Appasawmy Mudaliar* (11) and *Gaeble v. Ramayi Ammal* (12).

It is difficult to reconcile all the observations made by the learned Judges who took part in the cases above referred to. In case of discretionary powers vested in Courts, I do not think any hard and fast rules can be laid down so as to fetter that discretion in advance in all cases that may arise in future. The observations of Jenkins, C. J., in *Hume v. Poresk Chunder Ghose* (13), that a discretion given in the widest terms by the Legislature ought not to be crystallised or restricted by a series of cases but should remain "free and untrammelled to be fairly exercised according to the exigencies of each case," may well be borne in mind. It seems to me that the power of superintendence and the powers given by section 115 were intended to give the High Court jurisdiction to see that the proceedings before lower Courts were properly conducted, and I see no reason why the High Court should refuse to set right matters if by doing so it would save unnecessary expense or delay or a multiplicity of proceedings. There may be a right of appeal, but it may be unnecessary to drive a party to the expense and trouble of an appeal by timely interference. Speaking for myself, it seems to me that grave injustice might occur in particular cases if the High Court should decline to interfere where patent irregularities in procedure are brought to its notice and should leave the suit to take what is in its opinion a wrong course, simply on the ground that after all the mischief has been done, the Court can remedy the evil by its appellate judgment. While on the one hand Courts will not generally interfere in revision where an equally efficacious remedy is open to the party by way of appeal, the Court, on the other hand, has to be satisfied that having regard to the facts of each particular

(2) 31 M. 60; 3 M. L. T. 246.

(3) 9 Ind. Cas. 672; 21 M. L. J. 484; 9 M. L. T. 273; (1911) 2 M. W. N. 369.

(4) 28 Ind. Cas. 189; 2 L. W. 230.

(5) 26 Ind. Cas. 106; (1914) M. W. N. 614; 16 M. L. T. 156.

(6) 26 Ind. Cas. 954; 20 C. L. J. 426.

(7) 22 Ind. Cas. 279; (1914) M. W. N. 95.

(8) 29 B. 213; 7 Bom. L. R. 12.

(9) 12 Ind. Cas. 173; 22 M. L. J. 136; (1911) 2 M. W. N. 257; 10 M. L. T. 549.

(10) 16 Ind. Cas. 820; 24 M. L. J. 73; 38 M. 15.

(11) 24 Ind. Cas. 782; 1 L. W. 233.

(12) 24 Ind. Cas. 781; 1 L. W. 232.

(13) 22 Ind. Cas. 321; 41 C. 446; 15 Cr. L. J. 49.

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case, the remedy by way of appeal would give the party as complete and efficacious a relief as interference at the stage when the High Court has become aware that the lower Court has acted in the exercise of its jurisdiction illegally or with material irregularity.

I set aside the order of the Sub-Judge and direct that he proceed with the suit on the lines indicated by me above. He will first direct the plaintiff to amend the plaint as advised, then decide whether the amendment should be allowed after hearing the defendants, and if he allows the amendment he should direct written statements to be filed on the amended plaint, settle proper issues and proceed with the final disposal.

The respondent should pay the appellant's costs of this revision petition. Costs in the lower Court will be at the discretion of the Subordinate Judge.

Petition allowed.

CALCUTTA HIGH COURT.

CIVIL RULE No. 258 OF 1915.

March 30, 1915.

Present:—Justice Sir Asutosh Mookerjee, Kt., and Mr. Justice Newbould.

KUMUD KUMAR BOSE AND OTHERS—

PETITIONERS

versus

HARI MOHAN SAMADAR—

OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), O. XLIII, r. 1, (d)—Appeal against order dismissing for default application to set aside ex parte decree, maintainability of.

Under clause (d) of rule 1 of Order XLIII of the Code of Civil Procedure an appeal is competent against an order of summary dismissal for default of an application to set aside an *ex parte* decree.

Civil Rule against an order of the District Judge of Barisal, dated the 8th December 1914, refusing to hear an appeal against an order of the Munsif of Perozepur, dated 7th November 1914.

Babu Soresh Chandra Bose, for the Petitioners.

JUDGMENT.—In this case, the District Judge has refused to entertain an appeal against an order by which the Court of first instance

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dismissed for default an application to set aside an *ex parte* decree in a mortgage suit. The petitioner, who was the defendant in that suit, applied to have the *ex parte* decree set aside. The application was fixed for disposal on the 7th November 1914. On that date an application was made on his behalf for adjournment. The Court held that the application was frivolous and refused to grant time; thereupon, the Pleader intimated to the Court that he had no further instructions. The application was accordingly dismissed for default. The petitioner then appealed to the District Judge; the result was that the following order was recorded: "No appeal lies; summarily dismissed." It is clear that under clause (d) of rule 1 of Order XLIII of the Code, the appeal was competent. The order assailed by way of appeal was an order under rule 13 of Order IX; it was immaterial that the application to set aside the *ex parte* decree had been dismissed, not on the merits, but for default. The District Judge has clearly declined to exercise a jurisdiction vested in him by law.

The result is that this Rule is made absolute and the order of the District Judge set aside. The records will be returned to him in order that the appeal may be heard on the merits.

Rule made absolute.

CALCUTTA HIGH COURT.

APPEAL FROM ORDER No. 199 OF 1914.

May 29, 1914.

Present:—Justice Sir Asutosh Mookerjee, Kt., and Mr. Justice Beachcroft.

TARAK NATH SARKAR—PLAINTIFF—

APPELLANT

versus

NATABAR MONDAL—DEFENDANT—

RESPONDENT.

Decree, execution of—Civil Procedure Code (Act V of 1908), O. XXI, r. 2, cl. (3)—Payment or adjustment recognized, when certified or recorded—Judgment-debtor not to suffer for Court's negligence in making record.

It is plain from clause (3) of rule 2, Order XXI of the Code of Civil Procedure, that a payment or

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adjustment shall not be recognized by any Court executing the decree, unless it has been either certified or recorded. This does not require that the payment or adjustment must be both certified and recorded. [p. 46, col. 2.]

In clause (3) of rule 2 of Order XXI, the term 'certified' refers to clause (1) and the term 'recorded' to clause (2). [p. 46, col. 2.]

A judgment-debtor does not lose his protection, merely because the Court fails to perform the duty cast upon it, viz, to make a record that the payment or adjustment has been certified by the decree-holder. [p. 46, col. 2.]

Appeal against an order of the District Judge of Jessore, dated the 2nd April 1914, affirming that of the Munsif of Magura, dated the 4th December 1913.

Babus Sib Chandra Palit and Sasadhar Ray, for the Appellant.

JUDGMENT.—This appeal is directed against an order by which the District Judge, in concurrence with the Court of first instance, has refused an application for execution of a decree. The judgment-debtor pleaded that the decree had been satisfied by payment out of Court and that the satisfaction had been notified to the Court by the decree-holder. The decree holder objected that no notice could be taken of the alleged payment, as the record of the Court did not show that it had been certified under clause (3) of rule 2 of Order XXI of the Code; and he denied that the decree had been satisfied or that he had ever admitted satisfaction in any petition filed by him in Court. The Courts below have found that the payment was in fact made as stated by the judgment-debtor and a petition was filed in Court by the decree-holder notifying that the decree had been satisfied in full. But this petition has not been traced and there has been much speculation as to how it has disappeared. We are not concerned with these hypotheses; the fact remains that the payment was made, that it was notified to the Court by the decree-holder, and that the latter has taken advantage of the disappearance of the petition to deny falsely that the decree had been satisfied. Under these circumstances the question arises, whether there is any substance in the argument of the decree-holder that the payment was not certified as required by law because it was not recorded by the Court. In our opinion, there is no force in this contention.

Clause (1) of rule 2 of Order XXI provides that where any money payable under a decree of any kind is paid out of Court or the

decree is otherwise adjusted in whole or in part to the satisfaction of the decree-holder, the decree-holder shall certify such payment or adjustment to the Court whose duty it is to execute the decree, and the Court shall record the same accordingly. It is worthy of note that there was no provision in section 258 of the Code of 1882 which required the Court to record the payment or adjustment. Clause (2) then deals with the case in which the judgment-debtor intimates the fact of payment or adjustment to the Court, and provides that if, after such intimation has been given and a notice has been served upon the decree-holder, the latter fails to show cause why the payment or adjustment should not be recorded as certified, the Court shall record the same accordingly. Clause (3) finally provides that payment or adjustment which has not been certified or recorded as aforesaid, shall not be recognized by any Court executing the decree. A comparison of this clause with the corresponding paragraph of section 258 of the Code of 1882 shows that the words 'or recorded' have been introduced for the first time into clause (3) of rule 2 of Order XXI. It is plain, from clause (3) of rule 2, that a payment or adjustment shall not be recognized by any Court executing the decree, unless it has been either certified or recorded. This does not require that the payment or adjustment must be both certified and recorded. It is also clear that in clause (3) of rule 2, the term 'certified' refers to clause (1) and the term 'recorded' to clause (2). Consequently, it cannot be reasonably contended that the judgment-debtor loses his protection, merely because the Court fails to perform the duty cast upon it, namely, to make a record that the payment or adjustment has been certified by the decree-holder. The decree-holder, at any rate, is not prejudiced by the omission of the Court to make the record. He has received the payment or has entered into an adjustment with the judgment-debtor. He has notified the fact to the Court; he has done his duty, as the Code does not provide for any special form to be adopted for the purpose. The failure of the Court to make the record does not surely entitle him to take advantage of the omission to the detriment of the judgment-debtor. Under these circumstances, we are of opinion that the view

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taken by the District Judge is correct and his order must be affirmed.

Appeal dismissed.

CALCUTTA HIGH COURT.

FIRST CIVIL APPEAL No. 350 OF 1911.

August 17, 1914.

Present:—Justice Sir Asutosh Mookerjee, Kt.,
and Mr. Justice Beachcroft.

BALDEO NARAIN JHA—DEFENDANT—
APPELLANT

versus

BHAYA LAL SINGH AND OTHERS—
PLAINTIFF AND OTHER DEFENDANTS —
RESPONDENTS.

Estoppel—Property jointly mortgaged by two persons as its owners—One of them cannot subsequently deny that the other had no title.

Where a property which stands in the names of A and B is jointly mortgaged by A and B to X, on the allegation that A and B are proprietors in respect of the shares for which they are registered, it is futile for A or his successors to contend subsequently, as against X or his representatives that B had no title to the property and that A was the sole owner.

Mahomed Mozuffer Hossein v. Kishori Mohun Roy, 22 C. 909; 22 I. A. 129, referred to.

Appeal against the decree of the Subordinate Judge of Muzafferpur, dated the 17th February 1911.

Babu Lahmi Narayan Singh, for the Appellant.

Babus Umakali Mukerjee, Baldeo Narain Singh and Baidyanath Narain Singh, for the Respondents.

JUDGMENT.—This appeal is directed against the decree in a suit for declaration of title to immoveable property and for recovery of possession thereof. The plaintiff-respondent claims title by purchase at a sale held in execution of a mortgage-decree. The mortgage was created by the representatives of four branches of a *Mitakshara* family. The appellant was entitled to one-sixth share of the properties given by way of security; another of the mortgagors was ostensibly entitled to a half share and two others were entitled to one-sixth share each. The appellant now contends that the mortgagor whose name stood registered in respect of one-half share and who joined in the mortgage as owner of that share, was not really interested in the property at

all, he was merely a *benamidar* for the appellant and that, consequently, the purchaser in execution of the mortgage-decree has not acquired a valid title to that share. The Subordinate Judge has overruled this contention on the ground that the evidence establishes that the property was really owned by all the persons in whose name it stood. The reasons given by the Subordinate Judge for his conclusion are *prima facie* sound, and no serious attempt has been made in this Court to controvert that finding. Apart from this, it is plain that the appellant is not entitled to challenge the title of the mortgagee. According to him the property was acquired by his father in the name of Babu Ojha. Assume that the allegation is proved. As Babu Ojha was the ostensible owner of the property, the title of the mortgagee from Babu Ojha is not liable to be impeached either by the father of the defendant or by the defendant himself as his successor-in-interest. If A and B jointly mortgage to X a property which stands in their names, on the allegation that they are proprietors in respect of the shares for which they are registered, it is futile for A or his successor to contend subsequently as against X or his representative that B had no title to the property, and that A was the sole owner: *Ramcoomar Koondoo v. McQueen* (1), *Euchmun Chunder Geer Gossain v. Kalli Churn Singh* (2); *Mahomed Mozuffer Hossein v. Kishori Mohun Roy* (3). Consequently, the question raised by the appellant cannot possibly be decided in his favour.

The result is that the decree of the Court below is affirmed in so far as this point is concerned and this appeal dismissed with costs.

Appeal dismissed.

(1) 11 B. L. R. 46 at p. 52; 18 W. R. 166; J. A. Sup. Vol. 40.

(2) 19 W. R. 292.

(3) 22 C. 909; 22 I. A. 129.

NATHA MAL V. ROSHAN LALL.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 1378 OF 1914.

July 20, 1915.

Present:—Mr. Justice Rafique.

NATHA MAL—DEFENDANT—APPELLANT

versus

ROSHAN LALL AND OTHERS—PLAINTIFFS—
RESPONDENTS.

Agra Tenancy Act (II of 1901), s. 202, applicability of—Agricultural holding—Grove.

Section 202 of the Agra Tenancy Act. II of 1901, applies only to agricultural holdings and not to groves. [p. 49, col. 1.]

Second appeal from the decision of the Additional District Judge of Aligarh, dated the 29th of July 1914.

FACTS.—The plaintiffs brought a suit in the Civil Court for the issue of an injunction restraining the defendants from cutting trees and for damages. The defence was that the defendant was the owner of the grove and that it was his *sir*. One of the issues framed was: "Has the defendant lost his ex-proprietary right?" The Court of first instance decreed the suit. In appeal before the District Judge it was contended that the Munsif ought to have asked the defendant to institute a suit in the Revenue Court under the provisions of section 202 of Act II of 1901. The lower Appellate Court confirmed the decree of the Court of first instance. The defendant appealed to the High Court.

Mr. P. L. Banerji, for the Appellant:—There being a distinct issue in the Court of first instance as to whether the defendant was a tenant of the plaintiffs, it was the duty of the Civil Court to act under the provisions of section 202 of the Agra Tenancy Act. The question was raised in the grounds of appeal also. I rely on the case of *Kuar Dirghibjai Singh v. Musammat Indar Kuar* (1).

In that case the defendant was absent and an *ex p rte* decree was passed against him and even then it was held that the Court ought to have acted according to the provisions of section 202.

Mr. Lakshmi Narayan (with him Mr. Jang Bahadur Lal), for the Respondents:—The defendant in his written statement never pleaded that he was a tenant. His case was that he was the proprietor. The Court, under these circumstances, could not of its

own motion refer the dispute as to tenancy to a Civil Court. Moreover, the present dispute relates to a grove, while section 202 speaks of an "agricultural holding". It cannot, therefore, be said that section 202 is applicable.

There is another point also to be considered. The Courts below have found that even if the defendant was an ex-proprietary tenant, his rights were extinguished under section 79 of the Tenancy Act. In this view of the case the Courts below were perfectly within their rights to decree the plaintiffs' claim.

JUDGMENT.—The defendant-appellant was the owner of half the *khewat* No. 2. In execution of a decree against him his share was sold and purchased by the plaintiffs-respondents on the 20th of March 1908. In the sale certificate the description of the property sold is given which includes a *beri* grove. On the 8th of April 1914, the plaintiffs-respondents brought the suit out of which this appeal has arisen, for a declaration that they were the owners and proprietors of the *beri* grove situate on plot No. 380 and for an injunction against the defendant-appellant restraining him from interfering with their possession. They said that the defendant-appellant a short time before the institution of the suit had without any right wrongfully cut down two trees of the grove in question. They asked for Rs. 30 as damages for the price of the trees cut down by the defendant-appellant. The latter resisted the suit by denying the title of the plaintiffs-respondents to the grove. He said that it was excepted from the sale and that it was his *sir*. The learned Munsif decreed the claim. On appeal his decree was confirmed. The defendant-appellant comes here in second appeal and contends that as he raised the question of ex-proprietary tenancy in respect of plot No. 380 on which the grove is situate, the Courts below were not competent to dispose of that question under section 202 of Act II of 1901. On reference to the record it appears to me that no specific plea was taken by the defendant-appellant to the effect that after the sale of his *zemindari* share he became an ex-proprietary tenant of the plot on which the grove is situate. He did say that the said plot was his *sir*, and in connection

(1) 4 A. L. J. 195 (Notes).

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with that statement the first Court discussed the question whether he was an ex-proprietary tenant of that plot. It came to the conclusion on the evidence in the case that even if the defendant-appellant was an ex-proprietary tenant of that plot, he had lost his right by his having been out of possession for more than six months. The same view was taken by the learned Judge on appeal. It cannot be said on the pleadings in the case that the question now raised was agitated in the Courts below. But apart from that I do not think that the provisions of section 202 of Act II of 1901 are applicable to the present case. The plot in suit, that is, No. 380 on which the grove is situate, is not an agricultural holding and the provisions of section 202 of Act II of 1901 apply only to agricultural holdings. The objection of the appellant to the decree passed against him, therefore, fails and the appeal is dismissed with costs including fees on the higher scale.

Appeal dismissed.

CALCUTTA HIGH COURT.

CIVIL RULE No. 1222 OF 1914.

March 26, 1915.

Present:—Justice Sir Asutosh Mookerjee, Kt., and Mr. Justice Newbould.

GOPAL CHANDRA BOSE AND ANOTHER—
PETITIONERS

versus

HARI MOHAN DUTT AND OTHERS—

OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), s. 73, scope of—Rateable distribution—Two decree-holders against one judgment-debtor—Restitution—High Court, power of, to direct restitution of money withdrawn by decree-holder.

A, a decree-holder against C, the judgment-debtor, sought to satisfy his dues by the sale of an occupancy holding of C. C objected that the holding was not transferable and could not be sold in execution of a decree for money. The objection was overruled and the execution was allowed. B another decree-holder against C applied for execution of his decree by sale of the same holding and in the alternative prayed for rateable distribution if the holding was sold in execution of A's decree. C again objected that the holding was not transferable and this time his objection was allowed. The holding, however, was sold in A's decree.

Held, that B was entitled to rateable distribution of the sale-proceeds. [p. 50, col. 1.]

No valid claim for rateable distribution can be laid under section 73 of the Code of Civil Procedure if, in an application for execution of the decree, it has been held that the decree has been satisfied, or is barred by limitation, or if such application has been dismissed. [p. 50, col. 2.]

If pursuant to an erroneous order of a subordinate Court money has been paid out to a litigant, it is competent to the High Court to direct that person to bring back the money into Court when such erroneous order is set aside. The Court has inherent power to direct such restitution to enable it to do effective and complete justice between the parties. [p. 50, col. 2.]

Mrinalini Dasi v. Abinash Chandra Dutt, 6 Ind. Cas. 508; 11 C. L. J. 533; 14 C. W. N. 1024, *Nabin Kali Debi v. Banalata Debi*, 32 C. 921; 2 C. L. J. 595 and *Jogesh Chandra Roy v. Yakub Ali*, 21 Ind. Cas. 111; 17 C. W. N. 1057, referred to.

To bring a case under section 73, it is necessary to establish that more persons than one have made an application to the Court for execution of decrees for payment of money passed against the same judgment-debtor and have not obtained satisfaction thereof, before the receipt of the assets in respect whereof rateable distribution is claimed. [p. 50, col. 2.]

Bithal Das v. Nand Kishore, 23 A. 106; A. W. N. (1901) 4, distinguished.

Rule against an order of the Subordinate Judge of Dacca dated the 3rd September 1914.

Babus Basant Coomar Bose and Bhupendra Chandra Guha, for the Petitioners.

Babu Sarat Chandra Mookerjee, for the Opposite Party.

JUDGMENT.—We are invited in this Rule to set aside an order made under section 73 of the Code of Civil Procedure, 1908. The property brought to sale is an occupancy holding owned by the Pals. Two sets of decree-holders, the Boses who are the petitioners in this Court and the Dutts who are the opposite parties to this Rule, sought to satisfy their dues from the Pals by the sale of this property. The Dutts applied for execution of their decree for money against the Pals. The Pals objected that the holding was not transferable and could not be sold in execution of a decree for money. This objection was overruled by this Court on the 24th June 1912, when it was held that the holding was transferable by custom and was liable to be brought to sale in execution of a money decree. On the 15th March 1913, the Boses applied for execution of the decree for money which they held against the Pals. They stated that an application for execution had already been made at the instance of the Dutts and the 9th April 1913 had been fixed for the

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sale of the property. They prayed in the alternative that if the property was sold at the instance of the Dutts, they might be allowed rateable distribution under section 73 of the Code; if, on the other hand, the property was not brought to sale by the Dutts, they themselves might be permitted to attach and sell it. For some reason not explained, the property was not actually sold on the 9th April 1913. The Pals then objected to the attachment of the property by the Boses, and this time they were more fortunate than they had been with their objection against the attachment and sale of the property at the instance of the Dutts. The Court held that the holding had not been established to be transferable by custom and ruled on the 9th March 1914, that it could not be attached by the Boses. Their application of the 15th March 1913, in so far as it related to the prayer for rateable distribution, however, remained on the file, and the Court directed it to be heard along with the execution case initiated by the Dutts. The property was sold at the instance of the Dutts on the 16th March, 1914. The Boses then prayed that they might be allowed to share rateably in the sale-proceeds. The Dutts objected that as the Boses had failed to attach the property, they could not be allowed rateable distribution under section 73. The Court adopted this view and on the 3rd September 1914, disallowed the prayer of the Boses for rateable distribution. On the very next day, the sale-proceeds were paid out to the Dutts. The Boses now invite this Court to set aside the order of the 3rd September 1914, on the ground that the Court should have held that they have a *locus standi* to make the application for rateable distribution. The Dutts contend that the Rule should be discharged on two grounds: *first*, that inasmuch as they have already withdrawn the money from the Court, there can be no order for rateable distribution; and *secondly*, that as the Boses failed in their application for attachment of the holding, they cannot be permitted to claim rateable distribution under section 73. In our opinion, both these objections are unsustainable.

As regards the first objection, it is obviously open to this Court, should the order of the 3rd September 1914 prove erroneous, to direct the Dutts to bring

back into Court the money they had withdrawn on the basis of that order. It is well settled that if pursuant to an erroneous order of a subordinate Court money has been paid out to a litigant, it is competent to this Court to direct that person to bring back the money into Court when such erroneous order is set aside. The Court has inherent power to direct such restitution to enable it to do effective and complete justice between the parties. This fundamental principle is amply supported by the decisions of *Mrinalini Dasi v. Abinash Chunder Duth* (1), *Nobin Kali Debi v. Banalata Debi* (2), *Jogesh Chandra Roy v. Yakub Ali* (3). If the contrary view were taken, the result would be that this Court would find itself helpless when its interference was imperatively needed in the interests of justice. In the present case, it may be observed that the withdrawal of the money was so expeditious that the petitioners had no opportunity whatsoever to apply to this Court to obtain an *ad interim* order for stay of proceedings and for retention of the money in Court. The first objection to the Rule consequently fails.

As regards the second objection, it is plain that to bring a case within the scope of section 73, it is necessary to establish that, before the receipt of the assets in respect whereof rateable distribution is claimed, more persons than one have made an application to the Court for execution of decrees for payment of money passed against the same judgment-debtor and have not obtained satisfaction thereof. In the present case, an application was made by the Boses for execution and rateable distribution on the 15th March 1913; that application was still pending on the 16th March 1914, when the assets were realised. It may be conceded that if on an application for execution, it has been held that the decree has been satisfied or is barred by limitation, or if such application has been dismissed and is not pending at the time when the assets are realised, no valid claim for rateable distribution can be laid under section 73. But the case before us is of an entirely different description, for on the 9th April 1913, the Court had expressly directed that the prayer of the

(1) 6 Ind. Cas. 508; 11 C. L. J. 533; 14 C. W. N. 1024.

(2) 32 C. 921; 2 C. L. J. 595.

(3) 21 Ind. Cas. 111; 17 C. W. N. 1057.

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Boses for rateable distribution be considered along with the execution case initiated by the Dutts, and such claim for relief still awaited investigation when the assets were realised at the instance of the Dutts. Reliance has, however, been placed on behalf of the Dutts upon the decision of *Bithal Das v. Nand Kishore* (4), which was distinguished by this Court in *Ramjash Agarwala v. Guru Charan Sen* (5). There it was found that one of two decree-holders had attached the interest of the judgment-debtor in a joint *Mitakshara* property. Before the other decree-holder could attach that property, the judgment-debtor died, and it consequently became impossible for him to proceed against an interest in joint property, which had become vested by survivorship in the other members of the joint family. In these circumstances, it was ruled by Strachey, C. J., that as the decree-holder had lost his right to attach the share of the judgment-debtor who had died before attachment could be effected, he could not claim rateable distribution. We have here to deal with an entirely different set of circumstances; but it is worthy of note that Banerjee, J., did not rest his decision on the same ground as Strachey, C. J., whose view is not quite in harmony with the decision of the Bombay High Court in *Sorabji Edulji Warden v. Govinda Ramji* (6). It is needless for us to pronounce an opinion upon the precise question raised in *Bithal Das v. Nand Kishore* (4); it is sufficient to hold that it is clearly distinguishable and does not apply to the facts of this case. Here the property has been held by the Court to be a saleable occupancy holding; it has actually been brought to sale as such and converted into money at the instance of the opposite party. They, however, argue that the petitioners are not entitled to rateable distribution, because they were unsuccessful in their allegation that the property was saleable. This contention is clearly untenable. Nor can we accede to the suggestion that it was the imperative duty of the petitioners to come to this Court and have the erroneous order against them set aside before they could claim rateable distribution.

The result is that this Rule is made absolute and the order of the 3rd September

(4) 23 A. 106; A. W. N. (1901) 4.

(5) 3 Ind. Cas. 105; 11 C. L. J. 69; 14 C. W. N. 396.

(6) 16 B. 91.

1914 set aside. The Court below will make an order for rateable distribution, and the Dutts will bring back into Court, within such time as may be prescribed by that Court, so much of the money withdrawn by them as is necessary for payment to the Boses. The petitioners are entitled to their costs both here and in the Court below. We assess the hearing fee in this Court at two gold *mohurs*.

Rule made absolute.

SIND JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 4 OF 1913.

January 28, 1915.

Present:—Mr. Pratt, J. C., and Mr. Fawcett, A. J. C.

Seth NARSOOMAL—APPELLANT

versus

TIRATHMAL—RESPONDENT.

Limitation Act (IX of 1908), s. 20—Payment, what constitutes—Fresh starting point—Civil Procedure Code (Act V of 1908), O. XXI, r. 2—Payment by judgment-debtor not certified to Court, effect of—Statute, interpretation of.

'Payment' contemplated by section 20 of the Limitation Act must be of such a nature that it would be an answer to a suit brought by the plaintiff to recover the amount. [p. 52, col. 2.]

Kollipara Pullamma v. Maddula Tatayya, 19 M. 340 at p. 342; 6 M. L. J. 177; *Kariyappa v. Rachappa*, 24 B. 493 at pp. 496, 500; 2 Bom. L. R. 378; *Sukhamoni Chowdhurani v. Ishan Chunder Roy*, 25 C. 844 at p. 852; 25 I. A. 95; 2 C. W. N. 402, referred to.

No payment towards a judgment-debt is a 'payment' within the meaning of section 20 of the Limitation Act so as to give a fresh starting point for purposes of limitation, unless it has been certified to the Court under Order XXI, rule 2, Civil Procedure Code, within the prescribed period. [p. 52, col. 1.]

It is the duty of the Judge to make such construction as shall suppress all evasions for the continuance of mischief. [p. 53, cols. 1 & 2.]

Appeal against the order of the District Judge, Sukkur-Larkana.

Mr. *Isardas Oodharam*, for the Appellant.

Mr. *R. R. Bugtani*, for the Respondent.

JUDGMENT.—The appellant seeks to execute an instalment decree passed on the 26th May 1905 for Rs. 550 with interest at 6 per cent. per annum. His application for execution is dated the 7th March 1912 and is admittedly time-barred, unless it is held that a payment on account of interest made by the judgment-debtor in May 1910 perates under section 20 of the Limitation Act to extend the period of limitation

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prescribed by Article 182. A previous application for execution had been made on 3rd April 1908, so that the payment in question was made before the expiration of the period of three years prescribed under head 5 of Article 182.

The question has not been considered by the lower Appellate Court, which overruled other contentions for appellant that have not been urged before us. But the Subordinate Judge's Court held that as his payment had not been certified under Order XXI, rule 2, Civil Procedure Code, it could not [under sub-rule (3) of that rule] be recognised for any purpose whatever, even for extending the period of limitation. We agree with his view that an uncertified payment cannot under the present Code be recognised by any Court executing the decree *for any purpose whatever*, and that the present law overrides the decisions that there was nothing in the corresponding provisions of section 258 of the Code of 1882 to prevent an uncertified payment from operating as a part-payment within the meaning of section 20 of the Limitation Act, so as to prolong the period of limitation for applying for execution under that Act. This clearly follows from the omission of the words "as a payment or adjustment of the decree" which followed the word "recognised" in paragraph 3 of section 258 of the former Code. A similar view has been taken by the Calcutta High Court in *Kutubullah Sarkar v. Durga Charan Rudra* (1) and by the Allahabad High Court in *Radri Narayan v. Kunj Bihari Lal* (2) and two cases reported as *Gokul Chand v. Bhika* (3) and *Bhajan Lal v. Cheda Lal* (4).

Mr. Isardas for appellant contends, however, that the payment in question was sufficiently certified to the Court by its mention in the application for execution of 7th March 1912, and in support of this relies on the remarks of Farran, C. J., on this point in *Tukaram v. Babaji* (5). An application for execution has under Order XXI, rule 11 (2) (e), to contain a statement whether any, and (if any) what, payment or other adjustment of the matter in controversy has been

(1) 13 Ind. Cas. 424; 16 C. W. N. 396.

(2) 18 Ind. Cas. 731; 35 A. 178 at p. 183; 11 A. L. J. 224.

(3) 23 Ind. Cas. 753; 12 A. L. J. 387.

(4) 24 Ind. Cas. 215; 12 A. L. J. 825.

(5) 21 B. 122 at p. 124.

made between the parties subsequently to the decree, and as no particular form or manner is prescribed for certifying payments under Order XXI, rule 2, there appears to be no valid reason why they should not be certified to the Court in this manner. It is also true that no period of limitation is prescribed within which a decree-holder should certify a payment or adjustment and that it has been held that he may, therefore, apply at any time for having it certified. But this does not dispose of the question before us. It still remains to be considered whether a payment which is not certified "before the expiration of the prescribed period" is an effectual payment for the purpose, and within the meaning of section 20 of the Limitation Act.

The general test as to what constitutes a good payment under that section is, that it must be of such a nature that it would be an answer to a suit brought by the plaintiff to recover the amount, see *Kollipara Pullamma v. Maddula Tatayya* (6) and *Kariyappa v. Rachapa* (7). The same principle (which follows the corresponding English Law) is clearly approved by the Privy Council in *Sukhamoni Chowdhurani v. Ishan Chunder Roy* (8), where the case of *Kollipara Pullamma v. Maddula Tatayya* (6) was cited in argument (p. 849) and the payment in issue was held to be one contemplated by section 20, because it was "a payment in exoneration *pro tanto* of the liability of the person liable to pay."

In the present case, the appellant could have filed an application for execution of the decree and sought to recover this particular sum, among others claimed as due under his decree, at any time after its payment upto the expiration of the prescribed period in 1911. As soon as the 90 days allowed for a judgment-debtor's application under Order XXI, rule 2 (2), had elapsed, the payment in question could not be pleaded by the judgment-debtor as an answer to appellant's claim, because it had not been certified. It only becomes a good answer and an exoneration *pro tanto* of the judgment-debtor's liability on being certified to the Court. Under section 20 of

(6) 19 M. 340 at p. 342; 6 M. L. J. 177.

(7) 24 B. 493 at pp. 496, 500; 2 Bom. L. R. 378.

(8) 25 C. 844 at p. 852; 25 I. A. 95; 2 C. W. N. 402

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the Limitation Act the payment must be made "before the expiration of the prescribed period." But no payment towards a judgment-debt is (on the view taken above) a payment within the meaning of section 20 unless it has been certified. It follows that a payment, which is not certified till after "the expiration of the prescribed period", is insufficient to operate for the benefit of the judgment-creditor under that section.

As a somewhat analagous case, reference may be made to *Venkaji Babaji Naik v. Shidramapa Balapa Desai* (9). In that case it was held that where apart from a document which is inadmissible in evidence, for want of registration, the receipt of certain sums *as interest* cannot be proved, the receipt of the amounts cannot save the suit from limitation. The fact that the requirements of the law relating to registration had not been complied with by the plaintiff, prevented the payment being available for his benefit under section 20. An uncertified payment is under Order XXI, rule 2 (3), on a somewhat similar footing. The mere payment is not sufficient: there is a statutory requirement to be satisfied to make it a valid payment, so far as regards any Court executing the decree: and until that requirement is satisfied it does not become a payment of the kind contemplated by section 20 of the Limitation Act. The payment and certifying must, therefore, both be made "before the expiration of the prescribed period."

The above view has also been adopted in *Bhajar Lal v. Cheda Lal* (4), but it is not necessary to go so far as to lay down that a decree-holder cannot (if he wants to) certify a payment made to him out of Court after the decree has become barred by limitation. The head-note to the effect probably goes further than what the learned Judge really meant, *viz.*, that if the decree-holder does certify a payment after the decree has become time-barred, that is ineffectual to save limitation under section 20.

It may be added that the above view is also one which follows the general rule that "it is the duty of the Judge to make such construction as shall suppress all eva-

sions for the continuance of mischief." Maxwell on the Interpretation of Statutes, 3rd Edition, page 157. Order XXI, rule 2, Civil Procedure Code, imposes a statutory obligation on the decree-holder to certify all payments or adjustments out of Court, and this obligation will perhaps be less evaded than it is, if decree-holders understand that they stand to lose something by not certifying a payment or adjustment, at any rate before the execution of a decree becomes time-barred. The contrary view, that a decree-holder can certify at the last moment and still get the benefit of section 20 of the Limitation Act, would practically make Order XXI, rule 2 (1), a dead letter, unless and until it suited the decree-holder to certify a payment for his own benefit. But this is plainly opposed to the whole object of that rule, which is intended for the protection of the judgment-debtor and not for the decree-holder's benefit.

To apply the remarks made in *Venkaji v. Shidramapa* (9), the case, no doubt, is one of hardship, so far as appellant cannot now execute his decree, but the hardship has arisen from his neglect to comply with the provisions of a statutory law which we should be straining and not giving effect to, if we allowed this appeal. It must, therefore, be dismissed with costs.

Appeal dismissed.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 593 OF 1907.

June 17, 1908.

Present:—Mr. Justice Rampini, Acting Chief Justice and Mr. Justice Ryves.

TARAKISHORE CHOWDHURY—

PLAINTIFF—APPELLANT

versus

NABIN CHANDRA KARMOKAR AND

OTHERS—DEFENDANTS—RESPONDENTS.

Ejectment—Lakheraj (tenure, protected—Thak map, entry in, 60 years old, admissible in evidence—Lakheraj, existing from Permanent Settlement, not incumbrance to be annulled—Regulation XIX of 1795, s. 6, construction of—Tenures of insignificant area—Presumption.

Where the purchaser at a revenue sale brings a suit to eject the defendants from the lands held by

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them, and it is found that the said defendants have been holding 3 *cottahs* and 7 *dhurs* as a *lakheraj* tenure from a time before the Permanent Settlement out of 7 *cottahs* 7 *dhurs* and 7 *powas*, the total area of the land in dispute:

Held, that the plaintiff is entitled to eject the defendants from the remaining 4 *cottahs* and 7 *powas* of land, in respect of which the defendants are obviously trespassers. [p. 51, col. 2.]

An entry in the *thak* map made about 60 years ago is admissible in evidence. [p. 54, col. 2.]

Maharaja Jagadindra Nath Roy Bahadur v. Secretary of State for India in Council, 7 C. W. N. 193 (P. C.); 30 I. A. 44; 5 Bom. L. R. 1; 30 C. 291; *Abdul Hamid Mian v. Kiran Chandra Roy*, 7 C.W.N. 849, referred to.

Secretary of State for India in Council v. Fazal Ali, 18 C. 234, distinguished.

In 1793 the Government resumed all classes of invalid tenures but it did not think it necessary to resume *lakheraj* tenures of insignificant area:

Held, that that being so, the lower Appellate Court was entitled to presume that the disputed land was one of those tenures of insignificant area, which the Government did not think it worth while to resume, and, therefore, to hold that the defendant's tenure was one dependent upon the estate of which it was a part. [p. 55, col. 1.]

Appeal against the decree of the Additional Subordinate Judge of Dacca, dated the 12th December 1906, modifying that of the Munsif, Dacca, dated the 26th September 1905.

Babu Sarat Chandra Basak, for the Appellant.

Babus Mahendra Nath Ray and Krishna Prosad Sarbadhikari, for the Respondents.

JUDGMENT.—This appeal arises out of a suit brought by the purchaser at a revenue sale to eject the defendants from the lands held by them. The area of the land in dispute in this suit is about 7 *cottahs* 7 *dhurs* and 7 *powas*. The defendants have been found by the lower Appellate Court to hold 3 *cottahs* and 7 *dhurs* as a *lakheraj* tenure from a time before the Permanent Settlement. It has, therefore, held that the plaintiff is not entitled to eject them. The learned Subordinate Judge, however, has stated that the claim for *khass* possession by the plaintiff and for the ejectment of defendants is dismissed.

The plaintiff appeals and on his behalf it has been argued (1) that as the learned Judge has found that only 3 *cottahs* 7 *dhurs* was the area of the defendants' *lakheraj* tenure, the plaintiff is, therefore, entitled to a decree for *khass* possession of the remaining 4 *cottahs* 7 *powas*; (2) that the finding of the Subordinate Judge as to the 3 *cottahs* 7 *dhurs*

being a *lakheraj* tenure is wrong; (3) that the entry in the *thak* map is not admissible in evidence; and (4) that the lower Appellate Court has misconstrued section 6 of Regulation XIX of 1793.

We think that the first of these pleas must prevail. The defendants are in occupation of 7 *cottahs* 7 *dhurs* and 7 *powas* of land. The lower Appellate Court has found that the defendants are protected to the extent of 3 *cottahs* and 7 *dhurs*. Therefore, the plaintiff is decidedly entitled to eject the defendants from the remaining 4 *cottahs* and 7 *powas* of land in respect of which the defendants are obviously trespassers. We must, therefore, modify the decree of the lower Appellate Court to this extent with costs in proportion.

We see no reason, however, to interfere with the findings of the lower Appellate Court as regards the 3 *cottahs* 7 *dhurs* of land which the Subordinate Judge has held to constitute a *lakheraj* tenure existing from before the Permanent Settlement. The learned Pleader for the appellant contends that the finding has been wrongly arrived at because the entry in the *thak* map is not admissible in evidence. The *thak* map was made in 1856-57, that is, about 60 years ago. That entry is, in our opinion, admissible in evidence. This has been pointed out in several cases, namely, in the cases of *Maharaja Jagadindra Nath Roy Bahadur v. Secretary of State for India in Council* (1) and *Abdul Hamid Mian v. Kiran Chandra Roy* (2). The learned Pleader for the appellant relies upon the case of *Secretary of State for India in Council v. Fazal Ali* (3). But that case has been discussed and distinguished in the case of *Abdul Hamid Mian v. Kiran Chandra Roy* (2). The entry in the map was, therefore, admissible in evidence and was good evidence of possession and the lower Appellate Court was justified in presuming that the *lakheraj* tenure existed from before the Permanent Settlement. This being so, the defendants cannot be ejected from this land, because it is not an incumbrance which the plaintiff can annul. The learned Pleader for the appellant maintains that the lower Appellate Court has misconstrued the pro-

(1) 7 C. W. N. 193 (P. C.); 30 I. A. 44; 5 Bom. L. R. 1; 30 C. 291.

(2) 7 C. W. N. 849.

(3) 18 C. 234.

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visions of section 6 of Regulation XIX of 1793. We, however, do not think that he has done so. In 1793 the Government resumed all classes of invalid tenures but it did not think it necessary to resume *lakheraj* tenures of insignificant area. That being so, the lower Appellate Court was entitled to presume that the disputed land was one of those tenures of insignificant area, which the Government did not think it worth while to resume and, therefore, to hold that the defendants' tenure is a tenure dependent upon the estate of which it is a part. We, therefore, see no reason to interfere with the decree of the lower Appellate Court as regards 3 *cottahs* 7 *powas* of land and accordingly affirm it to this extent. As regards 4 *cottahs* 7 *dhurs*, as already mentioned, we decree the appeal with costs in proportion.

Appeal partly allowed.

PRIVY COUNCIL.

APPEAL FROM THE CALCUTTA HIGH COURT.

February 9, 1915.

Present:—Lord Shaw, Sir George Farwell,
Sir John Edge and Mr. Ameer Ali.

Raja RAMKANAI SINGH DEB
DARPASHAHA and ANOTHER—PLAINTIFFS
—APPELLANTS

versus

MATHEWSON and OTHERS—DEFENDANTS
—RESPONDENTS.

Chota Nagpur Encumbered Estates Act (VI of 1876), s. 17, as amended by Act (V of 1884), and r. 16 of the rules framed thereunder—Putni lease, grant of, by manager—Sanction by Commissioner—Final lease not sanctioned by Commissioner—Validity of lease—Term in sanction order that money should be advanced before particular date—Breach, if invalidates transaction—Successors of debtor, if can assail transaction on ground of non-observance of condition—Sanction of putni to one person—Putni granted to another—Difference in persona, if affects validity.

Section 17 of the Chota Nagpur Encumbered Estates Act, VI of 1876, as amended by Act V of 1884 and rule 16 of the rules framed thereunder, which require the sanction of the Commissioner as regards leases of immoveable property belonging to owners incapacitated thereunder for terms over four years, do not lay down that in cases in which it is affirmatively established that a transaction itself in all its essential particulars has obtained the sanction of the Commissioner and in which it is requisite that the transaction be carried into effect by the preparation

of the appropriate deeds, the document ultimately prepared should again be submitted for sanction. [p. 57, col. 1.]

Quere:—Whether a sanction given to the grant of a *putni* in favour of R. W. and Company could validate a grant in pursuance thereof in favour of R. W. and Company Ltd., as being to a different *persona* and whether a change in the lessee or *putnidar* ought to be treated as a change in essentials? [p. 57, col. 2.]

Appeal from the decree and judgment of the Calcutta High Court, dated the 28th April 1910, affirming those of the Subordinate Judge of Manbhum, dated the 25th November 1907.

FACTS.—The suit was for a declaration that a *putni* lease, dated 29th June 1890, was *ultra vires* and invalid as containing terms not intended to be contained therein and as not being sanctioned by the Commissioner as required by law, inasmuch as it related to an encumbered estate governed by the Chota Nagpur Encumbered Estates Act VI of 1876, and the rules framed thereunder, and by Act V of 1884. The Courts below upheld the *putni*. The plaintiff, thereupon, appealed to His Majesty in Council.

Messrs. *Uppjohn, K. C.*, and *Dunne*, for the Appellants:—The *putni* is *ultra vires* and not binding on the appellant, as the intention of the parties was that the *ijara* of 27th February 1883 was to be the basis thereof but was really in excess of it. Further the *putni* is illegal, inasmuch as it has not been sanctioned by the Commissioner as required by the Chota Nagpur Encumbered Estates Act, VI of 1876, as amended by Act V of 1884, section 17 and rule 16 framed under the powers vested under section 19. The case of *Gulabsingh v. Gokuldas* (1) is distinguishable, inasmuch as there the sanction of the executive head of a Province was required and it could not be expected that he would go into details. Further the sanction is to R. Watson & Co. and the *putni* is granted to quite a different *persona*, viz., R. Watson & Co., Ltd. It being also a condition precedent that the *salami* payable under the *putni* was to be paid before the end of March 1890, the *putni* is invalid as the *salami* was paid only in June 1890. The breach could not be waived.

Mr. *DeGruyther, K. C.* (with *Sir W. Garth*), for the Respondents, being called on only as (1) 19 Ind. Cas. 521; 17 C. L. J. 619; 17 C. W. N. 918; 15 Bom. L. R. 613; (1913) M. W. N. 542; 14 M. L. T. 55; 9 N. L. R. 117; 40 C. 784; 25 M. L. J. 179; 40 I. A. 117.

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to whether the *putni* that was granted was the same as that sanctioned by the Commissioner, referred to the evidence in support thereof.

Mr. Upjohn, K. C., replied.

JUDGMENT.

LORD SHAW.—This is an appeal from a judgment and decree of the High Court of Bengal, dated the 28th April 1910, affirming a judgment and decree of the Subordinate Judge of Manbhum, dated the 25th November 1907, dismissing the suit with costs. The main object of the suit was to obtain a declaration of the nullity of a *putni* lease, dated the 29th June 1890. The other demands in the plaint were consequential upon such a declaration of nullity being obtained. The only question argued in the appeal was whether the *putni* lease was *ultra vires* and invalid.

The facts are briefly these. The first appellant, the plaintiff, is the son and successor of the late Raja Broja Kishore Singh Deb Darpashaha, the owner of the Barabhum Estate. In 1883 the Raja borrowed Rs. 60,000 from Messrs. Robert Watson and Company on a mortgage of his estate, and on 27th February of that year he executed an *ijara* lease in their favour. This lease contained a condition that if the Company should desire to take a *putni* lease of such portions of 84½ villages as were treated in the *ijara* as *ghatwali* lands, the Raja would grant such a *putni* on certain terms. On 8th March 1885 this *putni* was granted. Four years thereafter, *viz.*, on 6th March 1889, the affairs of the Raja being deeply embarrassed, the estate was placed under the protection of Government by virtue of the Chota Nagpur Encumbered Estates Act, 1876.

There were apparently considerable difficulties in arranging for the liquidation of the debts. After negotiations it was agreed that the remaining portions excluded from Messrs. Watson and Company's former *putni* lease should be demised to these creditors for a sum of Rs. 30,000. Their Lordships have considered the documents and have no hesitation whatsoever in accepting the view that the true, and, in fact, only meaning of the transaction was that expressed in the Commissioner of Chota Nagpur's letter of the 20th February 1890, in which he sanctioned "the proposal to grant them a *putni*

lease of the 84½ villages excluded from the present *putni*."

The elements of the transaction being thus settled and the amount of the premium arranged, what remained to be done was to have the actual deed drawn up and executed. This was done. It has been argued before the Board that the *putni* lease which was sanctioned was to be a lease containing the terms of the *ijara* lease. The Board cannot assent. These two contracts are essentially different in character, the latter being of a temporary character, containing provisions and reservations suitable to a lease for a short duration. Their Lordships have no hesitation in accepting the judgment of the High Court which is thus expressed on this point:—

"The fact that the Raja had granted a previous *putni* lease was known to the Commissioner, and was, in fact, referred to in his sanction. * * * It is * * * reasonable to assume that the Commissioner understood its character when he was asked to sanction a similar *putni*. It would have been inconvenient that the subsequent *putni* should be on any different terms from the first, because, as pointed out in the course of the correspondence, the proposed new *putni* was in respect of villages which were scattered about in the area covered by the earlier *putni*, and the object of the second *putni* was to round up the estate. I do not think, therefore, that this ground has been made out."

Apart from the point just dealt with, the *putni* lease actually granted is now challenged. The grounds of challenge may be compendiously and conveniently stated as follows:—

(1) It is said that the sanction was, upon a sound construction of the letter of 20th February 1890, merely a sanction of a proposal to grant a *putni*. Their Lordships think the objection to be trivial. This proposal had been made, it had been accepted, a contract was accordingly completed on the subject, and it was that contract so completed that was sanctioned.

(2) It was said that the sanction contained the clause "provided that the amount be paid before the end of March 1890." In the course of carrying out the bargain some delay, not very great, occurred. There was an exchange of views as to the actual word-

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ing of the draft *putni*, but the document was finally settled by both parties, and on the 25th June 1890, Messrs. Watson and Company paid the *salami* of Rs. 30,000 to the official manager of the estate, *viz.*, the Deputy Commissioner. This being done, it does not appear to their Lordships that it would have been open thereafter for a challenge to be made, even by the Deputy Commissioner himself, or for the Commissioner's sanction to have been withdrawn. *A fortiori* there appears no ground for sustaining such a challenge when put forward after a considerable lapse of years on behalf of the successor of the debtor.

(3) The last objection is of a two-fold character. It is urged that the sanction of the Commissioner, being a statutory requisite in virtue of the Chota Nagpur Encumbered Estates Act of 1876, of the rules thereunder, and of the Act of the Governor-General, V of 1884, such sanction was not given to the final and actual *putni* lease itself. This depends upon a construction, especially, of rule 16, which is in the following terms:—

"The power to lease under section 17 of the Act shall be subject to the following provision:—'No lease shall be given for any term exceeding three years without the sanction of the Deputy Commissioner, or exceeding four years without the sanction of the Commissioner.'"

Upon this point their Lordships are of opinion that when it is affirmatively established that a transaction itself in all its essential particulars has obtained the sanction of the Commissioner, and when it is requisite that the transaction be carried into effect by the preparation of the appropriate deeds, a challenge merely on the ground that the document ultimately prepared had not been submitted for sanction cannot be sustained. In administrative and departmental action it must necessarily be the case that formal details may have to be entered upon in order to carry into practical effect, and put into legal shape, the arrangement to which sanction was adhibited. The first head of this objection accordingly fails. And it was further urged that in any view the transaction which was sanctioned was a transaction of a grant of a *putni* lease to Robert Watson and Company, in other words, to a firm of individual men and not to Robert Watson and Company, Limited, *v.e.*, a

different and incorporated *persona*. This demands careful consideration. There is this to be said for the objection, that the *persona* in the latter case is different from the *persona* in the former, and that a change in the lessee or *putnidar* ought to be treated as a change in essentials. It may be added that a *putni* lease of land, an agreement of an important and wide-reaching character, might demand separate consideration, and point to a different conclusion when this essential was altered. Questions might arise, and difficulties suggest themselves, with regard to a limited Company against whom legal remedies at law might not be the same as in the case of individuals, and public and administrative considerations might come into play operative either in the way of restriction or refusal on account of a change in *persona* in the lessee. In the opinion of their Lordships, it is not necessary to pronounce any judgment upon this point in the present case. For, their Lordships are of opinion that when the negotiators in the course of correspondence mentioned in their letters Robert Watson and Company, they did in fact mean and were perfectly understood to mean Robert Watson and Company, Limited, the fact of the incorporation of the limited concern being well known; and, indeed, one of the principal documents of the case is the petition, dated 14th May 1889, being the petition of Messrs. Robert Watson and Company, Limited, filing the account of the money due to them. It may be true that the limited concern is a different one from the previous and unincorporated firm, but in the language of the judgment of the High Court:

"The misdescription does not, under the ordinary principle applicable to such matters, affect the validity of the sanction or the lease. Though there was such a misdescription, it is perfectly clear what was intended by the sanction, and that it was intended that the lease should be given and taken by the persons who are properly described as Messrs. Robert Watson and Co., Limited."

A point was taken to the effect that the *putni* transaction could not be held to have been ratified, seeing that it had not specifically taken into account the existence of *khoorpoosh* or maintenance rights over the property sold. These could in no view have been affected, for the simple reason that the interests of third parties properly secured over

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the properties were in no respect prejudiced. And as to the further point that in the event of the discontinuance of these rights a certain reversion would follow to the *zemindar*, their Lordships are of opinion that this reversionary right not being in fact embraced within the grant, no prejudice to any such rights has occurred. The point accordingly fails.

Their Lordships are of opinion that the judgments of the Court, below are correct, and they will humbly advise His Majesty that the appeal be dismissed with costs.

Appeal dismissed.

Solicitors for the Appellants: Messrs. Theodore Bell & Co.

Solicitors for the Respondents: Messrs. Burton Yeates and Hart.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL NO. 2312 OF 1911.

March 27, 1913.

Present:—Justice Sir Asutosh Mookerjee, Kt., and Mr. Justice Beachcroft.

SITANATH PANDA—DEFENDANT APPELLANT
versus

HARA NARAIN MAHAPATRA—

PLAINTIFF RESPONDENT.

Bengal Tenancy Act (VIII of 1885), ss. 20, 21, 105, 116, scope of—Fair and equitable rent, settlement of—Non-occupancy raiyat—Tenant, status of—Lease by certificated guardian, without sanction of District Judge, if valid.

Where the plaintiff got a lease for a term of six years from the mother of the defendant in 1895 while the latter was an infant, and it was contended in 1910 that this lease was not binding upon the defendant, inasmuch as his mother, though his certificated guardian, had not obtained the sanction of the District Judge.

Held, that the lease was merely voidable at the instance of the defendant but that no question could now arise as to the avoidance of the lease as the plaintiff had been allowed to hold over ever since 1910. [p. 58, col. 2.]

Where the plaintiff was allowed to hold over after the expiry of the original term of the lease and occupies the agricultural land for a period of nine years in a district to which sections 20 and 21 of the Bengal Tenancy Act were, before the grant of the lease, extended:

Held, (1) that the plaintiff acquired the status of a non-occupancy *raiya*, and that this status could not be retrospectively affected by the subsequent extension to the district of section 116 of the Bengal Tenancy Act; [p. 59, col. 1.]

(2) that the plaintiff was a non-occupancy *raiya* under the defendant and was entitled to have fair

rent assessed under section 105 of the Bengal Tenancy Act. [p. 59, col. 1.]

Brahmanunda Mahapatra v. Arjun Raut, 1 C. L. J. 310 and *Rafiuddin Mahomed v. Iswar Raut*, 20 Ind. Cas. 394; 17 C. L. J. 555, followed.

Appeal against the decree of the Special Judge of Cuttack, dated the 2nd March 1911, affirming that of the Settlement Officer of Cuttack, dated the 1st August 1910.

Babus *Provas Chunder Mitter* and *Surendra Madhub Mullick*, for the Appellant.

Babu *Surendra Nath Ghosal*, for the Respondent.

JUDGMENT.—This is an appeal on behalf of the landlord-defendant in a suit commenced by the tenant-respondent under section 105 of the Bengal Tenancy Act for settlement of fair rent. The landlord defended the suit on the allegation that the plaintiff was not his tenant. It was established, however, that in 1895 the plaintiff got a lease for a term of six years, from the mother of the defendant while the latter was an infant. It has been argued that this lease was not binding upon the appellant; inasmuch as his mother, though his certificated guardian, had not obtained the sanction of the District Judge. This contention is of no assistance to the appellant, because even if it be assumed—as the matter has not been investigated—that the lease had not been sanctioned by the District Judge, it was merely voidable at the instance of the defendant. No question, however, can now arise as to the avoidance of the lease. The original term of the lease has expired, and the plaintiff has been allowed to hold over ever since 1901. Even if the lease had been for five years or for a shorter period, and the plaintiff had held over after the expiry of the term, as he has done, he would have by this time acquired the status that he has actually attained. The real question in controversy consequently is, what is the status of the plaintiff in view of the provisions of the Bengal Tenancy Act? Upon that matter, there is no room for controversy. On the 10th December 1891, that is, six years before the grant of the lease to the plaintiff, sections 20 and 21 of the Bengal Tenancy Act were extended to the district in which the disputed land is situate. The result of that extension was to make section 6 of Act X of 1859 inapplicable, as laid down by this Court in the case of *Brahmanunda*

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Mahapatra v. Arjun Raut (1), which was accepted as good law in *Rafiuddin Mahomed v. Iswar Raut* (2). It was not till the 21st August 1906 that section 116 of the Bengal Tenancy Act was extended to this district. In the interval the plaintiff had been in occupation for a period of nine years and had acquired the status of a non-occupancy *raiyyat*. That status could not obviously be retrospectively affected by the subsequent extension of section 116. The plaintiff is thus a non-occupancy *raiyyat* under the defendant and is entitled to have fair rent assessed under section 105 of the Bengal Tenancy Act. The decree of the Special Judge must consequently be affirmed and this appeal dismissed with costs. We assess the hearing fee at one gold *mohur*.

Appeal dismissed.

(1) 1 C. L. J. 310.

(2) 20 Ind. Cas. 394; 17 C. L. J. 585.

PRIVY COUNCIL.

APPEAL FROM THE BOMBAY HIGH COURT.

February 25, 1915.

Present:—Lord Dunedin, Lord Shaw,
Sir George Farwell, Sir John Edge and
Mr. Ameer Ali.

Raja Bahadur MOTILAL SHIVLAL—
DEFENDANT—APPELLANT

versus

THE BOMBAY COTTON MANUFACTURING COMPANY, LTD.—PLAINTIFFS
—RESPONDENTS.

Company—Manager or Managing Director, power of, to purchase liability of stranger or partner.

The Manager or Managing Director of a Mill Company has no implied authority to purchase on behalf of his Mill the liability of a stranger and still less that of its own Manager or Manager's partner in a private transaction of his own. [p. 61, col. 1.]

Appeal from the decree and judgment of the Bombay High Court, dated 20th August 1912, affirming those of Beaman, J., dated 4th March 1912, in the exercise of the ordinary original civil jurisdiction of the said Court.

FACTS.—The plaintiffs-respondents sued the defendant-appellant, a money-lender, to recover a certain sum of money which, it was alleged, was paid by the plaintiff Company on the 21st April 1909 to the defendant under circumstances which entitled the plaintiff Company to recover it as money had and received. The

plaintiffs pleaded that the defendant obtained the payment of the sum from them by a fraudulent scheme concocted by his *munim*, Dani, and Dwarkadas Dharamsey, one of the agents of the Company, or that the payment of the sum was obtained from the plaintiffs without consideration.

The defendant denied the alleged fraud and want of consideration; and pleaded that the sum of money paid to him by the plaintiff company was in re-payment of a loan which, Dwarkadas had represented was required for the use of the plaintiff Company.

The issues material for the purpose of this report were as follows:—

(1) Whether a fraudulent contrivance was devised by J. Dani, the *munim* of defendant, and Dwarkadas Dharamsey to secure to the defendant the re-payment of Rs. 50,000 as alleged in paragraph 5 of the plaint.

(2) Whether a payment of Rs. 50,000 by the plaintiffs to defendant on 27th April 1909 was caused to be made by Dwarkadas Dharamsey and was procured by J. Dani fraudulently as alleged in paragraph 7 of the plaint?

(3) Whether defendant obtained payment of the said sum of Rs. 50,000 odd by fraud of his agent and whether he is responsible for the same, as alleged in paragraph 9 of the plaint?

(4) Whether the defendant obtained payment of the said sum from the plaintiff Company without consideration, as alleged in paragraph 9 of the plaint?

Beaman, J., who tried the case, found on all the issues in the affirmative, and decreed the suit with costs. The Court of Appeal (Scott, C. J., and Chandavarkar, J.) affirmed this decree. The material part of their judgment was as follows:—

“That the onus lies upon the defendant appears from the following passage in Smith's *Mercantile Law*, Volume I, 11th Edition, page 35: ‘The following statement of the Law, from earlier editions of the work, has received high judicial sanction. The unexplained fact that a partnership security has been received from one of the partners in discharge of a separate claim against himself is a badge of fraud, or of such palpable negligence as amounts to fraud, which it is incumbent on the party who so took the

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security to remove, by showing either that the partner from whom he received it acted under the authority of the rest or at least that he himself had reason to believe so. Later authorities, however, appear to regard the issue that arises in circumstances of this nature being not one of fraud, but simply as one of authority. The onus, however, remains the same. The party alleging the fraud or the authority must establish it; and, in our opinion, this statement of the law with regard to the partnership dealings is equally applicable to circumstances such as we have here, where transactions are effected by the Agents of the Company and it is sought to bind the Company by their sayings and doings.

"There being, then, no proof that Dani had good reason to believe that Dwarkadas in this matter was acting on behalf of the plaintiff Company, the only alternative which remains open to the defendant is to show that there was a valid and binding novation effected by Dwarkadas Dharamsey on the 14th April by which the liability of Purshotam Jiwandas was transferred with the consent of the Company to the plaintiffs. There is, however, no evidence that Dwarkadas had any authority on behalf of the Company to accept for them a liability which had been taken upon himself by Purshotam, one of the Agents. The defendant has been unable to show by reference to the Company's books or to his own that the Company got any benefit from the loan of Rs. 50,000 on the 13th February. The transaction, if we hold the representation of Vallabh not to be proved, was a transaction simply between the defendant and Dwarkadas Dharamsey, and in the absence of evidence of authority to effect a novation we could not saddle the liability for the transaction upon the plaintiff Company."

The defendant, thereupon, appealed to His Majesty in Council.

Sir Robert Finlay, K. C., Messrs. *Brown and Raikes*, for the Appellant:—The receipt for the amount was signed by the Secretaries, Treasurers and Agents of the plaintiff Company, which must be held bound thereby.

[*LORD DUNEDIN*.—The appellant has to show affirmatively that the Company authorised the agents to borrow the money.

The mere fact that the agents had signed the receipt does not prove such authority.]

It was not disputed that the agents had full power to execute in the ordinary course such receipts.

Messrs. *Upjohn, K. C.*, and *Dunne*, for the Respondents, were not called upon.

JUDGMENT.

SIR GEORGE FARWELL.—This is an appeal from a judgment and decree, dated 20th August 1912, of the High Court of Bombay, affirming a judgment and decree of the High Court in its original jurisdiction, made on 4th March 1912.

In 1909, the date of the transactions in question in this appeal, the appellant was a banker and money-lender in Bombay, having as his business Manager there one Dani. At the same time the respondent Company had as its Secretaries, Treasurers and Agents the firm of *Jiwandas & Co.*, consisting of two partners, Dwarkadas Dharamsey and Purshotam, and Dwarkadas was also Agent and Managing Director of the *Tricundas Mills Company* and the *Lakmidas Mills Company*; both of these Companies were then quite insolvent, while the respondents were perfectly solvent.

On the 13th February 1909, Dwarkadas applied to Dani for a loan to himself or either of the two mills of Rs. 50,000; Dani refused to make the advance to Dwarkadas but agreed to make it to Purshotam, and accordingly, on a receipt signed by Purshotam for Rs. 50,000 bearing interest at 8 per cent., Dani, on behalf of the respondents, paid the sum of Rs. 50,000 to Dwarkadas, who at once applied it for his own use and benefit by reducing his own indebtedness to the *Tricundas Mills*. On due date, the 14th April 1909, Dani, by his son, applied for payment to Purshotam who referred him to Dwarkadas. Dwarkadas was quite unable to pay, and thereupon Dani, Dwarkadas and Purshotam prepared a number of documents and paper entries in the books of the respondent Company and the *Tricundas Company* for the fraudulent purpose of transferring the liability to pay the amount due on the receipt from Purshotam and the *Tricundas Company* to the solvent respondent Company. A receipt for Rs. 50,666-10-8 was signed by Purshotam on behalf of the respondents and was given to Dani in discharge to the bill

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then due, and entries were made in their books by Dwarkadas and Purshotam, crediting the said sum to the appellant as received from him and debiting Rs. 68,666-10-8, which included this Rs. 50,666-10-8. Various other entries were made in the books of the Tricundas Mills and in those of Dwarkadas and of the respondents, but both Courts below agree in regarding them as fraudulent and there is no question left for their Lordships' consideration except that of authority of the respondents' agents. It is said that the liability of Purshotam was duly transferred to the respondents by Dwarkadas as their agent. Their Lordships, however, are of opinion that Dwarkadas had no such authority: it is not suggested that he had express authority, and the Manager or Managing Director of a Mill Company has no implied authority to purchase on behalf of his mill the liability of a stranger and still less of their own Manager or Manager's partner in a private transaction of his own.

Their Lordships will humbly advise His Majesty that this appeal be dismissed with costs.

Appeal dismissed.

Solicitors for the Appellant: Messrs. Latteys and Hart.

Solicitors for the Respondents: Messrs. T. L. Wilson & Co.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 1104 OF 1912.

April 15, 1915.

Present:—Mr. Justice Richardson and Mr. Justice Mullick:

NABOGHAN BADHAI AND OTHERS—
DEFENDANTS—APPELLANTS

versus

RAGHU NATH BABU AND OTHERS—
PLAINTIFFS—RESPONDENTS.

Central Provinces Land Revenue Act (XVIII of 1881), ss. 68, 72, 83, 120, 152 (b), scope of—Record of Rights, entry made in correctness of—Civil Court, jurisdiction of—Limitation Act (IX of 1908), Sch. I, Arts. 14, 120, applicability of—Deputy Commissioner, power of, to give effect to decree.

A suit under section 83 of the Central Provinces Land Revenue Act is governed by Article 120, and not by Article 14, of the Schedule to the Limitation Act, 1908. [p. 62, col. 2.]

Where a dispute related to an entry made by a Settlement Officer in a Record of Rights prepared under Chapter VI of the Central Provinces Land Revenue Act and the appellants were described as *shikmi gaontias* or permanent tenants under the plaintiffs, who were the *gaontias* of the village, and a suit was instituted by the plaintiffs under section 83 of the Land Revenue Act to have the entry amended so that the appellants might be described as mortgagees and not as permanent tenants:

Held, that the Settlement Officer acted either under section 69 or section 72 of the Act in deciding the question between the parties or in making the disputed entry in the Record of Rights, and that under section 83, the Civil Court had jurisdiction to review his decision or the entry. [p. 63, col. 1.]

The provision of section 120 shows that a suit under section 83 is in the nature of a declaratory suit and that in spite of the express provisions of the section, a Civil Court can only declare that an entry is erroneous and how it should be amended, but it cannot execute its decree by bringing the Record of Rights into Court and altering it. The decree has to be taken to the Deputy Commissioner. This conclusion is confirmed by section 152, clause (b), which deprives the Civil Court of jurisdiction over certain matters including correction of entries or revision of records under sections 120, 121 and 122. [p. 62, col. 2.]

Faki Gulam Mohidin v. Sajnak, 18 B. 244, referred to. *Agin Bindh v. Mohan Bikram Shah*, 30 C. 20 at p. 27; 7 C. W. N. 314 and *Parbati Nath v. Rajmohun Dutt*, 29 C. 367; 6 C. W. N. 92, referred to.

Appeal against the decision of the District Judge of Sambalpur, dated the 13th February 1912, affirming that of the Subordinate Judge, Sambalpur, dated the 13th September 1911.

Babus Sarat Chandra Roy Chowdhury and Dharendra Krishna Ray (for Babu Gobinda Chandra Chakravarty), for the Appellants.

Babu Satis Chandra Ghose, for the Respondents.

JUDGMENT.

RICHARDSON, J.—This is an appeal from the decree of the District Judge of Sambalpur, confirming the decree of the Subordinate Judge of the same district.

The land in dispute is situated in the District of Sambalpur and in matters pertaining to the land revenue is governed by the Central Provinces Land Revenue Act (XVIII of 1881). The dispute relates to an entry made in a Record of Rights prepared under Chapter VI of that Act. The entry describes the appellants as *shikmi gaontias* or permanent tenants under the plaintiffs, who are the *gaontias* of the village. At this stage of the litigation it is very properly conceded that if it is open to the plaintiffs to

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contest the correctness of the entry, the entry is wrong, the lease granting the appellants a permanent tenancy having been judicially set aside. On the other hand it is not denied that the appellants are entitled to possession as mortgagees. In substance, therefore, the plaintiffs seek to have the entry amended so that the appellants may be described as mortgagees and not as permanent tenants.

The suit was instituted by the plaintiffs and dealt with by the Courts below as a suit under section 83 of the Land Revenue Act. On that footing the principal question which arises is, whether a suit under section 83 is subject, as regards limitation, to Article 14 or to Article 120 of the Schedule of the Limitation Act. Article 14 applies "to suits to set aside any act or order of an officer of Government in his official capacity" and the period of limitation provided is one year from the date of the act or order. Under the omnibus Article 120 the period of limitation is six years from the time when the right to sue accrues. Section 83 enables a suit to be brought to have entries in the Record of Rights relating to certain specific matters "cancelled or amended." We are not concerned with the rest of the enabling clause or with the two provisos. For the appellants it is contended that an entry in a Record of Rights is an "act" or "order" of a Government officer and that as section 83 in effect authorises the Civil Court to set aside such act or order in certain cases, the present suit, if it falls within the section, must be governed by Article 14. The argument is directed to the distinction suggested by reported cases between a power on the part of the Civil Court to make a decree which is merely declaratory of the plaintiff's rights and a mere basis for further proceedings before some Revenue or other officer and a power to make a decree which positively sets aside and nullifies something which an officer of Government has done. In illustration reference may be made to *Agin Bindh v. Mohan Bikram Shah* (1) and *Parbati Nath v. Rajmohun Dutt* (2). The appellants would have it that the decrees made

below are decrees of the latter class, and if it be assumed that the disputed entry is an "act" or "order" which has been set aside, the language of section 83 lends some colour to the contentions advanced. But section 83 must be read, in my opinion, as the lower Courts have read it, with sections 120 and 152. The Record of Rights in question has been made over to the Deputy Commissioner and section 120 gives the Deputy Commissioner power in such case to correct any entry on certain grounds of which one is the following:—

"(b) that by a decree in a suit brought under section 83, it has been declared to be erroneous."

This provision shows that a suit under section 83 is in the nature of a declaratory suit and that though the section speaks of a suit under it as a suit to have an entry cancelled or amended, the Civil Court can only declare that the entry is erroneous and how it should be amended, but cannot execute its decree by bringing the Record of Rights into Court and altering it. The decree has to be taken to the Deputy Commissioner. This conclusion is confirmed by section 152, clause (b), which deprives the Civil Court of jurisdiction over certain matters including "12) correction of entries or revision of records under sections 120, 121 and 122."

No case precisely in point was cited at the Bar, but perhaps the most in point is that of *Faki Ghulam Mohidin v. Sajnak* (3). In my opinion the suit is not governed by Article 14 but by Article 120 and is within time.

A further point however was taken before us. It was not taken in the Courts below but as it raises a question of jurisdiction we have to notice it. It is now suggested that the suit is not within section 83 at all and that the Civil Courts had no jurisdiction. Under section 83 a Civil Court has jurisdiction in respect of entries as to any matter referred to in section 78. Section 78 again relates back to a number of sections of which sections 68 and 72 may be mentioned. Section 68 directs the Settlement officer to ascertain the persons who are in possession as proprietors of each *mahal*. "By defini-

(1) 30 C. 20 at p. 27; 7 C. W. N. 314.

(2) 29 C. 367; 6 C. W. N. 92.

(3) 18 B. 244.

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tion the word 'proprietor' includes for most purposes a 'gaontia' [section 4 clause 8 (a)], and is also to 'be deemed to include an assignee of proprietary rights' (Explanation II of section 4 A). An "inferior proprietor is not, as such, a tenant" (section 4, clause 14). Now, if a permanent tenure-holder such as a *shikmi gaontia* is in respect of his tenants a proprietor, though, it may be, an inferior proprietor, the question whether the defendants are in possession as permanent tenure-holders or merely as mortgagees, is apparently within the scope of section 68. It seems reasonable *prima facie* that the section should extend to the ascertainment of the character of the proprietary possession and the language seems sufficiently wide to admit of a construction which would bring such a question within its scope. Under section 72, again, "the Settlement Officer is to ascertain and record for each *mahal* the status of all tenants occupying land therein, the lands respectively held by them, the conditions on which they respectively hold such lands, and the rents (if any) payable by them respectively." Under this section the question whether a particular person is or is not a tenant is a question which must be open to the Settlement Officer in connection with the entries which the section 72 requires to be made. The determination of that question is a necessary preliminary. If, therefore, a permanent tenure-holder is *qua* the superior landlord a "tenant," the Settlement officer had jurisdiction to decide for the purpose of the preparation of the Record of Rights whether the defendants could properly lay claim to such a status. The conclusion is that in deciding the question between the parties or in making the disputed entry in the Record of Rights the Settlement Officer acted either under section 68 or section 72 and his decision, or the entry, was open to review by the Civil Courts under the terms of section 83. The contention on the contrary urged for the first time in this Court, therefore, fails.

The decrees of the Courts below are in a proper declaratory form and in the result this appeal must be dismissed with costs.

MULLICK, J.—I agree.

Appeal dismissed.

MADRAS HIGH COURT.

ORIGINAL SIDE APPEAL No. 33
OF 1914.

February 12, 1915.

Present:—Mr. Justice Sadasiva Aiyar and
Mr. Justice Napier.

A. VARADARAJULU CHETTY—

DEFENDANT—APPELLANT—

versus

A. RAJAMMA—PLAINTIFF—RESPONDENT.

Executors—Suits, inter se, of devastavit, if maintainable in India—English Common Law Rule against maintainability, if applies to Indian Courts—Forms of action, if exist in India.

Unlike in England, there are no forms of action within one of which every suit must be brought in Indian Courts and consequently the rule of English Common Law which forbids an action of *devastavit* being brought by one executor against another, has no application to India. [p. 64, col. 1.]

In the absence of any direction in the testator's Will, an executor is not entitled to lend money without security to another executor. [p. 64, col. 1.]

Appeal from the judgment of the Hon'ble Mr. Justice Sankaran Nair, dated the 2nd of March 1914, passed in the exercise of the ordinary original civil jurisdiction.

FACTS.—By his last Will and testament one Purushothama Chetty appointed the plaintiff and the defendant and one Nalam Venkataratnam as his executrix and executors respectively, and appointed the plaintiff also as his legatee. The plaintiff and the defendant both joined in taking out Probate of the Will. The defendant mismanaged the property and lent a sum of Rs. 8,500 to Nalam Venkataratnam without any security whatever. The latter having become insolvent, the plaintiff sued the defendant for a *devastavit*. His Lordship Mr. Justice Sankaran Nair, who heard the case sitting on the original side, held that the defendant was liable to account for the sum of Rs. 8,500 lent out to Nalam Venkataratnam and gave the necessary directions for the filing of accounts, etc. Against the said decision, defendant appealed to the High Court.

Mr. A. Krishnaswami Iyer, for Mr. K. Srinivasa Iyengar (with Messrs Venkatasubba Rao and Radhakrishnayya), for the Appellant:—The action sounds as an action of *devastavit*. Such an action is not maintainable by one executor against another. The Will authorises the lending of money without security.

KHIRODA SUNDARI DASÍ v. NABIN CHANDRA SAHA.

In any view the plaintiff is jointly liable with the defendant as she had consented to the loan.

Mr. C. P. Ramaswami Iyer, for the Respondent:—The rule of English Law forbidding actions by executors, *inter se*, is based upon the peculiar procedure of that law as regards forms of action within which every suit must be brought. The freedom of litigants in India is not circumscribed by any such forms of action. The Will does not empower the executor to lend without security. There is no ground raised as to the plaintiff's consent to the loan and further that point has been specially reserved by the learned trial Judge.

JUDGMENT.

SADASIVA AIYAR, J.—The appellant, 1st defendant, is one of the two executors who took out the Probate, Exhibit A, and accepted the office of executor. The testator's name is Purushothama Chetty. The plaintiff is the other executor who took out Probate A third executor, Nalam Venkataratnam, is an insolvent and it does not appear that he joined in the Probate. The learned trial Judge held the 1st defendant liable to account to the estate in respect of a sum of Rs. 8,500 (eight thousand five hundred rupees) which belonged to the estate and which he lent out to the third executor. The Judge directed the 1st defendant to file the necessary accounts and also gave the usual further directions. The first contention in appeal (if I understood it right) is that one executor cannot file an action at common law, according to English practice, against another executor, that the present action is an action of *devastavit*, which is a common law action, and hence that this suit must be dismissed.

The short answer is that there are no forms of action within one of which every suit must be brought in Indian Courts and that the records show that this action was brought on behalf of the estate for establishing all necessary reliefs for the benefit of the estate.

Then it is contended that the 1st defendant was entitled to lend the money without security to Nalam Venkataratnam. A perusal of the testator's Will clearly shows that this contention also is untenable.

Lastly, it is argued that, in any event, the plaintiff is jointly liable with the 1st defendant, as she consented to the loan made to Nalam Venkataratnam. In the first place this is not stated as one of the grounds of appeal in the appeal memorandum, which only says that because the plaintiff was wrong-doer herself, she could not call upon the 1st defendant to answer. In the next place, the learned Judge says: "It is unnecessary for me to determine at *this stage* whether the plaintiff consented to it or not." I have, therefore, no doubt that the questions whether the plaintiff consented to the making of the loan to Nalam Venkataratnam, and if so, whether she is jointly liable with the 1st defendant for the loss incurred by the estate or even whether she, as executor-legatee, is liable in a greater degree than the 1st defendant—all these questions were left to be decided in later stages of the suit, and we must presume that the final decree in the suit would have been passed after a consideration of these points.

I would, therefore, dismiss the present appeal with costs.

NAPIER, J.—I concur.

Appeal dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM ORDER NO. 69 OF 1913.

April 8, 1915.

Present:—Justice Sir Asutosh Mookerjee, Kt., and Mr. Justice Newbould.

KHIRODA SUNDARI DASÍ AND ANOTHER
—DEFENDANTS—APPELLANTS

versus

NABIN CHANDRA SAHA—

PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. V, r. 17, scope of—Summons, service of, upon purdanashin lady, how effected—Court, power of, to direct service otherwise—Registered notice.

Under the provisions of rule 17 of Order V of the Code of Civil Procedure, a valid service is effected when the serving officer affixes a copy of the summons on the outer door or some other conspicuous

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part of the house in which a lady ordinarily resides, in case she is a *pardanashin* lady and is not able to accept service personally, and has no agent empowered to accept service on her behalf and has also no adult male member in her family upon whom service may be effected. [p. 66, col. 1.]

Where, either by reason of the custom of the country or for any other reason, it is impossible for the serving officer to obtain access to the person to be served, the case may, without undue stretch of language, be held to be covered by the description, "where the defendant cannot be found by the serving officer." [p. 66, col. 2.]

Carter v. Youngs, (1877) 42 N. R. Sup. Ct. (10 Jones and S.) 169 and *MacCarthy v. MacCarthy*, (1879) 16 Hun. N. Y. 546, referred to.

Le Grand v. Fairall, (1892) 86 Iowa 211; 58 N. W. 115, distinguished.

It is open to a Court, even where there has been a technical compliance with the provisions of rule 17 to order service in another mode, if the Court thinks fit to do so, in the interests of justice. The Court may, in a case of this description, direct the issue of summons to *pardanashin* ladies by means of notice sent by registered post, so that the cover may, in due course, reach the lady herself. [p. 67, col. 1.]

Appeal against an order of the Subordinate Judge of Dacca, dated the 20th January 1913.

Dr. Rash Behary Ghose and Babu Upendra Lal Roy, for the Appellants.

Dr. Sarat Chunder Basak, for the Respondent.

JUDGMENT.—This appeal is directed against an order of refusal of the Court below to set aside an *ex parte* decree. The respondent instituted a suit against several persons to recover a large sum of money alleged to be due from them as members of a partnership concern. The suit was decreed *ex parte*. Two of these defendants, now appellants before us, made an application to set aside that decree on the ground that they had no knowledge of the suit and could not appear to defend it. The Subordinate Judge has held that no case has been made out to justify an order to set aside the *ex parte* decree. On the present appeal, the decision of the Subordinate Judge has been assailed on two grounds; namely, *first*, that the summonses in the suit were not duly served upon the appellants; and, *secondly*, that they were, at any rate, prevented by sufficient cause from appearing when the suit was called on for hearing.

With regard to the first branch of the contention of the appellants, it is necessary to

bear in mind that they are *pardanashin* ladies and are the widows of one Peary Mohan Shah who is alleged to have been a member of the firm. According to their case, they lived separate from the other members of the family to which their husband belonged, and neither their husband nor they themselves had any concern with the partnership. The return of the peon was to the effect that as they could not be found and as there was no authorised agent to receive summonses on their behalf, the copies of the summonses and plaint were affixed on the main gate of their dwelling house. The peon has been examined and his deposition in Court is substantially to the same effect. On behalf of the appellants, it has been contended that there was no valid service of summons upon them; and in support of this view, reliance has been placed upon the decision of the Judicial Committee in *Clark v. Rouplaul Mullick* (1). Our attention has also been invited to rules 12, 15, 17 and 20 of Order V of the Civil Procedure Code of 1908. Rule 12 provides that wherever it is practicable, service shall be made on the defendant in person, unless he has an agent empowered to accept service, in which case service on such agent shall be sufficient. In the case before us, it was not practicable to effect service on the appellants in person; as by the custom of the country, the serving officer could not obtain access to them; nor had they an agent empowered to accept service. Consequently it was impossible to comply with the requirements of rule 12. Rule 15 provides that where, in any suit, the defendant cannot be found and has no agent empowered to accept service of the summons on his behalf, service may be made on any adult male member of the family of the defendant who is residing with him. There has been considerable discussion at the Bar as to the meaning of the expression "where the defendant cannot be found" and we have been asked to determine whether the expression can be appropriately applied to a case where the serving officer is not able to obtain access to a *pardanashin* lady, who, it is known, resides in a particular house. We shall presently deal with this question in connection with rule 17. But, apart from this point, it is plain that rule 15 has no

(1) 2 M. I. A. 263; 3 Moo. P. C. 252; Morton 403; 1 Sar. P. C. J. 188; 18 E. R. 300; 13 E. R. 106; 1 Ind. Dec. (o. s.) 1189.

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application to the circumstances of the present case. The appellants had no agent empowered to accept service of summons on their behalf, nor was there any adult male member of their family who resided with them and could accept service on their behalf. We next come to rule 17 which is in these terms: "Where the defendant or his agent or such other person as aforesaid refuses to sign the acknowledgment, or where the serving officer, after using all due and reasonable diligence, cannot find the defendant, and there is no agent empowered to accept service of the summons on his behalf, nor any other person on whom service can be made, the serving officer shall affix a copy of the summons on the outer door or some other conspicuous part of the house in which the defendant ordinarily resides or carries on business or personally works for gain, and shall then return the original to the Court from which it was issued with a report endorsed thereon or annexed thereto stating that he has so affixed the copy, the circumstances under which he did so and the name and address of the person (if any) by whom the house was identified and in whose presence the copy was affixed." The service, in the case before us, was effected in accordance with rule 17, and the question for consideration is, whether that was valid service. The first portion of rule 17 clearly has no bearing upon the case before us. There was no refusal on the part of the appellants or their agent or any male member of their family to sign the acknowledgment; no question of refusal arises, till the serving officer has delivered or tendered a copy of the summons under rule 16 to the defendant personally or to his agent or other person competent to accept service on his behalf. The question consequently narrows down to this. Is this a case where the serving officer, after using all due and reasonable diligence, "could not find the defendant?" In our opinion, rule 17 is applicable to a case of the description now before us, where the serving officer is not able to obtain access to the *purdanashin* lady who has to be served and cannot deliver or tender a copy of the summons to her. There is no decision in Indian Courts directly in point, and the ruling of the Judicial Committee in *Clark v. Roupland Mullick* (1) is of no real assistance in the solution of this problem. In

the first place, the order given in that case was for service upon an agent of the lady concerned, in conformity with the provisions of sections 13 and 15 of Regulation III of 1803. In the second place, there is no special provision in the present Code of Civil Procedure for service of summons on *purdanashin* ladies as there was in the Regulation mentioned. In our opinion, where it is impossible for the serving officer to obtain access to the person to be served, either by reason of the custom of the country or for any other reason, the case may, without undue stretch of language, be held to be covered by the description "where defendant cannot be found by the serving officer." This view is in accord with the decision in *Carter v. Youngs* (2). The defendant was confined to his house with illness and his wife refused to permit the officer to have access to him. It was ruled that the case was one in which "the defendant could not be found," and substituted service was ordered. To the same effect is the decision in *MacCarthy v. MacCarthy* (3), where the father of the lady to be served would not allow her to appear before the serving officer. The case of *LeGrand v. Fairall* (4) is clearly distinguishable; there, the statutory provision required that service could be effected by leaving a copy of the summons only if the defendant could "not be found within the country of his residence"; the lady to be served was sick and the serving officer could not see her; it was ruled that the substituted service could not be allowed. We are not unmindful that this view of the law may in some instances render the service practically infructuous and defeat the very object of the service of summons upon the defendant, namely, to apprise him that a suit has been instituted against him in a Court of Justice: *Hope v. Hope* (5); *Kistler v. Tettmar* (6). The class of cases we have in view is of the description now before us, namely, where a *purdanashin* lady is not able to accept service personally, has no agent empowered to accept service on her behalf, and has also no adult male member in her

(2) (1877) 42 N. Y. Sup. Ct. (10 Jones and S.) 169.

(3) (1879) 16 Hun. N. Y. 546.

(4) (1892) 86 Iowa 211; 58 N. W. 115.

(5) (1854) 4 De G. M. and G. 328; 23 L. J. Ch. 682; 2 W. R. 698; 43 E. R. 534; 102 R. R. 146.

(6) (1905) 1 K. B. 39; 74 L. J. K. B. 1; 53 W. R. 230; 92 L. T. 36; 21 T. L. R. 24.

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family upon whom service may be effected. In such a case as this, valid service is effected under the provisions of rule 17 if the serving officer affixes a copy of the summons on the outer door or some other conspicuous part of the house in which the lady ordinarily resides, and yet the result may be that the person served is really never apprised of the suit. It is plain, however, that a narrow construction cannot be placed upon the terms of rule 17, so as to restrict their operation and to exclude cases clearly covered thereby. But it is worthy of note that there is no real danger of injustice, if the provisions of rule 19 are strictly carried out by the Court. That rule imposes upon the Court the duty to satisfy itself that service has been properly effected, and the Court is authorised either to declare that the summons has been duly served or order such service as it thinks fit. Consequently, it is open to the Court, even where there has been a technical compliance with the provisions of rule 17, to order service in another mode if the Court thinks fit to do so, in the interests of justice. The Court may, in a case of this description, direct the issue of summons to *purdanashin* ladies by means of notice sent by registered post, so that the cover may in due course reach the lady herself. In this view, we are of opinion that the case before us is covered by rule 17 and that as the requirements of that rule have been fulfilled, the appellants cannot succeed on the ground that the summonses were not duly served on them within the meaning of rule 13 of Order IX of the Code. With regard to the second branch of the contention of the appellants, namely, that they were prevented by sufficient cause from appearing when the suit was called on for hearing, it is material to state that they were examined on Commission, when they pledged their oath that they had no knowledge of the suit and consequently could not defend it. The respondent decree-holder seeks to meet this allegation by proof that the ladies must have known of the suit, as they appeared in Court through a Pleader to oppose his application for attachment before judgment. This contention is rested on a *vakalatnama* which purports to bear the signature of one of the appellants, Golap Sundari Dasi. It was also signed on behalf of the other appellant, Khiroda Sundari Dasi, by her officer Kamikhaya Ranjan Dutt. The decree-holder,

however, did not take steps in the Court below to prove what purports to be the signature of Golap Sundari Dasi on the *vakalatnama*; nor did he establish that Khiroda Sundari Dasi had authorised Kamikhaya Ranjan Dutt to sign the *vakalatnama* on her behalf. As the ladies were examined on Commission, it was a singular omission on the part of the decree-holder that the *vakalatnama* was not put to either of them. But even if this defect in proof had been remedied, the question would require investigation, under what circumstances and on what representation was the *vakalatnama* signed, and what information, if any, was received by the ladies in respect of the suit instituted against them. The evidence has not been directed to elucidate these vital points, and we have accordingly been pressed by the respondent to allow additional evidence to be taken at his instance at this stage. We are clearly of opinion that we should not accede to this request, as the respondent had ample opportunity to substantiate his case in the Court below. The position consequently is, that the respondent has failed to rebut the allegation on oath made by the ladies that they had no knowledge of the suit. The truth of their assertion appears extremely probable when we remember how the summons is said to have been served on them. There is further the significant circumstance that the ladies had successfully contended before Mr. Justice Fletcher in another proceeding that they were not partners of the firm; and there is considerable force in the argument that if they had been apprised of the proceedings in this suit, they would undoubtedly have repeated the defence which they had previously taken so effectively. The surrounding circumstances all point to the conclusion that the appellants never received actual intimation of the suit.

Finally, it has been argued on behalf of the respondent that as Kamikhaya Ranjan Dutt, an officer of Khiroda Sundari Dasi, was aware of the suit, the ladies had constructive notice thereof. No such contention was raised in the Court below and no foundation has been laid in the evidence for any possible ground on which constructive notice could be imputed to the appellants. We hold accordingly that the ladies have established that they had no knowledge of the suit and that they were prevented by sufficient cause from

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appearing when it was called on for hearing.

The result is that this appeal is allowed, the order of the Court below is discharged and the application to set aside the *ex parte* decree granted. Under the proviso to rule 13 of Order IX, we direct that the *ex parte* decree be set aside only as against the two ladies who are the appellants before us; the decree will stand as against the other defendants. The suit will be revived as against the present appellants only, and will be tried out on the merits as against them alone. They will have opportunity to file written statements and the case will be tried out in due course. The appellants are entitled to their costs of these proceedings both here and in the Court below. We assess the hearing fee in this Court at two gold mohurs.

Appeal allowed.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

REVENUE PETITION NO. 28 OF 1913-14
OF SULTANPUR DISTRICT.

August 8, 1914.

Present:—Mr. Tweedy, S. M.

DAL SINGH—PLAINTIFF—APPELLANT

versus

Musammat LIHAZUN NISA—DEFENDANT—
RESPONDENT.

Oudh Rent Act (XXII of 1886), s. 55—Notice of ejectment written in Kaithi and Urdu, validity of.

A notice of ejectment written in *Kaithi* and *Urdu* (and not in *Hindi* and *Urdu*) is good.

Appeal from the decree of the Commissioner, Lucknow, dated 26th November 1913, upholding the order of the Assistant Collector, Sitapur, dated 7th July 1913.

Babu *Hargobind Das*, for the Appellant.

FACTS.—The landlord issued a notice of ejectment against the tenant which was written in *Kaithi* and *Urdu*, and the tenant contested it on the ground that the notice was bad as it was not written in *Hindi* and *Urdu* as provided by section 55 of the *Oudh Rent Act*. The lower Court found that the figures used in *Hindi* and *Kaithi* were the same, that their alphabets, although somewhat different in character, were much akin to each other; that the *patwaris* in several villages keep their

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papers in *Kaithi* and many literate villagers know it, and that even if there was a defect in the notice, it was very petty and such as could not prejudice the tenant.

JUDGMENT.—There is nothing in this appeal. After hearing appellant's Counsel I dismiss the appeal. Respondent is not represented by Counsel and I give no costs.

Appeal dismissed.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEALS NO. 2539 AND 2698 TO
2707 OF 1912.

March 31, 1915.

Present:—Justice Sir Asutosh Mookerjee, Kt.,
and Mr. Justice Newbould.

N. vab SIR SALIMULLAH BAHADUR AND
OTHERS—PLAINTIFFS—APPELLANTS

versus

RAHENUDDI AND OTHERS—DEFENDANTS

—RESPONDENTS.

Bengal Tenancy Act (VIII of 1885), ss. 163, 164 (1), 165, object of—Tenure, sale of, effect of—Bid, if not sufficient to satisfy decree and costs—Sale, independent of value of bid.

The intention of the Legislature, as can be gathered from sections 163, 164 and 165 of the *Bengal Tenancy Act*, is to entitle a decree-holder, if he so desires, to proceed under section 165 in the event of the sale on the first notification not realising a sum sufficient to liquidate the amount of the decree and costs. [p. 70, col. 1.]

It is not obligatory upon him, however, in this contingency, to avail himself of the provisions of section 165; he may nevertheless be content with the sale under section 164 and if the sale is held under that section, the result described therein follows, *viz.*, the purchaser becomes entitled to annul all encumbrances other than registered and notified encumbrances, provided he follows the procedure prescribed in section 167. [p. 70, col. 1.]

The consequence of the sale does not depend upon the amount of the bid offered by the successful purchaser, it is independent of the value of the bid. [p. 70, col. 1.]

Section 165 was enacted solely for the benefit of the decree-holder; if the bid is not sufficient to satisfy his decree and costs, it entitles him to have the property sold, with power to annul all encumbrances, but it is not obligatory on him to adopt this extreme measure and he is not in peril if he decides not to pursue this special remedy. [p. 70, cols. 1 & 2.]

Banbihari Kapur v. Khetra Pal Singh Roy, 13 Ind. Cas. 785; 16 C. W. N. 259; 38 C. 923, distinguished and dissented from.

Appeals against the decree of the Subordinate Judge, Backergunj, dated the 20th July 1912, reversing those of the Munsif

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of Patuakhali, dated the 28th February 1912.

Babu Surendra Nath Guha, for the Appellants.

Babu Gumada Churn Sen, for the Respondents.

JUDGMENT.—This is an appeal by the plaintiffs in a suit for declaration of title to land and for recovery of possession thereof. The plaintiffs are the superior landlords of a *nim osut taluk*. The *talukdars* defaulted to pay rent, with the result that they were sued and a rent-decree was obtained against them on the 7th April 1909. On the 5th August 1909, the plaintiffs applied to execute the decree in accordance with the provisions of the Bengal Tenancy Act; five days later, an order was made for the simultaneous issue of the writ of attachment and the sale proclamation under sub-section (1) of section 162. The sale was held under sub-section (1) of section 164 on the 23rd September, when the decree-holders themselves purchased the defaulting tenure. The sale was confirmed in due course and symbolical delivery was made to the purchasers. They could not, however, obtain actual possession of the land, as they were resisted by the defendants who set up under-tenures in the property sold. The plaintiffs thereupon took proceedings under section 167 of the Bengal Tenancy Act and the requisite notices for the annulment of the alleged encumbrances were duly served. On the 18th April 1911, the plaintiffs commenced this action to eject the defendants. The Court of first instance found that the decree was for arrears of rent, that it had been executed in accordance with the provisions of the Bengal Tenancy Act, that at the sale held under sub-section (1) of section 164, the purchasers had acquired the tenure with power to annul the encumbrances thereon other than registered and notified encumbrances, and that steps had been taken in conformity with section 167 to annul the encumbrances set up by the defendants. In this view the Court decreed the suit. Upon appeal the Subordinate Judge has reversed that decision on the ground that the sale, though held under the Bengal Tenancy Act, operated only as a sale under the provisions of the Code of Civil Procedure, and that the decree-holders auction-purchasers, had acquired nothing beyond the right,

title and interest of the judgment-debtors. This decision is based on the ground that as the sum, realised at the sale, was not sufficient to liquidate the amount of the decree and costs, the sale must be decreed to have been held, not under sub-section (1) of section 164, but under the provisions of the Code of Civil Procedure. The Subordinate Judge, in this view, has dismissed the suit. On the present appeal, it has been argued on behalf of the plaintiffs that the view taken by the Subordinate Judge as to the effect of the sale held on the 23rd September 1909 is erroneous and that the purchaser at that sale acquired the defaulting tenure with power to amend all encumbrances other than registered and notified encumbrances. This view has been controverted by the respondents, on the authority of the decision in *Banbihari Kapur v. Khetra Pal Singh Roy* (1). It has been, indeed, broadly argued on their behalf that a sale in execution of a decree for arrears of rent operates as a sale under sub-section (1) of section 164, only if the sum realised at the sale is sufficient to liquidate the amount of the decree and costs. We feel no doubt that this contention is erroneous and is not supported by the provisions of the Bengal Tenancy Act.

Section 159 formulates the fundamental principle that where a tenure or holding is sold in execution of a decree for arrears due in respect thereof, the purchaser shall take subject to the interests defined as protected interests, but with power to annul the interests defined as encumbrances. Section 163 provides that when the decree-holder makes the application for execution mentioned in section 162, the Court, if it admits the application and orders execution of the decree as applied for, shall issue simultaneously the order of attachment and the proclamation required by rules 66 and 70 of Order XXI of the Civil Procedure Code. Sub-section (2) of section 163 lays down that the proclamation shall announce that the tenure or holding will first be put up to auction, subject to the registered and notified encumbrances, and will be sold subject to those encumbrances, if the sum bid is sufficient to liquidate the amount of

(1) 13 Ind. Cas. 785; 38 C. 923; 16 C. W. N. 259.

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the decree and costs, and, that, otherwise, it will, *if the decree-holder so desires*, be sold on a subsequent date of which due notice will be given, with power to annul all encumbrances. Sub-section (1) of section 164 provides that when a tenure has been advertised for sale under section 163, it shall be put up to auction, subject to registered and notified encumbrances; and if the bidding reaches a sum sufficient to liquidate the amount of the decree and costs including the costs of sale, the tenure shall be sold subject to such encumbrances. The respondents argue that if the bid does not reach a sum sufficient to liquidate the amount of the decree and costs, the sale, if concluded, operates only as a sale under the provisions of the Code of Civil Procedure, with the consequence that the purchaser acquires merely the right, title and interest of the judgment-debtor. We are clearly of opinion that this contention is not well-founded. If we were to accept the contention of the respondents, we would have to read into sub-section (1) words which are not to be found there. The intention of the Legislature, as can be gathered from sections 163, 164 and 165, is to entitle the decree-holder, *if he so desires*, to proceed under section 165 in the event of the sale on the first notification not realising a sum sufficient to liquidate the amount of the decree and costs. It is not obligatory upon him, however, in this contingency, to avail himself of the provisions of section 165; he may nevertheless be content with the sale under section 164; and if the sale is held under that section, the result described therein follows, namely, the purchaser becomes entitled to annul all encumbrances other than registered and notified encumbrances, provided he follows the procedure prescribed in section 167. The consequence of the sale does not depend upon the amount of the bid offered by the successful purchaser; it is independent of the value of the bid. It is obvious that section 165 was enacted solely for the benefit of the decree-holder; if the bid is not sufficient to satisfy his decree and costs, it entitles him to have the property sold, with power to annul all encumbrances; but it is not obligatory on him to adopt this extreme measure, and he is not in peril if he de-

cides not to pursue this special remedy. We have been pressed, however, to adopt the contrary view on the strength of some observations in the case of *Banbihari Kapur v. Khetra Pal Singh Roy* (1), which support the contention of the respondent. With all respect for the learned Judges who decided that case, we are unable to accept their view as a correct exposition of the law on the subject. But we do not think it necessary to refer the matter for decision to a Full Bench, because the observations mentioned were not necessary for the purpose of the decision of that case. It further appears that in that case the sale certificate stated that the purchaser had acquired merely the right, title and interest of the judgment-debtor, while in the case before us the sale certificate shows, on the face of it, that the purchaser acquired the defaulting tenure itself which had been brought to sale. In our opinion, the view taken by the Subordinate Judge cannot possibly be supported.

The result is that this appeal is allowed, the decree of the Subordinate Judge set aside and that of the Court of first instance restored. This order will carry costs both here and in the Court of Appeal below.

It is conceded that this judgment will govern the other appeals, *viz.*, Nos. 2698 to 2707 of 1912 and similar decrees will be drawn up in each case.

Let the records be sent down as soon as possible.

Appeals allowed.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1052 OF 1914.

July 8, 1915.

Present:—MR. Justice Chamier.

Seth CHAND MAL—PLAINTIFF—APPELLANT
versus

SARJU AND OTHERS—DEFENDANTS—
RESPONDENTS.

Mortgage—Occupancy-holding, mortgage of—Zemindar taking rent from mortgagee—Position of mortgagee—Ejectment—Agra Tenancy Act (II of 1901), s. 21.

In September 1901 an occupancy-tenant mortgaged his holding with possession. The zemindar accepted

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rent from the mortgagee. In 1911 the occupancy-tenant relinquished his holding:

Held, that the occupancy having come to an end, the mortgagee was neither an occupancy-tenant nor a mortgagee but a mere tenant of the *zemindar* and liable to be ejected.

Second appeal from the District Judge of Benares, dated April 24th, 1914.

The Hon'ble Mr. *Gokul Prasad*, for the Appellant.

Mr. *Kulindi Prasad*, for the Respondents.

JUDGMENT.—In this case the tenant of an occupancy holding executed a mortgage in favour of the defendants in September 1901, that is, after the passing of the present Tenancy Act. The mortgage was, therefore, invalid. The plaintiff, who is the *zemindar*, might have taken action under section 31 of the Tenancy Act, but he did not do so. He accepted rent from the so-called mortgagees for several years and he has now brought this suit to have them ejected from the holding. Meanwhile in 1911 the occupancy tenant relinquished his holding. According to the decisions of this Court the occupancy tenancy has come to an end. The defendants are certainly not occupancy tenants and it appears to me that they cannot call themselves mortgagees. In the events which have happened, it appears to me that the defendants are the tenants of the plaintiff and may be ejected by him. I was referred to two cases supposed to bear more or less on the present case, namely, *Ram Sarup v. Kishan Lal* (1) and *Brij Kumar Lal v. Sheo Kumar Missir* (2). Neither of these cases applies to the present case. The latter had to do with a mortgage made before the passing of the present Tenancy Act. In my opinion the decision of the Court of first instance was correct and should not have been disturbed. I allow this appeal, set aside the decree of the District Judge and restore the decree of the Court of first instance with costs here and in the lower Appellate Court.

Appeal allowed.

- (1) 4 A. L. J. 306; 29 A. 327; A. W. N. (1907) 76.
(2) 29 Ind. Cas. 215; 13 A. L. J. 649.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 66 OF 1911.

November 11, 1914.

Present:—Mr. Justice Chevis and
Mr. Justice Shadi Lal.

NIAMAT ALI AND OTHERS—PLAINTIFFS—
APPELLANTS

versus

SECRETARY OF STATE FOR INDIA

AND OTHERS—DEFENDANTS—RESPONDENTS.

Adverse possession—Sale of property of absconder under ss. 87 and 88 of Criminal Procedure Code—Vendee, rights of—Suit (by collaterals of absconder—Limitation Act (IX of 1908), Sch. I, Art. 144.

A sale under sections 87 and 88 of the Criminal Procedure Code, 1898, of the property of an absconding accused transfers only his personal rights and does not confer absolute ownership on the vendees. [p. 72, col. 1.]

Where, therefore, *H*, a village proprietor, murdered his wife in 1891 and absconded and his property was sold to the predecessors-in-interest of the defendants Nos. 2 to 7 and *H* was afterwards arrested, tried, convicted and hanged on 22nd September 1898:

Held, on a suit by his collaterals instituted on 22nd August 1908 for possession on the ground that the sale did not affect their reversionary rights, that the defendants' possession did not become adverse to the plaintiffs till after the death of *H* and the suit was, therefore, quite within time. [p. 73, col. 2.]

Roda v. Harnam, 18 P. R. 1895 (F. B.); *Sundar v. Salig Rqm*, 9 Ind. Cas. 300; 34 P. L. R. 1911; 33 P. W. R. 1911 (F. B.); 26 P. R. 1911; *Bejoy Chunder Banerjee v. Kally Prosonno Mookerjee*, 4 C. 327; 2 Shome L. R. 106, referred to.

Second appeal from the decree of the Divisional Judge, Gujranwala Division, at Lahore, dated the 25th November 1910.

Mr. *Badr-ud-Din Kureshi* and *Lala Radha Kishan*, for the Appellants.

Mr. *Broadway*, *Rai Bahadur Pandit Sheo Narain* and *Lala Shib Das*, for the Respondents.

JUDGMENT.—The plaintiffs, who are appellants in this Court, sued for possession of a plot of land belonging to one Hamida, and their suit has been dismissed by the learned Divisional Judge as barred by time under Article 144 of the Limitation Act. The question for the determination is whether the defendants have succeeded in proving that they had held the land adversely to the plaintiffs for twelve years prior to the institution of the suit. We have heard arguments on both sides, consulted the law bearing upon the issue before us, and have arrived at the conclusion that the bar of limitation has not been made out and that this appeal must succeed.

NIAMAT ALI v. SECRETARY OF STATE.

The facts which are relevant to the question of limitation are simple and do not admit of any dispute.

Hamida, the original proprietor of the property, murdered his wife in 1891 and absconded during the Police investigation. Proceedings, under sections 87 and 88, Criminal Procedure Code, were thereupon taken against him and his estate was finally sold by the Court on the 8th October 1895 to certain persons who are now represented by defendants Nos. 2 to 7. The vendees paid the price on the 9th April 1896 and took possession of the property more than twelve years prior to the institution of the suit. Hamida was afterwards arrested, tried, convicted, and hanged on the 22nd September 1898.

In 1908 a Full Bench judgment of this Court, reported as *Sadhu Singh v. Secretary of State* (1), was published and the plaintiffs, who are collaterals of Hamida, instituted on the 22nd August 1908 the present suit, alleging on the strength of that judgment that, under the Customary Law of the Punjab, the sale of ancestral land made in 1895 must be regarded as having conveyed the rights of Hamida only and that, as those rights came to an end on his death in 1898, the sale did not prejudicially affect the right of inheritance of his reversioners.

This contention is undoubtedly borne out by the above-mentioned judgment and, whatever our view may be on the subject we are bound to follow the proposition of law laid down therein. We must, therefore, hold that the sale transferred only the personal rights of the convict and did not confer absolute ownership on the vendees. The question then arises, whether they have perfected their title by efflux of time.

The learned gentlemen who have argued the case before us for the parties, are agreed that the only provision of the Limitation Act applicable to the case is Article 144, and according to that Article the period of limitation begins to run from the date on which the possession of defendant becomes *adverse to plaintiff*. We have, therefore, to decide whether the defendants had held the land adversely to the plaintiffs for 12 years before the 22nd

(1) 18 P. R. 1908 (F. B.); 156 P. L. R. 1908; 19 P. W. R. 1908.

August 1908, the date on which the suit was instituted. It is clear that if the *terminus a quo* for adverse possession is the date of Hamida's death, the present suit is within time.

It is equally clear that if the defendant's possession is regarded as adverse from the date on which they obtained possession under the sale, the claim is barred by limitation. The issue is thus narrowed down to the determination of the date from which possession of the vendees should, under the law, be regarded as adverse *qua* the collaterals of Hamida.

The solution of the matter depends upon whether the possession of the defendants during the life-time of Hamida could be considered adverse to the latter's collaterals. We may say at once that it was certainly adverse to Hamida and if the plaintiffs in the present case derive their title to sue for possession from or through Hamida, then, by reason of the definition of the word "plaintiff" contained in section 2 of the Limitation Act, the present plaintiffs would be identified with Hamida and the possession which was adverse to him would be adverse to the plaintiffs.

But can it be said that the collaterals derive their title *to sue* for possession of ancestral land from or through the male proprietor who is for the time being in possession thereof? The answer to this question has been repeatedly given in the negative and it is only necessary to cite two Full Bench judgments in support of this view. In *Roda v. Harnam* (2) Mr. Justice Rivaz, speaking with respect to the right of a collateral to sue for possession of ancestral land alienated by the proprietor governed by Customary Law, made the following observations:—

"But does he derive his *right to sue* for possession from or through such person? In our opinion, he does not, inasmuch as his right to sue for possession, in spite of the last owner's act of alienation, is derived from no individual, but from the customary rule which places a restriction upon the owner's powers of disposition of ancestral property, and renders him liable to be controlled in that

(2) 18 P. R. 1895 (F. B.).

* LALTA PRASAD v. BARMHA DIN.

respect by his collateral heirs. Such a right never accrued to the alienor himself, and is, therefore, it seems to us, one that cannot be passed on to his successor. The "right to sue" for possession appears to us clearly to import something more than the right to possession, and a simple test appears to us to be this,—could the donor in his life-time have sued to recover possession of the property on grounds similar to those which are the foundation of the present plaintiff's claim? In our opinion, he clearly could not have done so, and we cannot, therefore, affirm that the plaintiff has derived his right to sue from the donor."

To the same effect is the judgment of the Full Bench in *Sundar v. Salig Ram* (3), where it was ruled that possession adverse to a reversioner entitled to possession of property after the death of a widow cannot be adverse to the reversioner next in succession, until after the former reversioner's death. The principle of that judgment appears to us to apply *a fortiori* to the present case in which the plaintiffs had no possible right to possession at the time of the alienation.

It has been pointed out by Mr. Justice Markby in the well-known judgment reported as *Bejoy Chunder Banerjee v. Kally Prosonno Mookerjee* (4), that adverse possession means "possession by a person holding the land, on his own behalf, of some person other than the true owner, the true owner having a right to immediate possession."

In the present case, the plaintiffs were, as stated above, not entitled to possession at the time of the sale and the vendees could not, therefore, be regarded as holding adversely to them. We are unable to accede to the contention that the involuntary sale of Hamida's land in 1895 had the effect of improving the position of the collaterals and giving them a right of immediate possession. No authority has been cited in support of it and the general principles of Customary Law are decidedly opposed to this proposition. The cases cited by the learned Counsel for the respondents do not apply to the present case inasmuch as, (3) 9 Ind. Cas. 309; 26 P. R. 1911 (F. B.); 34 P. L. R. 1911; 33 P. W. R. 1911.

(4) 4 C. 327; 2 Shome L. R. 106.

in those cases, the true owner was entitled to immediate possession and, therefore, possession in derogation of his rights was obviously adverse to him.

It follows from the above discussion that the period during which the vendees held adversely to Hamida cannot be availed of against the plaintiffs. The conclusion, therefore, at which we arrive, is that the Statute of Limitation began to run against them from the date of Hamida's death in 1898, when their right to possession accrued, that the adverse possession of the defendants which began in that year had not ripened into ownership on the date of the suit and that the claim is, therefore, within time. We accordingly accept the appeal, set aside the judgment and decree of the lower Appellate Court, and remand the case under Order XLI, rule 23, to that Court for decision on the merits. The Court-fee on the memorandum of appeal shall be refunded; other costs to be costs in the case.

Appeal accepted.

ODDH JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION PETITION No. 17 OF 1915.

January 21, 1915.

Present:—Mr. Lindsay, J. C., and

Mr. Kanhaiya Lal, A. J. C

LALTA PRASAD—DEFENDANT—APPLICANT
versus

BARMHA DIN AND OTHERS—PLAINTIFFS AND
OTHERS—DEFENDANTS—OPPOSITE PARTY.

Court-fee, insufficiency of, plea as to—Plaint, allegations in, value of—Court, duty of.

Where a plea is taken to the effect that the plaint is insufficiently stamped, all that a Court has to do is to see whether the Court-fee as paid is sufficient according to the various allegations contained in the plaint, and in doing so it does not decide that those allegations are true. [p. 74, col. 1.]

Tara Chand v. Afzal Beg, 13 Ind. Cns. 185; 34 A. 184; 8 A. L. J. 1329, referred to.

Application against the order of the Subordinate Judge, Sitapur, dated 2nd December 1914.

Mr. Mammohan Nath Chak, for the Applicant.

SRIKANGA CHARARIAR v. PRANATHARTHIHARA CHARARIAR.

JUDGMENT.—This is an application for revision of an order passed by the Subordinate Judge of Sitapur in a suit which was brought for partition of what was alleged to be joint family property. The plaint was filed on a ten rupees stamp, and a preliminary issue was raised by reason of the plea taken by the defendant to the effect that the plaint was insufficiently stamped and that the property being valued over Rs. 90,000 an *ad valorem* Court-fee was leviable. This preliminary issue has been decided by the Subordinate Judge in favour of the plaintiff. The view of the law taken by the Subordinate Judge and for which he cites various authorities, including a recent decision of the Allahabad High Court reported as *Tara Chand v. Afzal Beg* (1) is to the effect that for the purposes of determining the Court-fee in a suit all that has to be regarded is what is contained in the various allegations set out in the plaint. We do not understand the Subordinate Judge to have decided that those allegations are true. All that he has done is to find that on assuming them to be true, the Court-fee of Rs. 10 which the plaintiff paid on the plaint was sufficient. We agree with this view of the law. We find no reason for interference in this case. The application is rejected.

Application rejected.

(1) 13 Ind. Cas. 185; 34 A. 184; 8 A. L. J. 1329.

MADRAS HIGH COURT.

FIRST CIVIL APPEAL NO. 159 OF 1913.

July 21, 1915.

Present:—Sir John Wallis, Kt., Chief Justice,
and Mr. Justice Srinivasa Aiyangar.
TIRUMALAI TIRUPATI KOVIL
KANDADAI APPAN SRIRANGA
CHARIAR AND ANOTHER—PLAINTIFFS—
APPELLANTS

versus

TIRUMALAI TIRUPATI KOVIL
KANDADAI APPAN PRANATHARTHI-
HARA CHARIAR AND OTHERS—
DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 92—Suit to administer inam, when maintainable—Inam to benefit grantees not temple, effect of.

No suit lies under section 92 of the Code of Civil

Procedure to administer an *inam* granted to certain persons for the performance of the service of Acharyapurusha in a temple when no part of the *inam* was applicable to the temple but the whole of it was intended to benefit the grantees alone. [p. 75, col. 1.]

Appeal against the decree of the Court of the Subordinate Judge of North Arcot, in Original Suit No. 2 of 1912.

Messrs. T. Rangachariar and N. S. Rangasawmy Aiyangar, for the Appellants.

Messrs. A. Ramachandrier, T. V. Muthukrishna Aiyar and T. M. Krishnasawmy Aiyar, for the Respondents.

JUDGMENT.—This is a suit instituted by the plaintiffs under section 92 of the Code of Civil Procedure against defendants Nos. 1 to 4, in whose family the office of Acharyapurusha in the Tirumalai Tirupati temples is hereditary, and against their alienees, and prays for the removal of the defendants Nos. 1 to 4 from the office of trustees of the suit properties, for the appointment of new trustees, a declaration that the alienations of the suit properties by the defendants are void, and an order vesting them in the new trustees. The suit properties are *inams* confirmed to the defendants' family at the time of the *Inam* Settlement, and the original grant appears to have included the land itself as well as the revenue thereon. The *inam* registers state that they had been granted for service as Acharyapurusha in the Tirumalai Tirupati Devasthanam so long as the service should be rendered, and the title-deed, Exhibit B, acknowledges the title of the grantee to a *devadayam* or *pagoda* service *inam* "for the support of the *pagoda* called service of Acharyapurusha in the said temple." The words "the support of the *pagoda* called," which do not make very good sense, were probably part of the common form drawn up for the confirmation of *devadayam inam* and do not add anything to the nature of the grant which, as also appears from the register, was for the service called Acharyapurusha in the said temple and was confirmed so long as the conditions thereof should be duly performed. The defendants denied that the lands so granted are held by them as trustees and contended that the suit was not maintainable under section 92 of the Code of Civil Procedure. The Subordinate Judge held that the grant

* NAURANGA SINGH v. SHEORAJA.

was for the benefit of the grantees though possibly burdened with certain trusts to a slight extent, and dismissed the suit apparently on the ground that no sufficient case of breach of trust was made out. It was the practice of former rulers to provide for the support of temple officers by grants of this kind and great numbers of such grants exist not only in connection with this temple, as to which see Exhibit M, but also in connection with other temples throughout the country. Such *inams* are liable to be resumed under the conditions of the grant if the services provided for are not duly rendered; but it has never yet been suggested that the lands so granted are held by the grantees on trust for the temple which can be administered by the Court, or form the subject of a suit under section 92 of the Code of Civil Procedure.

According to the definition of a trust in the Trusts Act, which is equally applicable to a charitable trust unaffected by that Act, a trust is an obligation annexed to the ownership of property and arising out of a confidence reposed in and accepted by the owners for the benefit of another or of another and the owner. The main object of the grant in this case would appear to have been the support of the temple officer discharging the duty of Acharyapurusha in the Tirumalai temple and the *inam* title-deed does not state that any portion of the *inam* was applicable to the temple. We agree with the Subordinate Judge that the plaintiffs have failed to show that the grant was given, among other things, for the performance of festivals in the Nadamuni temple below the hill at Tirupati and that the property was held on trust for that temple, as well as for the grantee named. We also think the plaintiffs have failed to show that the property was held on trust for the grantee named and the Tirumalai temple. The fact that, as found by the Subordinate Judge, it is the practice of the defendants to expend small sums on the performance of festivals in the Tirumalai temple itself is not enough, in our opinion, to show that the original grant was made to the grantee for the benefit of the temple as well as the grantee. Reference was made to the provisions in Madras Act VIII of 1869 that nothing in the *inam* title-deed shall be

deemed to affect rights of holders or occupiers of lands from which any *inam* is derived or to affect the interests of any person other than the *inam*-holder named in the title-deed, and if it could be shown that under the original grant either of these temples had a beneficial interest in the land itself or even in the revenue thereon, that interest would not be affected by a title-deed issued to a third party in which they were not named, but that is not the case here. In the result, we think that in the circumstances the suit which was filed under section 92 of the Code of Civil Procedure fails and that the Subordinate Judge was right in dismissing it. The appeal is dismissed with costs.

Appeal dismissed.

ODDH JUDICIAL COMMISSIONER'S COURT.

EXECUTION OF DECREE APPEAL No. 45 OF 1914.
February 10, 1915.

Present: —Mr. Stuart, A. J. C.

NAURANG SINGH — APPLICANT—
APPELLANT

versus

Musammam SHEORAJA — OBJECTOR—
RESPONDENT.

Limitation Act (IX of 1908), s. 7—Execution of decree—Joint Hindu family manager's power of discharge—Minor members of family—Limitation.

The manager of a joint Hindu family has a right to execute a decree for his own benefit and that of the remaining members of the family and to give a valid discharge with respect to the execution of the decree, without their concurrence, even though they be minors; and if he fails to exercise such right time does nevertheless run against the minor members. [p. 76, col. 1.]

Mahableshwar Krishnapa v. Ramchandra Mangesh Kulkarni, 21 Ind. Cas. 350; 15 Bom. L. R. 882; 38 B. 94, referred to.

Appeal against the order of the District Judge, Rai Bareilly, dated 14th July 1914, upholding the order of the Munsif, Dalman, dated 7th April 1914.

Mirza Sami Ullah Beg, for the Appellant.

Sayed Zahur Ahmad, for the Respondent.

JUDGMENT. —The first point for decision is whether Shambhu Dayal Singh had a right to execute the decree for his own benefit and that of his minor brothers at the

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time that he made the application of 1908. I find that the objector asserted that Shambhu Dayal Singh was the manager of a joint Hindu family, of which he and his brothers were members, and that the other side, although it had an opportunity of denying this allegation, did not do so. There are other reasons also for finding that he was the manager of the family, and I decide that he was the manager and *karta* of a joint Hindu family, of which he and his minor brothers were members. He, therefore, had the right to execute the decree in 1908 both for his own benefit and that of his minor brothers. The execution of the decree was not an act which could possibly operate to the disadvantage of other members of the family, and, had he been able to execute the decree and obtain full satisfaction of the decretal amount, it is obvious that it would have been necessary for him to give a discharge to the judgment-debtor. Such a discharge would have been for the benefit of the other members of the family, and in those circumstances, I find that in 1908 Shambhu Dayal Singh had a right to give a valid discharge with respect to the execution of this decree without the concurrence of his minor brothers. My views to this effect are supported by a recent decision of the Bombay High Court in *Mahableshwar Krishnapa v. Ramchandra Mangesh Kulkarni* (1). Such being the case, time ran against all the decree-holders from a date preceding the date when execution was sought in 1908, and the present application is time-barred.

I, therefore, dismiss this appeal. The appellant will pay his own costs and those of the respondent.

Appeal dismissed.

(1) 21 Ind. Cas. 350; 15 Bom. L. R. 882; 38 B. 94.

MADRAS HIGH COURT.

CIVIL MISCELLANEOUS PETITION No. 2983
OF 1913.

April 29, 1915.

Present:—Mr. Justice Seshagiri Aiyar and
Mr. Justice Napier.

Sri RAJENDRA SINGH BAHU GARU—
PLAINTIFF—PETITIONER

versus

Sri Sri Sri VIKRAMA DEO GARU,
MAHARAJA OF JEYPORE

—DEFENDANT—RESPONDENT.

Agency Rules r. 10 cl. (2), r. 16—Divisional Assistant, power of—Agent, power of, to hear appeals from orders of Divisional Assistant.

A Divisional Assistant has, on a true construction of rule 10, clause (2), and rule 16 of the Agency Rules, power to decide cases referred to him for disposal by the Agent. [p. 76, col. 2.]

Under the rules the Agent has power to entertain and dispose of appeals preferred in such cases disposed of by the Divisional Assistant. [p. 76, col. 2.] A decree should not be given to the plaintiff in a suit on a promissory note merely on a comparison of handwriting when he himself does not go into the witness-box or give any other evidence. [p. 77, col. 1.]

Petition praying that in the circumstances stated therein the High Court will be pleased to direct the Agent to the Governor of Madras at Vizagapatam to review his judgment in Appeal Suit No. 3 of 1913, preferred against that of the Court of the Special Assistant Agent, Koraput Division, in Original Suit No. 15 of 1912.

Mr. T. Rangachariar, for the Petitioner.

Mr. B. Narasimha Rao, and the Hon'ble Mr. B. N. Sarma, for the Respondent.

JUDGMENT.—The suit was instituted in the Court of the Agent, as the amount claimed was Rs. 10,000 due under a promissory note executed by the predecessor-in-title of the defendant. The suit was referred by the Agent to the Divisional Assistant. It is clear from the language of clause 2 of rule 10 that the Divisional Assistant is to decide the case. Under rule 16, appeals lie from all cases disposed of by the Divisional Assistant to the Agent. There can be no doubt, on the language of rules 10 and 16, that the Divisional Assistant did dispose of the case referred to him. It is somewhat anomalous that the Agent should hear appeals from cases which he alone has power to entertain and which are beyond the pecuniary jurisdiction of the Divisional Assistants. The analogy of the Civil Courts Act in the Presidency is against such a

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procéduré. But we have to interpret the rules as we find them, however much we may consider that they should have been different. We must overrule Mr. Rangachariar's contention that the Agent had no power to hear the appeal.

Mr. Rangachariar strongly pressed upon us the fact that no orders were passed by the Divisional Assistant on the application of the plaintiff's Pleader to send for additional records and to examine fresh witnesses. A similar application was made to Mr. Duff's predecessor in September and he rejected it on the ground that it was put in too late. The application of the 9th January was presented during the hearing of the case and it must be taken that Mr. Duff saw no reason to differ from his predecessor that the application was not in time. A number of affidavits were filed on either side that during the hearing of the appeal the Agent was asked to remand the case to take the evidence which Mr. Duff should have taken. The affidavits are so contradictory that we do not think it safe to act upon any of them. We hold that there was no irregularity in this respect.

On the merits, the Agent has refused to believe the plaintiff's witnesses. He was largely influenced by the fact that the plaintiff did not go into the witness-box. We see no error in law in his having refused to base his decision solely on the comparison of handwriting. He has come to a definite conclusion on the facts and we see no ground for interfering with his decision.

We dismiss the petition with costs.

Petition dismissed.

ALLAHABAD HIGH COURT.

EXECUTION FIRST APPEAL No. 135 OF 1914.

May 27, 1915.

Present:—Mr. Justice Chamier and

Mr. Justice Piggott.

DAMODAR DAS AND OTHERS—JUDGMENT-DEBTORS —APPELLANTS

versus

BIRJ LAL—DECREE-HOLDER —RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XLV, r. 15—Order of Privy Council—"Execution," meaning of —Application for restoration of possession—Jurisdiction

—Printed judgment of Privy Council, if action can taken on without order in Council.

The word "execution" in Order XLV, rule 15, of the Code of Civil Procedure, is intended to cover execution of any kind, that is to say, it covers the case of restitution as well as the case of enforcement of a decree for possession or the like passed for the first time in the case on an appeal to His Majesty in Council and a person who desires to obtain execution of any kind, whether by way of rescitution or otherwise, must apply, in the first instance, to the Court indicated by rule 15. [p. 78, col. 2.]

No action can be taken only on the printed copy of a judgment of their Lordships of the Privy Council without proof that an order in Council has followed thereon. [p. 78, col. 2.]

Execution first appeal from a decree of the Subordinate Judge of Bareilly.

Mr. M. L. Agarwala, for the Appellant.

Dr. Satish Chandra Banerji (with him Mr. A. E. Ryves), for the Respondent.

JUDGMENT.—This appeal and the connected Appeals Nos. 246, 263, 264 and 359 of 1914 arise out of proceedings taken by Birj Lal, one of the parties to the case of *Birj Lal v. Musammat Inda Kunwar* (1), in connection with the order of His Majesty in Council in that case. As the report shows, there were two suits of which one (No. 62 of 1907) was brought by Inda Kuar for possession of a 10-*biswas* share in a village and the other (No. 63 of 1907) was brought by Het Ram and others for possession of the other 10-*biswas* share in the village. The Court of first instance in Suit No. 62 gave Inda Kuar a decree for a 2-*biswas* share on certain terms and dismissed her claim for the remaining 8 *biswas*. Suit No. 63 was dismissed by the Subordinate Judge. On appeal this Court passed decrees in favour of the plaintiffs in both suits. Birj Lal, a defendant in both suits, appealed to His Majesty in Council. The two appeals were consolidated in an order by His Majesty in Council dated February 9th, 1914. On March 13th, 1914, Birj Lal presented an application to the Court of first instance in Suit No. 62, praying that he might be restored to possession of the 10-*biswas* share pending the taking of certain accounts ordered by their Lordships of the Privy Council. In the same

(1) 23 Ind. Cas. 715; 36 A. 187; 26 N. L. J. 443; 18 C. W. N. 649; 12 A. L. J. 495; 19 C. L. J. 469; (*914) M. W. N. 405; 15 M. L. T. 395; 16 Bom. L. R. 352; 1 L. W. 794.

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suit he presented two applications for re-payment of costs which had been recovered from him by Inda Kuar and a third application, the nature of which need not be specified. In Suit No. 63 Birj Lal applied to the Subordinate Judge to restore him to the possession of the 10 *biswas* share, inasmuch as the suit of Het Ram and others had been dismissed by their Lordships of the Privy Council. Birj Lal presented with his application a printed copy of the judgment of their Lordships of the Privy Council containing their recommendation in the usual form as to the order which should be passed in the case. But he did not file any copy at all of the order in Council. His opponents at once objected that he was not entitled to apply to the Subordinate Judge without first presenting an application to this Court under Order XLV, rule 15, of the Code of Civil Procedure and they professed complete ignorance of the terms of the order of their Lordships of the Privy Council. They pleaded that the printed copy produced by Birj Lal could not be admitted in evidence and, even if admitted, could afford no justification for disturbing their possession. The Subordinate Judge threw out all their objections. Hence these appeals.

Order XLV, rule 15, provides that whoever desires to obtain execution of any order of His Majesty in Council shall apply by petition, accompanied by a certified copy of the decree passed or order made in appeal and sought to be executed, to the Court from which the appeal to His Majesty was preferred, and such Court is required to transmit the order of His Majesty in Council to the Court which passed the first decree appealed from, or to such other Court as His Majesty in Council by such order may direct, and shall (upon the application of either party) give such directions as may be required for the execution of the same. It is contended, *first*, that Order XLV, rule 15, does not apply at all to the case of a person who is entitled to restitution of the kind described in section 144 of the Code, and, *secondly*, that even if a person entitled to such restitution may make an application under Order XLV, rule 15, he is not obliged

to do so and he may go direct to the Court of first instance under section 144. We are unable to accept either of these contentions. It appears to us that in the absence of Order XLV, rule 15, there would be nothing to show what Court in India is to carry out an order of His Majesty in Council. We think that the word 'execution' in Order XLV, rule 15, is intended to cover execution of any kind, that is to say, that it covers the case of restitution as well as the case of enforcement of a decree for possession or the like passed for the first time in the case on an appeal to His Majesty in Council, and that a person who desires to obtain execution of any kind, whether by way of restitution or otherwise, must apply, in the first instance, to the Court indicated by rule 15. In the present case that was this Court. Further, we are of opinion that the Subordinate Judge was not entitled to take any action on the printed copy of the judgment of their Lordships of the Privy Council without proof that an order in Council had followed thereon; for what has to be enforced or executed is not the judgment or recommendation of their Lordships but the order in Council. The result is that Appeals Nos. 135, 263 and 264 are allowed and Birj Lal's applications are dismissed with costs in both Courts. Appeals Nos. 246 and 359 are dismissed with costs.

We have been informed that, since the disposal of the applications referred to above by the Subordinate Judge, an application was made by Inda Kuar to this Court under Order XLV, rule 15, Civil Procedure Code, and on her application the order of His Majesty in Council has been transmitted to the Court of the Subordinate Judge in order that it may be executed. We may point out that, as the order in Council has now reached the Court of the Subordinate Judge, it is open to all parties to these suits to apply to the Subordinate Judge for such relief as they may be entitled to without making any further application to this Court, under Order XLV, rule 15, of the Code of Civil Procedure.

Appeal decreed.

SENCHURAMA NAIDU v. ANNAPURANI AMMAL.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1181 OF 1913.

April 26, 1915.

Present:—Mr. Justice Sankaran Nair and
Mr. Justice Tyabji.

SENCHURAMA NAIDU, MINOR, BY NEXT
FRIEND, CHENGAMA NAIDU—DEFENDANT
No. 7—APPELLANT

versus

ANNAPURANI AMMAL—PLAINTIFF—
RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXII, r. 4 (2)—Defence open to legal representative as such—Alienation of family property by co-parcener—Suit for possession by alienee—Necessity.

It is open to the legal representative of a deceased defendant to raise a plea which could have been raised by the defendant himself, even though he had omitted to raise it specifically. [p. 79, col. 2.]

The plaintiff-respondent sued for possession of property sold to her by the appellant's father and it was contended that the alienation was for family purposes the money being required to defend a criminal case against the alienor.

Held, (1) that this by itself did not establish legal necessity, the evidence must also have shown that there was no other property by means of which he could have defended himself; [p. 79, col. 2.]

(2) that the Court should see whether at the time the suit was brought, if a partition of the property had been made between the members of the family, the plaintiff properties could have been allotted to the alienor without injustice to the other co-parceners or whether there was other sufficient property to be allotted to him equal in value to the property in suit and which could, therefore, be allotted to the plaintiff. [p. 80, col. 1.]

Second appeal against the decree of the District Court of Chingleput, in Appeal Suit No. 347 of 1910, preferred against that of the District Munsif of Poónamallee, in Original Suit No. 349 of 1909.

Mr. T. R. Ramachandra Aiyar, with him
Mr. T. R. Krishnaswamy Aiyar, for the
Appellant.

Mr. C. V. Ananthakrishna Aiyar, for the
Respondent.

This second appeal coming on for hearing on the 27th August 1914 and having stood over for consideration till the 4th September 1914, the Court delivered the following

JUDGMENT.—Mr. Ramachandra Aiyar on behalf of the 7th defendant, the appellant before us, contends that the plaintiff is not entitled to the possession of the properties which she claims under an alienation by the 2nd defendant, the

appellant's father. He argues that the plaintiff is only entitled to bring a suit for partition of all the properties which belong to the family of the 2nd defendant, and if the properties in suit are allotted to the 2nd defendant, she might be entitled to get them or she might be entitled to properties equal in value to the plaintiff properties out of the properties which might be allotted to the 2nd defendant. In reply it is contended on behalf of the respondent, the plaintiff, that as the 7th defendant, the appellant before us, was made a party only as the representative of the 2nd defendant, it is not open to the 7th defendant to raise any defence which is not appropriate to his representative character under Order XXII, rule 4, Civil Procedure Code, and as the 2nd defendant did not and could not raise this plea, it is not open to the 7th defendant to raise this contention. But we are of opinion that it was open to the 2nd defendant himself to raise the plea in this case that the sale, though binding on him to the extent of his share, is not binding upon his son, the 7th defendant, and it was, therefore, open to the 7th defendant to raise the same plea, though it is true that the 2nd defendant omitted to raise it specifically.

The next contention is that the alienation by the 2nd defendant was for family purposes. It is said that the money from the disputed sale was taken to defend a criminal case against the 2nd defendant. The Judge holds that there is good evidence that the 2nd defendant came into good property when he came of age and he squandered practically the whole within a few years and that this, therefore, negatives the plea of justifying necessity. This finding, in our opinion, is insufficient. The Judge does not find that at the time the 2nd defendant had to defend himself, if he had to do so, in the criminal case brought against him, there was family property out of which he could have defended himself. We must, therefore, ask for a finding on this point.

The Judge also finds that at the time the alienation was made there was other ancestral family property in the hands of the 2nd defendant, and it is quite possible

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that the plaint property might have been allotted to the share of the 2nd defendant if a partition had been asked for. The question is, whether, at the time the suit was brought, if a partition of the family properties had been made between the members of the family, the plaint properties might have been allotted to the 2nd defendant without injustice to the other co-parceners; or whether there was other sufficient property to be allotted to the 2nd defendant, equal in value to the properties now in suit and which might, therefore, be allotted to the plaintiff. On this question also there is no finding by the District Judge.

We, therefore, direct the District Judge to return findings on the following questions :—

1. Whether there was a criminal case against the 2nd defendant and whether he received the money from the vendee to defend himself in that criminal case;

2. whether it was necessary for him to raise this amount at that time;

3. if it was not necessary for him, whether the alienee acted *bona fide* and in good faith after making due inquiry;

4. at the time the suit was brought if a partition had been made between the members of the family, whether (a) the plaint properties or (b) properties of the same value might have been allotted to the share of the 2nd defendant.

The findings should be submitted within six weeks from this date, and seven days will be allowed for filing objections. Further evidence may be received.

In compliance with the order of this Court contained in the above judgment, the District Judge, Chingleput, submitted the following

FINDING.—The High Court has called for findings on the following four issues:—

(1) Whether there was a criminal case against the 2nd defendant and whether he received the money from the vendee to defend himself in that criminal case?

(2) Whether it was necessary for him to raise this amount at that time?

(3) If it was not necessary for him, whether the alienee acted *bona fide* and in good faith after making due inquiry?

(4) At the time the suit was brought, if a partition had been made between the members of the family, whether (a) the plaint properties or (b) properties of the same value might have been allotted to the share of the 2nd defendant?

2. Issues (1) and (2).—The allegation that the 2nd defendant spent a portion of the consideration under Exhibit B was not started by the plaintiff in the first instance. It was made for the first time during the remanded trial before the District Munsif by D. Ws. Nos. 2 and 3, apparently under the impression that such expenditure is illegal or immoral, and that the son of a Hindu father is not liable to pay a debt incurred for such a purpose. This suggestion appears to have been adopted in the course of argument by the plaintiff's Pleader, first in the District Munsif's Court and then on his behalf in the High Court, to show that the expenditure in connection with a criminal case is a perfectly legal purpose and that, therefore, the sale is valid and binding on the 7th defendant.

3. The evidence as to whether there was a criminal case against the 2nd defendant is most flimsy. D. Ws. Nos. 2 and 3 in the District Munsif's Court deposed that the 2nd defendant told them he had received money from the 1st defendant for expenses in connection with a criminal complaint against him and for such other purposes. Both these witnesses gave no details regarding the criminal case. When the case came up for trial on remand in this Court, both sides disclaimed the suggestion that there was a criminal case against the 2nd defendant and the only witness who refers to that point is D. W. No. 3 (already examined as D. W. No. 2 in the Munsif's Court). He says: "There was a case of assault in the name of Kanniah Naidu in the Poonamallee Magistrate's Court. I do not know how much he spent for it. It was a trivial case." Then he says that the 2nd defendant told him that it was thrown out. He adds that the case was such that it did not require the raising of money by selling property. In my opinion this story of a criminal case is a pure myth. I find, therefore, issues Nos. 1 and 2 in the negative.

4. Issue 3.—There is no evidence that the 1st defendant made any inquiries when

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he purchased the suit property from the 2nd defendant. I, therefore, find issue (3) in the negative.

5. *Issue 4.*—The 2nd defendant, as the adopted son of one Abbi Naidu, inherited lands in Nemum and Kuttambakkam villages to the extent of about 50 acres. The evidence adduced on behalf of the 7th defendant shows that the 2nd defendant sold from time to time lands in both these villages. For the 7th defendant it is contended that the sales were not for the benefit of the family. The 2nd defendant's father-in-law (D. W. No. 1 in this Court) says that the money was squandered away as the 2nd defendant was leading a life of dissipation, but he admits that he has no personal knowledge in the matter. The Vakil for the 7th defendant urges that, if a partition was effected on the date of suit, the lands sold away by the 2nd defendant prior to it, should be regarded as having fallen to his share; but in the absence of any specific evidence this contention cannot be upheld. The evidence on both sides tends to show that the 2nd defendant was in possession of about 20 acres besides a house worth about Rs. 1,500 on the date of suit. The witnesses do not agree as to the value of the lands, but I think the general effect of their evidence is that excluding the suit property, the lands and the house would be worth about Rs. 9,000 on the date of the suit.

6. It is next alleged on behalf of the 7th defendant that the 2nd defendant incurred debts which were not for the benefit of the family and that they should be debited against him in the partition. There can be no doubt that the 2nd defendant left a large amount of debt on the date of his death. Some of the debts have been partially discharged by his widow with the assistance of her father. Under Exhibit III, all the family properties have been mortgaged to raise a loan of Rs. 4,000 from D. W. No. 2 in this Court. Besides the debts recited in Exhibit III several promissory notes purporting to have been executed by the 2nd defendant have been produced on behalf of the 7th defendant, and it is said that they have been discharged either by cash payment or by execution of fresh promissory notes. It is contended on behalf of the 7th defendant that if the amount of these debts is deducted from Rs. 9,000, the total value of

the family properties exclusive of the suit property, a very small margin would be left for division between the father and the son and that, therefore, the suit property could not have been allotted to the 2nd defendant.

7. Exhibit III is as recent as 23rd September 1914, subsequent to the remand, and there is nothing to show that the debts recited in it are not binding on the 7th defendant. The first item of debt in Exhibit III is Rs. 1,464-2-0 to one Kondal Naidu and this is admitted by the plaintiff.

Item (2) is Rs. 800 to Chengama Naidu, the 2nd defendant's father-in-law. There is no document for it.

Item (3) This is long after date of suit and, therefore, cannot be taken into consideration.

Item (4). This is also long after date of suit.

Item (5) was incurred by the 7th defendant's mother, but a portion of it, Rs. 400, which was raised to discharge the debt due to one Kondal Naidu, must be taken into account.

Item (6) There is no document for it.

Item (7) consists of cash received by the 7th defendant. This, of course, is not a debt of the father. The valid items, therefore, are:—

Item (1) Rs. 1,464-2-0 and Rs. 400 out of item (5)—say roughly Rs. 2,000.

8. Regarding the promissory notes produced, only one witness gives evidence. They were produced at a late stage. They are Exhibits VI, VII, VIII and IX. It cannot be said that these have been proved. These debts are said to have been discharged, either by payment or by execution of fresh promissory notes. Some of these debts were time-barred, when fresh notes were executed. As to this, the 7th defendant's Vakil argues that on the date of suit, these promissory notes were not time-barred and, therefore, were enforceable against the 2nd defendant. Even allowing for these, I consider that this total indebtedness of the 2nd defendant was not more than Rs. 2,500 on the date of suit. If this is deducted from Rs. 9,000, the balance is Rs. 6,500. The suit property was worth on the date of suit, according to the evidence, about a thousand rupees. Therefore, if a partition was effected on the date of suit, the suit property might have been allotted

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to the 2nd defendant. I accordingly find issue (4) in the affirmative.

This second appeal coming on for final hearing after the return of the finding of the lower Appellate Court upon the issues referred by this Court for trial, the Court delivered the following

JUDGMENT.—We accept the findings and dismiss the second appeal with costs.

Appeal dismissed.

CALCUTTA HIGH COURT.
APPEAL FROM ORDER NO. 8 OF 1913.

May 26, 1914.

Present:—Justice Sir Asutosh Mookerjee, Kt.,
and Mr. Justice Beachcroft.

MADHU SARDAR—APPELLANT

versus

KHITISH CHANDRA BANERJEE—

RESPONDENT.

Provincial Insolvency Act (III of 1907), ss. 13, 16, 34
—Interim Receiver, appointment of, object of—Attachment of insolvent's property before adjudication, effect of—Creditor, right of.

In an insolvency case an order for the appointment of an interim Receiver of the property of the debtor is made for the protection of the estate of the debtor for the benefit of the entire body of creditors. [p. 82, col. 2.]

Ex parte Fox, In re Smith, (1886) 17 Q. B. D. 4; 55 L. J. Q. B. 228; 54 L. T. 308; 34 W. R. 535; 3 Morrell, 63, referred.

A creditor who had attached a sum due to the insolvent before the estate of the insolvent vested in the Receiver appointed after the adjudication order, is entitled to apply it exclusively in satisfaction of his claim. [p. 83, col. 1.]

Appeal against the order of the District Judge of 24-Perganas, dated September 30th, 1912.

Babu Brajendra Nath Chatterjee, for the Appellant.

JUDGMENT.—This appeal is directed against an order made in the course of a proceeding under the Provincial Insolvency Act. On the 1st August 1912, the respondent, Khitish Chandra Banerjee, applied to be adjudicated an insolvent. The order was made on the 30th September 1912. Meanwhile on the 2nd September 1912, the District Judge had appointed an interim Receiver under section 13, clause (2). Notice was issued at the same time to the Examiner of the Eastern Bengal State

Railway to pay into Court what was due from the Railway authorities to the insolvent. Before this intimation reached the Railway authorities, the sum in their hands, which had been attached in execution of a decree obtained by the appellant against the applicant in insolvency, was paid into the Court of the Munsif of Goalundo. The money has subsequently been transferred by the Goalundo Court to the Court of the District Judge of the 24-Perganas, and is now in the hands of the Receiver appointed after the adjudication order. The question in controversy is, whether the appellant, as a creditor who had attached this sum before the estate of the insolvent vested in the Receiver appointed after the adjudication order, is entitled to apply it exclusively in satisfaction of his claim. The answer must depend upon the effect of the order for the appointment of an interim Receiver.

Section 13, clause (2), of the Provincial Insolvency Act provides that the Court at the time when the insolvency petition is admitted or at any subsequent time before adjudication may, of its own motion or on the application of any creditor, make an order for the appointment of an interim Receiver of the property of the debtor or any part thereof. The object of the appointment is clear from the proviso to the section, in which it is stated that an order for the appointment of an interim Receiver shall not be made unless the Court is satisfied that the debtor, with intent to defeat or delay his creditors or to avoid any process of the Court, has absconded or has departed from the local limits of the jurisdiction of the Court or has failed to disclose or has concealed, destroyed, transferred, or removed from such limits any documents likely to be of any use to his creditors. It is plain that an order for the appointment of an interim Receiver of the property of the debtor is made for the protection of the estate of the debtor for the benefit of the entire body of creditors. At the stage when the *ad interim* Receiver is appointed, no question arises as to the distribution of the property of the debtor amongst the creditors or as to preference amongst them. This view is not opposed to the

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decision in *Ex parte Fox, In re Smith* (1). It was there held, with reference to the terms of section 40 of the Bankruptcy Act, 1883, (46 and 47 Vict. C. 52) that the period of four months before the receiving order, for which the wages or salary of any clerk or servant in respect of services rendered to the bankrupt is entitled to priority over all other debts, includes not merely the four months before the date of the receiving order but also the four months before the date of the order of appointment of an *interim* Receiver where such appointment has been made. It is plain from an examination of the judgment of Cave, J., that such construction was adopted with a view to afford protection to clerks and servants of the insolvent whom it was obviously the intention of the Bankruptcy Act to save. In our opinion, the money under attachment in execution of the decree obtained by the appellant against the applicant in insolvency is still available for the satisfaction of his claim. We may add that the appellant is also entitled to the benefit of clause (1) of section 34 of the Provincial Insolvency Act, which restricts the operation of section 16, clause (6), and is in the following terms: "Where execution of a decree has issued against the property of a debtor, no person shall be entitled to the benefit of the execution against the Receiver except in respect of assets realised in the course of execution by sale or otherwise before the date of the order of adjudication." In the present case, the sum in question had been realised before the date of the order of adjudication. It had in fact been transferred by the Railway authorities to the Goalundo Court where the execution proceedings initiated by the appellant were pending at the time. From this point of view, the appellant is exclusively entitled to the benefit of this money.

The result is that this appeal is allowed, and the order of the District Judge made on the 30th September 1912 set aside in so far as it affects the appellant. The appellant will be entitled to take this money in satisfaction of his decree. The money will be returned to the Goalundo Court in order that it may be paid out to the appellant and satisfaction entered on his decree.

Appeal allowed.

(1) (1886) 17 Q. B. D. 4; 55 L. J. Q. B. 288; 54 L. T. 207; 34 W. R. 535; 3 Morrell, 63.

CALCUTTA HIGH COURT.

APPEALS FROM APPELLATE DECREES NOS. 2548
AND 3830 OF 1913.

July 16, 1915.

Present:—Mr. Justice Woodroffe and
Mr. Justice Newbould.

BHATA RAM DAS—PLAINTIFF—APPELLANT
versus

KSHITISH CHANDRA LAHIRI AND

OTHERS—DEFENDANTS—RESPONDENTS.

Non-transferable holding, nature of, transferee of, if can sue landlord for possession—Deposit in Court, landlord's objection to—Estoppel, if can arise by following Court's order.

Where a tenant is upon his holding, which is not transferable by custom, his possession protects the party to whom he transfers a portion of his interest; but where the tenant is no longer on the land after the holding has been sold, his property becomes the property of the landlord. [p. 84, col. 1.]

A purchaser of a non-transferable holding can, after the holding has been sold and the original tenant is no longer on the land, be a party to a suit for recovery of possession from the landlord. [p. 84, col. 1.]

Where on an auction sale of a holding not transferable by custom, a transferee of that holding made a deposit to set aside the sale but the landlord objected and on the Court overruling the objection, the landlord withdrew the money:

Held, that this did not amount to an estoppel, since the landlord objected and acted in accordance with the order of the Court. [p. 84, col. 1.]

That there was no duty on the landlord to proceed by way of an appeal to have it established that the transferee had no right to make the deposit. [p. 84, col. 1.]

Appeals against the decrees of the District Judge, Rangpur, dated the 3rd of May 1913, confirming that of the Munsif of Nilphamari, dated the 25th of March 1912.

Babu Dharendra Nath Bagchi, for the Appellant.

Babus Sarat Chandra Roy Chowdhury and Satya Charan Sinha, for the Respondents.

JUDGMENT.—These two appeals, Nos. 2548 of 1913 and 3830 of 1913, may be heard together. The first appeal refers to a purchase of a part of a non-transferable holding and the second to a purchase of the whole of such holding. The landlord brought a suit for rent against the recorded tenants, the purchasers not having been recognised by him. In that suit he brought the property to sale, purchased it and took possession. Thereupon the purchasers of the part and of the whole of the holdings respectively brought two suits to recover possession, and

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the Court below held that the purchasers of a non-transferable holding were not entitled to maintain these suits to set aside the sale on the ground of fraud.

In the first case the learned Vakil for the appellant relied upon the Full Bench decision of *Dayamoyi v. Ananda Mohan Roy Chowdhuri* (1), which held that "the transferee of a holding not transferable by custom can, by a suit, recover possession from the landlord who had forcibly dispossessed him." That may be so; but that is not the case before us. If the tenant is upon the land, then his possession protects the party to whom he has transferred a portion of his interest. That is not the case here. The tenant is no longer on the land after the holding has been sold, and what was the property of the original tenant is now the property of the landlord. Now nothing in the decision of the Full Bench shows that the Court below was not correct in holding that the purchasers of a non-transferable holding can, after the holding has been sold and the original tenant is no longer on the land, be a party to a suit for recovery of possession from the landlord. So I hold that this appeal fails.

As regards the second appeal, an argument was based on the ground of estoppel. It is said that after sale, the appellant made a deposit which was withdrawn by the landlord, and he cannot now say that the transferee was not recognised by him. There may be circumstances under which such estoppel may arise. Now, what we have to do is to look at the facts, and we find, as established by the first Court's judgment, that when the appellant sought to make the deposit, the landlord objected to its being made on the ground that the appellant had no *locus standi* to make the deposit. That objection was overruled by the Court below and the landlord withdrew the money inasmuch as the Court allowed the deposit. To my mind it appears that this does not amount to an estoppel, since the landlord objected and acted in accordance with the order of the Court. There was no duty on the landlord to proceed by way of an appeal to have it established that the transferee has no right to make the deposit.

(1) 27 Ind. Cas. 61; 18 C. W. N. 971; 20 C. 42 C. 172.

Therefore, both the appeals fail and are dismissed with costs.

Appeals dismissed.

PUNJAB CHIEF COURT.

FIRST CIVIL APPEAL NO. 1204 OF 1911.

March 31, 1915.

Present:— Justice Sir Donald Johnstone, Kt., and Mr. Justice Shah Din.

MAKHAN LAL AND OTHERS—PLAINTIFFS—
APPELLANTS

versus

GANESHI LAL—DEFENDANT—RESPONDENT.

Contract Act (IX of 1872), s. 62—Balance of account—Agreement to pay at different rate of interest, effect of—Limitation Act (IX of 1908), Sch. I, Art. 64 as amended by Punjab Loans Limitation Act (I of 1904).

A balance of account signed by the defendant and stating as payable a rate of interest different from that usually charged in the previous accounts is a new contract upon which a suit may be based and the period of limitation for such suit is 6 years under Article 64 of the Limitation Act, as altered in the Punjab Loans Limitation Act. [p. 85, cols. 1 & 2.]

Pala Mal v. Tulla Ram, 119 P. R. 1908; 206 P. W. R. 1808, distinguished.

First appeal from the decree of the District Judge, Gurgaon, dated the 31st July 1911.

Pandit Rambhaji Datta and Lala Tek Chand, for the Appellants.

Mr. D. C. Ralli, for the Respondent.

JUDGMENT.—In this case the plaintiff sued for Rs. 5,634 on account of principal and interest upon a book account (*ba-rue buhi khata* are the words at head of plaint). Defendant, relying on *Pala Mal v. Tulla Ram* (1), pleaded (or rather argued at the eleventh hour, when the case was, except as regards final arguments, finished) that the suit did not lie; and the lower Court, in a judgment marred by inconsistent findings*, in the end found in favour of defendant's contention and dismissed the suit with costs.

Plaintiff in appeal here has satisfied us that the aforesaid contention is unsound; that the ruling quoted has no real bearing on the case;

(1) 119 P. R. 1908; 206 P. W. R. 1808.

*Vide page 26, line 33, paper-book, and page 31, line 20.

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and that the decision of the lower Court on the point must be set aside. This done, we find ourselves in a position to dispose of the case as a whole, and we find we must give plaintiff a decree with costs for his full claim.

The defendant's point is that the suit is based on a mere balance and so does not lie—*Pala Mal v. Tulla Ram* (1). We have no quarrel with that ruling; but there is much force in plaintiffs' Counsel's contentions:—

(a) that the specific objection to the form of the suit was taken so late by defendant that the lower Court should have passed it by;

(b) that the suit, as a matter of fact, was not intended to be based on the balance of 29th November 1904, but on the whole account;

(c) that, if it be taken in law that the suit was based on the balance, then a correct interpretation of the entry shows that it imports a promise to pay and is not a mere acknowledgment;

(d) that in any case, if all these contentions are overruled, in view of the lateness of the raising of defendant's objection plaintiff should have been allowed to amend his plaint and should even now be allowed to do so.

We are inclined to think that each and every one of these contentions might, if the rest were ignored, be established from the record, but it is enough to say that the third (c) seems to us fully made out on the authorities. The balance is signed by the defendant, and it states as payable *a rate of interest, and that rate different (8 annas instead of 12 annas) from that usually charged in the previous accounts*. These circumstances show at once how dissimilar this case is from *Pala Mal v. Tulla Ram* (1),* where no rate of interest was mentioned in the document in suit. No further discussion from this point of view is required: we hold that this document was an "agreement" and so a new contract, and the defendant's contention, successful in the lower Court, falls to the ground.

There should have been an eight-anna stamp on the entry. This will be now levied from plaintiff with a penalty of Rs. 5.

The respondent's way of meeting the above requires only a very few words. He points out that on 20th May 1911 (page 19, paper-book) plaintiff said no penalty should be taken as "no agreement as to payment is entered." Plaintiff did say this; but we think he is no more bound by this than is defendant by his Pleader's statement immediately preceding (page 18) that, inasmuch as the balances contain entries about interest, they cannot be admitted in evidence without payment of penalty. Thus the *dicta* in *Satyabhama Dassee v. Krishna Chander Chatterjee* (2) and in many other rulings, confining parties to their pleadings, here cut both ways.

Then it is argued that the suit is time-barred by Article 85, Limitation Act, Schedule I; but in our opinion Article 64, as altered in the Punjab Loans Limitation Act, really applies, and the term is six years and not three.

Then it is said that defendant could prove that some of the items in the account are wrong: as to this we need only refer to the absence in his pleas of particulars of this sort and to *Daya Ram v. Chundar Bhan* (3).

It has not been pressed in argument before us that any of the transactions were *badni* in their nature. Probably this is because Ganeshi Lal, witness for defendant and a near relation of his by marriage, had to admit (page 23, line 5) that *badni* transactions were "never made by the plaintiffs' firm," such transactions not being "made at their shop."

The appeal is accepted. Plaintiffs are given a week to make good stamp and penalty as aforesaid, after which decree will be drawn up in their favour for Rs. 5,634 and costs in both Courts.

Appeal accepted.

(2) 6 C. 55; 6 C. L. R. 375.

(3) 22 Ind. Cas. 647; 66 P. R. 1914; 87 P. L. R. 1914; 39 P. W. R. 1914.

*Cf. also *Tirkuha v. Rizak Ram*, 8 Ind. Cas. 811; 8 P. L. R. 1911; 138 P. W. R. 1910; *Daula v. Gonda*, 35 P. R. 1903; 101 P. L. R. 1903 (F. B.); *Amir Chaud v. Sundar Mal*, 12 Ind. Cas. 617; 7 P. L. R. 1912; 207 P. W. R. 1211; *Mul Chand Lala v. Kashibullav Biswas*, 35 C. 111 (F. B.); 11 C. W. N. 1120, and so forth.

AHSAN ALI v. MUHAMMAD JAFAR ALI KHAN.

ODDH JUDICIAL COMMISSIONER'S
COURT.

CIVIL REVISION PETITION No. 165 OF 1914.

March 16, 1915.

Present:—Mr. Lindsay, J. C.

Mir AHSAN ALI—PLAINTIFF—

APPLICANT

versus

Nawab Mirza MUHAMMAD JAFAR
ALI KHAN—DEFENDANT—OPPOSITE PARTY.

Revision, application for, maintainability of—Civil Procedure Code (Act V of 1908), O. XLIV, r. 1—Pauper, leave to appeal as, refusal of, when open to revision.

An order of a lower Appellate Court rejecting, under Order XLIV, rule 1, Civil Procedure Code, an application for leave to appeal as a pauper, is not open to revision by the High Court, although the former Court has formed an erroneous opinion regarding the merits of the judgment of the first Court, unless it is shown to have exercised its jurisdiction with some illegality or irregularity.

Application against the order of the District Judge, Lucknow, dated the 19th August 1914.

Syed Ali Muhammad, for the Applicant.

Babu Putlu Lal, for the Opposite Party.

JUDGMENT.—This application for revision must be dismissed. The applicant is one Mir Ahsan Ali, who obtained leave to sue *in forma pauperis*. His suit was dismissed by the first Court. He made an application to the District Judge for permission to appeal *in forma pauperis* and the Judge taking action under the provisions of Order XLIV, rule 1, of the Code held, after perusing the petition and the judgment of the first Court, that there was no ground on which it could be held that the decree of the Court below was contrary to law or to some usage having the force of law or was otherwise erroneous or unjust. I fail to see how it can be contended that this order of the District Judge is open to revision. It is not made to appear that the Judge acted in the exercise of his jurisdiction with any illegality or irregularity. All that the Code required him to do was to peruse the judgment of the first Court and the application which was put in by the applicant. It is nothing to the point to say that the Judge has formed an erroneous opinion regarding

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the merits of the judgment of the first Court. That has got nothing to do with the case so far as this matter of revision is concerned. The Judge had jurisdiction to decide either rightly or wrongly and it may be that his opinion is wrong, but with that I have nothing to do. I am satisfied that no application for revision can be maintained. The application is dismissed with costs.

Application dismissed.

COURT OF THE BOARD OF REVENUE,
UNITED PROVINCES.

REVENUE PETITION No. 1 OF 1914 15 OF
LUCKNOW DISTRICT.

March 3, 1915.

Present:—Mr. Holms, S. M., and
Mr. Campbell, J. M.

RAM PRASAD—DEFENDANT—APPELLANT

versus

DALLA—PLAINTIFF—RESPONDENT.

Ejectment, contesting notice of—Statutory period, fresh, commencement of, plea as to—Lease, new, at enhanced rent—Enhancement, illegal—Tenant's action, effect of—Estoppel.

A tenant is estopped from pleading, in ejectment proceedings against him, commencement of a fresh statutory period from the date when a new lease was granted to him, if he does not pay the enhanced amount of rent entered therein, although the enhancement was illegal. [p. 87, col. 1.]

Appeal from the decree of the Commissioner, Lucknow, dated 1st September 1914, reversing the order of the Assistant Collector, Lucknow.

FACTS.—The plaintiff-tenant held certain plots at an annual rent of Rs. 49. After the expiration of his statutory period a fresh lease for the same holding was

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granted to him by the defendant-landlord at an annual rent of Rs. 98. But the tenant did not pay more than Rs. 49 as the annual rent even after the execution of the fresh lease. The landlord thereupon served the tenant with a notice of ejectment, which the latter contested on the ground that he was holding the land on a fresh lease although he did not pay the enhanced amount of rent as entered in the lease, inasmuch as the enhancement was illegal and excessive and was agreed upon to be only to the extent of 2 annas a rupee on the old rent, the entry in the lease having been fraudulently made in his ignorance. The Court of first instance cancelled the notice, considering the lease as null and void. The Commissioner on appeal reversed this order, saying that the new lease created a "fresh admission" and that the most which the landlord could do was to sue the tenant for arrears of rent.

Babu Lachhman Prasad Varma, for the Appellant.

JUDGMENT.

CAMPBELL, J. M.—(*February 4th*, 1915).—I am unable to agree with the Commissioner in this case. Respondent repudiated the terms of the lease, and not only did not pay the rent entered in it, but did not even pay at the enhanced rate which he himself admits having agreed to. Having resiled from the lease, I think he is now estopped from pleading that he is holding under an unexpired lease. Further, the enhancement shown in the lease having been found, and being palpably, illegal the whole lease is null and void. In my opinion respondent is clearly liable to be ejected.

I would, therefore, set aside the Commissioner's order and restore the order of the Court of first instance.

I would let parties bear their own costs in all Courts.

HOLMS, S. M.—I agree that in the circumstances it is not proved that any change has been made by the landholder in the rent of the holding, as the tenant did not abide by the terms of the lease. But I feel some doubt as to my colleague's opinion that the lease is null and void on account of the

enhancement of rent shown in it being illegal, though it might be voidable.

I concur, however, in the order proposed.
Appeal allowed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 436 OF 1913.

March 16, 1915.

Present:—Sir Alfred Kensington, Kt.,
Chief Judge, and Mr. Justice Rattigan.

JUMMA AND OTHERS—DEFENDANTS—

APPELLANTS

versus

MUBARIK KHAN AND ANOTHER—

PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), Sch. II, cls. 4, 6
—*Arbitration—Reference providing for appointment*
by Court of umpire in case of difference—Umpire,
whether can make valid award without consulting
arbitrators.

A suit for redemption of a *lekha mukhi* mortgage on payment of whatever sum might be found due was referred to arbitration, it being provided that in case of disagreement the Court should appoint an umpire whose decision would be final. The arbitrators having disagreed an umpire was appointed and he gave an award without consulting the arbitrators and differing from both of them:

Held, that the umpire was entitled to settle the matter in any way he thought proper. [p. 88, col. 2.]

Karim Bakhsh v. Subhan Ali, 6 P. R. 1891, referred to.

Second appeal from the decree of the Divisional Judge, Multan, dated the 9th October 1912.

Mr. Rustomji, for the Appellants.

Mr. Fazal Elahi, for the Respondents.

JUDGMENT.—The history of this long-standing dispute is as follows:—

In or about 1875 (the precise date is not material and cannot be given by Counsel), the plaintiffs' mother mortgaged 394 *kanals*, by way of *lekha mukhi*, to the defendants Nos. 1 to 5 who subsequently sub-mortgaged to defendants Nos. 6 to 10. In June 1907 the plaintiffs instituted the present suit as one for redemption of the land at Rs. 110, or whatever sum might be found due by

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the Court. The original mortgage was an oral transaction and Rs. 562 is said to have been advanced by the mortgagees, and from the written statement of defence filed by the defendants this may be taken to be correct. The conditions of a *lekha mukhi* mortgage are explained in paragraph 151 of Rattigan's Customary Law.

No proper account of produce receipts and interest charged has been kept up by the mortgagees, and the parties on the 18th November 1907 referred the whole question to arbitration. The reference provided that each side should appoint one arbitrator and that in case of disagreement the Court should appoint an umpire whose decision would be accepted.

On the 3rd February 1908 the defendants' umpire filed his award that redemption should be allowed at Rs. 3,855, unless the suit should be held by the Court to be time-barred. On the 20th February 1908 the plaintiffs' arbitrator filed his award to the effect that the account worked up to a large surplus in the hands of the defendants, and that the plaintiffs should now be given possession of the land without payment of any sort. The Court then appointed Budh Singh, Sadr Kanungo, to act as umpire, and on the 8th May 1908 he filed his award that the defendants were entitled to Rs. 2,364-11-0, saying nothing about the costs of suit. On the 23rd July 1908 the District Judge set aside the umpire's award on the ground of technical misconduct, and on the 14th November 1908 he decreed in favour of the plaintiffs for possession of the land without payment, leaving the parties to pay their own costs.

On the 12th April 1910 the Divisional Judge dismissed an appeal by the defendants, holding that he had no jurisdiction to consider the correctness or otherwise of the intermediate order, dated the 23rd July 1908, which annulled the arbitration proceedings. The dispute then came before the Chief Court as Civil Appeal No. 853 of 1910* which was dealt with as an application for revision.

By its order of 21st May 1912, the Chief Court held definitely that the suit was not time-barred, and also expressed an opinion

*The case is reported as *Juma v. Mubarak*, 15 Ind. Cas. 62; 106 P. W. R. 1912; 133 P. L. R. 1912; 97 P. R. 1912.—*Ed.*

that the lower Courts were entitled to their conclusion that the entire mortgage-debt had been paid off with interest from the produce of the land. The Court, however, went on to say that the Divisional Judge had wrongly declined to consider the order of the 23rd July 1908, and the case was therefore, remanded on that ground, saying that no other point in the case was to be re-opened. These are the terms of the judgment, but we infer that the Court left open the question whether the umpire was right in requiring Rs. 2,364-11-0 to be paid by the plaintiffs on redemption. The Divisional Judge (Mr. Parker) then decided on the 9th October 1912 that the District Judge had rightly imputed a technical misconduct to the umpire, and had rightly annulled the arbitration. He accordingly declined to interfere and again dismissed the defendants' appeal to his Court. The case is now again before the Chief Court as a second appeal from this decree of the 9th October 1912.

There are some curious misapprehensions in Mr. Parker's judgment. In the first place, he has misquoted the reference to arbitration as meaning that the umpire was bound to agree with one or other of the arbitrators and that the decision would be according to the majority. He failed to notice that the words "*ba kasrat rai*" were cut out from the agreement on which the reference was made, and it was obviously impossible to have the case satisfactorily decided on the supposition that the umpire was obliged to agree with one or other of the arbitrators without giving his own opinion on the merits.

We must hold that as the arbitrators disagreed, the umpire was entitled to settle the matter in any way he thought proper. The learned Judge has gone on to misapply the ruling [*Karim Bakhsh v. Subhan Ali* (1)] upon which he has relied in support of his view that the umpire was wrong in not conferring with the arbitrators. The effect of the ruling quoted is the precise opposite, and the umpire was here under no obligation to do more than arrive at what he considered the just decision, without conferring with arbitrators.

Finally, the Judge is clearly wrong in holding that the umpire fell into grave (1) 6 P. R. 189.

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error in taking Rs. 2,200 as the principal mortgage-debt instead of Rs. 562. The umpire never said anything of the kind. He did not find that the original mortgage was for Rs. 2,200, but that this was the sum which the parties themselves had accepted as representing the outstanding lien on the land in the Settlement proceedings of 1898. In this we think that he was clearly right, and both the lower Courts appear to us to have misunderstood the grounds upon which his award was given.

The umpire's decision is based on the entry of Rs. 2,200 as the outstanding lien in the statement of mortgages with possession prepared at the Settlement of 1898. The statement in question is that prescribed as statement H under No. 86 of the rules framed under section 46 of the Punjab Land Revenue Act, 1887. Section 46 occurs in the chapter dealing with Records of Rights, and we take this list of mortgages to be an essential part of the record prepared at a new Settlement. There is a presumption of correctness attaching to any entries in the statement, and it is not to be supposed that the entry of Rs. 2,200 was made without proper care and without the full knowledge of the parties concerned. We think that the Sadr Kanungo was perfectly right in taking this entry as the basis for his decision, and we are unable to agree with the lower Courts that he committed any sort of misconduct, either technical or other.

Looking at the matter in a somewhat different way, we do not consider that the plaintiffs have any real grievance if they are made to pay a substantial sum to the mortgagees in possession, after having looked on for some forty years while the land has been gradually brought under cultivation by the mortgagees. Practically all the land, except some forty or fifty *kanals*, is now cultivated and in the *jamabandi* of 1905-06 the revenue assessment is put at the substantial sum of Rs. 54. It appears to us impossible to say that the mortgagees must have recovered their original outlay by the profits of cultivation. In a district like Multan the expense of bringing land under cultivation is considerable, and if the original owners make a belated demand on a *lekha mukhi* mortgagee, they are bound to pay reasonable compensation for improvements. We can find nothing

improper in the Sadr Kanungo's assumption that the lien was taken at Rs. 2,200 in 1898, and we see nothing improper in his final conclusion that the plaintiffs ought to pay Rs. 2,364-11-0 before they can redeem. There was no misconduct on the umpire's part and there is no justification for setting aside his award.

The result is that this appeal by the defendants must be accepted. The decrees of the lower Courts are set aside and in place thereof we declare the plaintiffs entitled to possession of the land in dispute on payment to the defendants of Rs. 2,364-11-0 by way of redemption in accordance with the umpire's award. Under Order XXXIV, rule 7 (c), of the Civil Procedure Code, we direct that the plaintiffs shall pay into Court this sum within six months from the date of our decree. If the plaintiffs pay the amount within the period specified or within such further period as the Court may allow under the proviso to rule 8, they will be entitled to possession of the land in suit, and if they fail to make such payment, they will be debarred from all further right to redeem.

As the umpire's award is silent on the point we direct that the parties shall pay their own costs throughout, which appears to us the fairest order to pass under all the circumstances of the case.

Appeal accepted.

ALLAHABAD HIGH COURT.

LETTERS PATENT APPEAL No. 13 of 1915.

July 16, 1915.

Present:—Sir Henry Richards, Kt., Chief Justice, and Justice Sir P. C. Banerji, Kt.

KEDAR AND OTHERS—PLAINTIFFS—

APPELLANTS

versus

DEO NARAIN AND ANOTHER—DEFENDANTS—
RESPONDENTS.

Agra Tenancy Act (II of 1901), s. 32—Suit by transferee of a portion of fixed-rate holding for possession, maintainability of.

A transferee of a portion of a fixed-rate holding sued for possession of the portion purchased by him the tenant who was entitled to only $\frac{1}{4}$ ths of the holding but was in possession of the whole;

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Held, that the suit was not barred by section 32 of the Agra Tenancy Act. [p. 90, col. 2.]

Letters Patents Appeal against the decision of Justice Sir George Knox in Second Appeal No. 1591 of 1913, dated 17th of November 1914.

FACTS.—A certain fixed-rate holding consisted of 4 *biswas*. Out of this, the plaintiffs purchased a 1-*biswa* share. The defendants owned the remaining 3 *biswas*. The plaintiffs brought the present suit for possession of the share purchased by them, alleging that the defendants were in possession of the whole holding. The Court of first instance, the lower Appellate Court and a single Judge of the High Court dismissed the suit on the ground that section 32 of Act II of 1901 barred the suit.

Mr. Birj Nath Vyas, for the Appellants:—The present suit has been wrongly dismissed by all the Courts. It is not a suit for the division of a holding. It does not in any way injuriously affect the landlord. The provisions of section 32 of Act II of 1901 do not apply to a case like the present. The ruling relied on, *Achhey Lal v. Janki Prasad* (1), had no application to the facts of the present case. The ruling has been overruled by the decision of the Full Bench in the case of *Najibullah v. Gulsher Khan* (2).

Mr. M. L. Agarwala, for the Respondents:—The present suit is in effect an attempt to effect a division of the holding. Section 32 clearly shows that no suit is maintainable in any Civil or Revenue Court which aims at the division of a holding.

Mr. B. N. Vyas was not heard in reply.

JUDGMENT.—This appeal arises out of a suit in which the plaintiff claimed 1 *biswa*, which was alleged to be part of 4 *biswas* which constituted a fixed-rate holding. The lower Courts and this Court have dismissed the suit as being barred by section 32 of the Tenancy Act and as having been concluded by the authority of the case of *Achhey Lal v. Janki Prasad* (1). Section 32 of the Agra Tenancy Act provides that "No division of a holding or distribution of the rent payable in respect thereof, made by the co-sharers therein, shall be binding on the landholder, unless it is made with his consent." Clause 2 provides that "No suit or other

(1) 29 A. 66; 3 A. L. J. 735; A. W. N. (1906) 274.

(2) 1 Ind. Cas. 594; 31 A. 348; 6 A. L. J. 343 (F. B.)

proceeding for the division of a holding or distribution of the rent thereof shall be entertained in any Civil or Revenue Court." It is quite clear that all that section 32 provides against is the splitting up of a holding or the distribution of the rent so as to bind the land-holders. Clause 2 does no more than enact that a suit brought for such a purpose shall not be entertained by a Civil or Revenue Court. In the present case the plaintiff alleges that he has become the owner entitled to possession of a portion of a fixed-rate tenancy and that the defendant is a trespasser. He does not ask for the division of the holding nor for the distribution of the rent. He does not seek to bind the landholder in any way by the suit he brings. It seems to us, therefore, that section 32 does not bar the present suit. We may mention that the case relied upon by the lower Appellate Court and the learned Judge of this Court has been overruled by the Full Bench decision in *Najibullah v. Gulsher Khan* (2). As the suit was decided on a preliminary point in the lower Courts the case must be remanded. We accordingly allow the appeal, set aside the decree of this Court and also of both the Courts below, and remand the case to the Court of first instance through the lower Appellate Court with directions to re-admit the suit under its original number in the file and proceed to hear and determine the same according to law. Costs here and hitherto will be costs in the cause.

Appeal allowed; Case remanded.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 112 OF 1913.

March 8, 1915.

Present:—Mr. Justice Shah Din and
Mr. Justice LeRossignol.

NUR AHMAD—DEFENDANT—APPELLANT
versus

GHULAM HUSAIN—PLAINTIFF AND
ANOTHER—DEFENDANT—RESPONDENTS.

Custom—Alienation—Ancestral property—Childless proprietor—Awaras of Mauza Marir Hasan, Tahsil Rawalpindi.

A childless Awaras proprietor of Mauza Marir Hasan Tahsil Rawalpindi, has power by custom to alienate

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ancestral property in the presence of a first cousin even without necessity. [p. 92, col. 1.]

Second appeal from the decree of the Divisional Judge, Rawalpindi Division, dated the 2nd December 1912.

Bhagat Gobind Das, for the Appellant.

Mr. Bahadur Chand, for the Respondents.

JUDGMENT.—By a registered deed, dated the 26th January 1912, one Ghulam Muhammad, a childless Awan, proprietor of *Mauza* Marir Hasan, Tahsil Rawalpindi, sold a ruined hut (*khola*) situate in the *abadi* of the village to Nur Ahmad, a Chauhan of the same village, for Rs 200. The plaintiff, Ghulam Husain, first cousin of Ghulam Muhammad, brought the present suit for a declaration that the sale of the *khola* in question by Ghulam Muhammad shall not affect his reversionary rights after Ghulam Muhammad's death. The first Court held that the *khola* in suit was the ancestral property of the vendor and the present plaintiff, that the vendor had not under custom an unrestricted power of alienation in respect of ancestral property, and that the sale in dispute had not been made for legal necessity. Upon these findings the Court gave the plaintiff the declaratory decree prayed for. On appeal the Divisional Judge agreed with the first Court on all the points just referred to and dismissed the appeal.

In this second appeal the concurrent finding of the lower Courts, that the property in suit was ancestral, must be accepted as final, and we must also take it as finally decided between the parties that the sale was not made for legal necessity. The only question for decision in this appeal, therefore, is whether the sale was justified by custom or not.

Upon this point the first Court had laid the onus on the plaintiff, the issue drawn by the Court being in these terms:—"Had not defendant No. 1 (Ghulam Muhammad) full power under custom to make the alienation?" On this issue the conclusion came to by the Court was that the plaintiff had discharged the onus. The learned Divisional Judge, on the other hand, was of opinion that in the present case the onus would be on the vendee to prove the validity of the sale, and he held that the vendee had failed to prove that an Awan in the Rawalpindi District was competent to sell his ancestral property without necessity to a person belonging to another tribe.

We have considered the evidence produced by the parties in this case and have also referred to the rulings cited to us on both sides. The oral evidence is not of much value. The plaintiff produced four witnesses, including the vendee, whose evidence does not throw much light on the question of custom; on the other hand, the defendant-vendee produced six witnesses, one of whom, Muhammad Wali, an Awan of village Marir Hasan, gives several instances of alienations of ancestral land having been made by childless Awan proprietors in his village without objection by their collaterals. These instances have not, however, been properly verified and are of little value for the purposes of the present suit. Some of the vendee's witnesses, no doubt, say that an Awan proprietor can sell his property for necessity, but their statements on this point are not free from ambiguity, and we are not prepared to draw from them the conclusion, which has been drawn by the first Court, that according to those witnesses an Awan owner cannot sell ancestral property, except for legal necessity.

One judicial precedent has been cited by each party in this case. The plaintiff has relied on the case of *Nur Muhammad v. Said Alam*, decided by the Divisional Judge of Rawalpindi on the 20th August 1903; while the defendant has relied on the case of *Amir Hussain v. Nadar*, decided by the Divisional Judge of Rawalpindi on the 21st June 1905. The case of *Nur Muhammad v. Said Alam* related to *Mauza* Ranjili in Tahsil Pindigheb, and what was held in that case was that an Awan proprietor with sons had no power by custom to sell ancestral property to the prejudice of his sons.

The case of *Amir Hussain v. Nadar*, cited by the defendant-vendee, related to the village of Marir Hasan, in which the property in suit is situate, and it was held by the Divisional Judge (Mr. H. Scott-Smith) in that case that the nephew of a childless Awan proprietor had no power by custom to contest an alienation of ancestral land made by the latter. This case, relating as it does to village Marir Hasan, obviously is an important piece of evidence in favour of the defendant-vendee.

The following rulings of this Court were cited before us in argument:—*Devi Das v.*

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Bhakra (1); *Nura v. Tora* (2); *Khudayar v. Fatteh* (3); *Amir Ali v. Baggo* (4); *Khuda Bakhsh v. Waham Ali* (5); *Nur Khan v. Sarfaraz* (6); *Khuda Bakhsh v. Ahmad Khan* (7); *Lal Khan v. Nura* (8). It is unnecessary to discuss these rulings in detail, as it is not disputed that their net result is that the *Awans* of Shahpur Rawalpindi, Attock and Mianwali possess larger powers of alienation in respect of ancestral property than most of the other agricultural tribes residing in those districts. In *Amir Ali v. Baggo* (4), upon a full review of the published decisions of this Court relating to *Awans*, it was held by Johnstone, J., (1) that any interference with the natural rights of sons is jealously resented, and (2) that when there are no sons much freedom is allowed to male proprietors.

In *Lal Khan v. Nura* (8), it was pointed out that custom recognises a clear distinction between cases where an alienation is by a proprietor who has sons and cases where it is by a sonless proprietor, and that even those tribes who concede very extensive rights to male proprietors differentiate between the powers of a proprietor who has, and a proprietor who has not, sons living at the time of alienation.

In the present case the vendor is a childless *Awan* proprietor, and in a judicial decision relating to this very village, Marir Hasan, it was held by the Divisional Judge of Rawalpindi in 1905 that a childless *Awan* landowner had power by custom to alienate his ancestral property to the prejudice of his nephew. No instance to the contrary relating to Tahsil Rawalpindi has been cited before us, and assuming, without deciding, that the onus in this case lay on the vendee to prove the validity of the sale in his favour, we are of opinion that he has discharged this onus.

For the foregoing reasons, we accept the appeal, and setting aside the decree of the Divisional Judge, dismiss the plaintiff's suit with costs throughout.

Appeal accepted.

- (1) 53 P. R. 1899.
- (2) 46 P. R. 1900; P. L. R. 1900 p. 424.
- (3) 8 P. R. 1906; 64 P. L. R. 1908.
- (4) 15 P. R. 1907; 4 P. L. R. 1908; 35 P. W. R. 1907.
- (5) 10 Ind. Cas. 36; 144 P. L. R. 1911; 116 P. W. R. 1911; 88 P. R. 1911.
- (6) 16 Ind. Cas. 21; 238 P. W. R. 1912; 249 P. L. R. 1912; 100 P. R. 1912.
- (7) 19 Ind. Cas. 459; 151 P. L. R. 1913; 124 P. W. R. 1913; 114 P. R. 1913.
- (8) 25 Ind. Cas. 556; 238 P. L. R. 1914; 72 P. R. 1914.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1056 OF 1914.

July 9, 1915.

Present:—Sir Henry Richards, Kt., Chief Justice, and Mr. Justice Rafique.

KUNDAN LAL—PLAINTIFF—APPELLANT

versus

JAGAN NATH—DEFENDANT—RESPONDENT.

Contract Act (IX of 1872), ss. 60, 61—Appropriation—No appropriation of payment either by debtor or creditor—Appropriation to earliest debt.

Where there is no appropriation of payment either by debtor or creditor, the payment must be applied to the earliest debt due by the defendant to the plaintiff. [p. 94, cols. 1 & 2.]

Second appeal from the decision of the Additional Judge of Moradabad, dated 15th April 1914.

FACTS.—The plaintiff brought a suit on foot of a simple money-bond. The defendant pleaded payment. The Court of first instance decreed the claim. The lower Appellate Court found that the defendant had made a payment by cheque, that the plaintiff had not made any appropriation of the payment which was the bond sued upon, and accordingly the payment should be credited to the earliest debt. It accordingly dismissed the suit.

The plaintiff appealed to the High Court.

The Hon'ble Mr. Gokul Prasad, for the Appellant:—The lower Appellate Court has found that neither party made any appropriation. Consequently it was open to the plaintiff to make his election at any time before suit. The very fact that a suit was brought on the bond shows that the plaintiff did not elect to appropriate the money towards the debt in suit. There is no limit of time prescribed by the Contract Act within which the plaintiff must make his election to appropriate. This view is in accordance with English Law: *Seymour v. Pickett* (1). Under the Indian Evidence Act, it is for the defendant to prove that he made any payment towards a certain debt.

[RICHARDS, C. J.—The Contract Act seems to have departed from the English rule, otherwise there would be no object in enacting section 61.]

Mr. K. N. Katju, for the Respondent:—At the time the Contract Act was framed there was a conflict of authority in the English decisions. The Indian Law adopted one view

- (1) (1905) 1 K. B. 715 at pp. 723, 725; 74 L. J. K. B. 413; 92 L. T. 519; 21 T. L. R. 302.

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by enacting section 61. If no time is fixed for the creditor to make his election, section 61 would become meaningless. The creditor must exercise his option within a reasonable time. *Clayton's case* (2); *In re Sherry, London & County Banking Co. v. Terry* (3).

Mr. Gokul Prasad, in reply:—*Clayton's case* (2) has not decided the period of time up to which the appropriation is to be made. The Contract Act has incorporated the meaning of *Clayton's case* (2) as it was then understood. He also relied on Chitty on Contracts.

JUDGMENT.—This appeal arises out of a suit upon foot of a simple money-bond, dated the 10th of September 1910. The defendant pleaded payment. The Court of first instance decreed the plaintiff's claim. The lower Appellate Court found that the defendant had made a payment by a cheque, that the plaintiff had not made any appropriation of the payment and that accordingly the payment should be credited to the earliest debt then due by the defendant to the plaintiff, which was the bond sued upon. The lower Court says that the way the accounts were kept between the plaintiff and the defendant was that on the one side all advances made by the plaintiff to the defendant were entered and on the other side all the payments that were made to the plaintiff by the defendant. He seems to have been prepared to hold that from the way the account was kept, the plaintiff must be deemed to have from time to time appropriated the payments to the earliest debts. The case, however, was really decided on the assumption that there had been no appropriation by either party and it is on this basis that the case has been argued before us.

Section 60 of the Contract Act is as follows: "Where the debtor has omitted to intimate, and there are no other circumstances indicating, to which debt the payment is to be applied, the creditor may apply it at his discretion to any lawful debt actually due and payable to him from the debtor, whether its recovery is or is not barred by the law in force or

the time being as to the limitation of suits".

Section 61: "Where neither party makes any appropriation, the payment shall be applied in discharge of the debts in order of time, whether they are or are not barred by the law in force for the time being as to the limitation of suits. If the debts are of equal standing, the payment shall be applied in discharge of each proportionately."

The learned Additional Judge considered that if there had been no appropriation by either the debtor or the creditor, the payment must be applied to the earliest debt which was the bond in suit.

It is contended on behalf of the appellant that a creditor can make his election as to the appropriation of the payments "up to the last moment", and he cites the case of *Seymour v. Pickett* (1) as showing that the appropriation can even be made when the plaintiff is being examined at the trial of the case. On the other hand the respondents contend that under the provisions of section 61 of the Indian Contract Act where there is no appropriation made by the debtor when paying the money or the creditor when receiving it, the law itself appropriates the payment in the manner provided by section 61. The learned Vakil refers to *Clayton's case* (2). At page 605 of the report the Master of the Rolls says: "This state of the case has given rise to much discussion, as to the rules by which the application of indefinite payments is to be governed. Those rules we probably borrowed, in the first instance, from the civil law. The leading rule, with regard to the option given, in the first place to the debtor, and to the creditor in the second, we have taken literally from thence. But, according to that law, the election was to be made at the time of payment, as well in the case of the creditor as in that of the debtor, '*in re presenti, hoc est statim atque solutum est:—ceterum, postea non permittitur.*' If neither applied the payment, the law made the appropriation according to certain rules of presumption, depending on the nature of the debts, or the priority in which they were incurred. And, as it was the actual intention of the debtor that would, in the first instance, have

(2) 1 Mer. 572 at p. 605; 35 E. R. 781 at p. 792; 15 R. R. 161.

(3) (1884) 25 Ch. D. 692 at p. 702; 53 L. J. Ch. 404; 50 L. T. 227; 32 W. R. 394.

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governed; so it was his presumable intention that was first resorted to as the rule by which the application was to be determined. In the absence, therefore, of any express declaration by either, the inquiry was, what application would be most beneficial to the debtor. The payment was, consequently, applied to the most burthensome debt, to one that carried interest, rather than to that which carried none,—to one secured by a penalty, rather than to that which rested on a simple stipulation;—and, if the debts were equal, then to that which had been first contracted.”

Clayton's case (2) was one in which there was a current account, and it was held that the payments must be appropriated to the debts earliest in date. *Clayton's* case (2) was discussed in *Seymour v. Pickett* (1) and also in the case of *Cory Brothers & Co. v. The Owners of the Turkish Steamship "Mecca"* (4). At page 293 of the report of the last mentioned case Lord Macnaghten says: “In 1816 when *Clayton's* case (2) was decided, there seems to have been authority for saying that the creditor was bound to make his election at once according to the rule of the civil law, or at any rate, within a reasonable time, whatever that expression in such a connection may be taken to mean.” It seems to us that what the Indian Legislature did by sections 59—61 of the Indian Contract Act was to adopt the rule of civil law with certain modifications. Unless the meaning of section 60 is that the debtor is to make his appropriation (if any) at the time of paying and the creditor to make his appropriation (if any) at the time of receiving the money, it is difficult to conceive what is the meaning of section 61 or how it could be applied. We think that the view taken by the Court below was correct. If by reason of the manner in which the plaintiff kept the account, he is to be deemed to have appropriated the payment to the debt of earliest date, there is an end to the case. If, on the other hand, there was no appropriation by either debtor or creditor, the payment must be applied to the earliest debt due (4) (1897) App. Cas. 286; 66 L. J. P. C. 86; 76 L. T. 579; 45 W. R. 667.

by the defendant to the plaintiff. This was the bond in suit. We dismiss the appeal with costs, including in this Court fees on the higher scale.

Appeal dismissed.

MADRAS HIGH COURT.

LETTERS PATENT APPEALS NOS. 129 AND 130 OF 1913.

April 1, 1915.

Present:—Sir John Wallis, Kt., Chief Justice,
Mr. Justice Seshagiri Aiyar and
Mr. Justice Kumaraswami Sastri.

*Rajah Sahib Meharban-i-Dostan Sri RAJAH
ROW VENKATA KUMARA
MAHIPATI SURYA ROW BAHADUR
GARU, Sirdar RAJAMUNDRI CIRCAR
AND RAJAH OF PITTAPUR—
PLAINTIFF—APPELLANT IN BOTH*

versus

*IN L. P. No. 129 OF 1913
GANI VENKAT SUBBA ROW AND OTHERS
—DEFENDANTS—RESPONDENTS*

AND

*IN L. P. No. 130 OF 1913
MADDIKONDA BUCHIRAJU—
DEFENDANT—RESPONDENT.*

*Madras Estates Land Act (I of 1908), s. 211 (1)—
Suit to recover rent due during plaintiff's minority
before Act came into force, maintainability of—
Construction of Statute—Retrospective effect—Limitation
Act (IX of 1908), s. 7.*

Where rent accrued due to the plaintiff during his minority and he filed a suit for its recovery within three years from attaining majority claiming exemption from the bar of limitation under section 7 of the Limitation Act:

Held, (Seshagiri Aiyar, J., dissenting) that the right to sue had become vested in the plaintiff at the time of the passing of the Madras Estates Land Act and was not, therefore, barred having been kept alive under section 7 of the Limitation Act. [p. 96, col. 2; p. 97, col. 1; p. 100, col. 1.]

Per Wallis, C. J.—Where an Act contains provisions for limitation of suits which take away altogether a vested right of suit without providing any equivalent remedy, the provisions must be considered to have been enacted subject to the implied exception that they were not to extend to such vested rights of suit which were to continue subject to the rules of limitation in force at the passing of the Act. [p. 96, col. 1.]

Ramakrishna Chetty v. Subraya Iyer, 18 Ind. Cas. 64; 24 M. L. J. 54; (1913) M. W. N. 303; 38 M. 101, followed.

Gopeshwar Pal v. Jiban Chandra, 24 Ind. Cas. 37; 41 C. 1125; 18 C. W. N. 8C4; 19 C. L. J. 549 at pp. 551, 569; *Commissioner of Public Works (Cape Colony) v. Logan*, (1903) A. C. 355; 72 L. J. P. C. 91; 88 L. T. 779; 19 T. L. R. 545; *Colonial Sugar Refining Company v. Irving*, (1905) A. C. 869; 74 L. J. P. C. 77; 92 L.

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T. 738; 21 T. L. R. 513; *Jackson v. Woolley*, 8 El. and Bl. 778; 120 E. R. 284; 27 L. J. Q. B. 448; 4 Jur. (N. S.) 646; 6 W. R. 686, referred to.

Per *Kumaraswami Sastri, J.*—It is a well-known rule of construction that retrospective operation ought not to be given to a Statute so as to take away vested rights, unless that effect cannot be avoided without doing violence to the language of the enactment, and that except in special cases the new law ought to be construed so as to interfere as little as possible with vested rights. [p. 98, col. 2; p. 99, col. 1.]

Reid v. Reid, (1886) 31 Ch. D. 402; 55 L. J. Ch. 294; 54 L. T. 100; 34 W. R. 333; *Lauri v. Renad*, (1892) 3 Ch. D. 402; 61 L. J. Ch. 580; 67 L. T. 275; 40 W. R. 679, referred to.

A Statute of Limitation ceases to be a Statute of mere procedure where it shortens the period and is sought to be used to defeat causes of action which had accrued earlier than the length of time proscribed in the new law. [p. 99, col. 1.]

Though laws affecting limitation might abridge or enlarge periods of limitation in cases of suits or causes of action which were alive at the date when the new enactment came into force and which under the old law would expire afterwards, the change cannot, unless there is a clearly expressed intention to the contrary, either by apt words in the enactment or otherwise, be retrospective so as to destroy rights of suit which were alive on the date. [p. 100, col. 1.]

Per *Seshagiri Aiyar, J.*—A litigant cannot appropriate and reprobate. He cannot claim the advantage which a new law gives without submitting to the restrictions which it imposes. [p. 97, cols. 1 & 2.]

No one has a vested right in any rule of procedure. When a Statute provides for a new procedure for the enforcement of rights, it is always retrospective. [p. 98, col. 1.]

Gardner v. Lucas, 3 A. C. 582, followed.

The Limitation Act in force at the time a suit is instituted governs the action and not the one under which the right accrued. [p. 98, col. 1.]

Soni Ram v. Kanhaiya Lal, 19 Ind. Cas. 291; 35 A. 227; 13 M. L. T. 437; 17 C. W. N. 605; 11 A. L. J. 389; (1913) M. W. N. 470; 17 C. L. J. 488; 15 Bom. L. R. 489; 25 M. L. J. 131; 40 I. A. 74, referred to.

Appeals under clause 15 of the Letters Patent against the decree of this Court, in Second Appeals Nos. 323 and 433 of 1912, reported as 21 Ind. Cas. 595, preferred against the decrees of the District Court of Godaveri, in Appeal Suits Nos. 111 and 79 of 1910, preferred against the decree of the Court of the Deputy Collector of Godaveri, in Summary Suits Nos. 128 and 118 of 1910, respectively.

FACTS.—The *zamindar* of Pittapur, who attained majority in 1906, instituted suits under section 77 of the Estates Land Act in a Revenue Court for recovery of arrears of rent for *Fasli* 1315 (1895) within three years after attaining age, that is, in 1909. The Deputy Collector and the District Judge of Godaveri on appeal held that the suits were

barred under sections 210 and 211 of the Estates Land Act, as the suits were not brought within three years from the date when the arrears became due and as the provisions of the Limitation Act regarding the minority of the plaintiff did not apply to the Estates Land Act.

In second appeal, which came on for hearing before Sir Sankaran Nair and Sadasiva Aiyar, JJ., the former held that the suits were rightly held to be barred as the Estates Land Act had a retrospective operation, while the latter held that the section had no retrospective effect as the three years' period provided by the Estates Land Act expired even before the Act came into force. In the result the second appeals were dismissed.

Thereupon the plaintiff preferred these Letters Patent Appeals.

Mr. P. Somayya for Mr. P. Narayanamurthy, for the Appellant:—The question is whether section 7 of the Limitation Act applies to suits instituted under the Estates Land Act.

In *Manjuri Bibi v. Akkel Mahmud* (1) a similar question arose for consideration. The two years' period expired before the Bengal Tenancy Act came into force.

The question is whether the new Act will become applicable only when the two years' period has not expired or the new Act gives a further time. *Budhu Koer v. Hafiz Husain* (2), *Gopeshwar Pal v. Jiban Chandra* (3), *Soni Ram v. Kanhaiya Lal* (4).

The *ratio decidendi* of all the cases is that the new Act will not apply where its effect will be to confiscate the old right or to extinguish it.

Mr. B. Narasimha Rao and Mr. V. Ramadoss, for the Respondents:—Under section 77 of the Estates Land Act the plaintiff ceased to be a minor on 5th October 1906. The plaintiff merely claims an exemption and not a right. It is a mere personal exemption expressly taken away by the Act. There were no rights of action on the date of the suit. Can it be said that section 211 of the

(1) 19 Ind. Cas. 793; 17 C. L. J. 316; 17 C. W. N. 889.

(2) 20 Ind. Cas. 821; 18 C. L. J. 274 (F. B.).

(3) 24 Ind. Cas. 37; 19 C. L. J. 549 at pp. 551, 560 (F. B.); 18 C. W. N. 804; 41 C. 1125.

(4) 19 Ind. Cas. 291; 35 A. 227; 13 M. L. T. 437; 17 C. W. N. 605; 11 A. L. J. 389; (1913) M. W. N. 470; 17 C. L. J. 488; 15 Bom. L. R. 489; 25 M. L. J. 131; 40 I. A. 74.

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Code of Civil Procedure has taken away the exemption mentioned in section 7 of the Indian Limitation Act? This is not a matter expressly taken away by the Act. *Colonial Sugar Refining Co. v. Irving* (5).

Mr. V. Ramadoss, for the Respondent, quoted the following cases:

Second Appeal No. 130 of 1913, *Sundaram Iyer v. Muthuganapatigal* (6), *Fazil Karim v. Annada Mohan Roy* (7), *Arayil Kali Amma v. Pelappakkara Manakal Sankaran Nambudripad* (8), *Chidambaram Chetty v. Karuppan Chetty* (9), *Hope Mills Ltd. v. Vithaldas* (10).

JUDGMENT.

WALLIS, C. J.—I think that Sadasiva Aiyar, J., was right in following the carefully considered judgment of Benson and Sundara Aiyar, JJ., in *Ramakrishna Chetty v. Subraya Iyer* (11) and that the principle to be applied is that where an Act contains provisions for the limitation of suits which take away altogether a vested right of suit without providing any equivalent remedy, then according to the approved rule of construction, the provisions must be considered to have been enacted subject to the implied exception that they were not to extend to such vested rights of suit which were to continue subject to the rules of limitation in force at the passing of the Act. This rule of construction was adopted to give effect to the presumed intention of the Legislature not to take away vested rights in this fashion. It is recognised in section 8 of the Madras General Clauses Act, 1891, and the provisions now in question must be taken to have been enacted with reference to it. In *Ramakrishna Chetty v. Subraya Iyer* (11), it was held with reference to this Act that the six years' period applicable under Article 116 to a registered contract continued to apply to a suit for rent under the Madras Estates Land Act at a time when the period of limitation presented by it for suits of this nature had

(5) (1905) App. Cas. 369; 74 L. J. P. C. 77; 92 L. T. 738; 21 T. L. R. 513.

(6) 14 Ind. Cas. 184; (1912) M. W. N. 652; 11 M. L. T. 276.

(7) 11 Ind. Cas. 401; 15 C. W. N. 845.

(8) 5 Ind. Cas. 420; 34 M. 292; 7 M. L. T. 115; 20 M. L. J. 347; (1910) M. W. N. 516.

(9) 8 Ind. Cas. 543; 9 M. L. T. 75; (1910) M. W. N. 711; 35 M. 678.

(10) 7 Ind. Cas. 982; 12 Bom. L. R. 730.

(11) 18 Ind. Cas. 64; 24 M. L. J. 54; (1913) M. W. N. 303; 38 M. 101.

already expired. In the present case the claim for rent was not barred at the date of the passing of the Act, as it was kept alive under section 7 of the Limitation Act owing to the minority of the plaintiff. Sections 210 and 211 enact rules of limitation for suits under the Act, and section 211 expressly provides that section 7 and certain other sections of the Limitation Act shall not apply to suits under this Act. Thus the result of the passing of the Act, which came into force two days after it received the Viceroy's assent, was to leave no opportunity for the exercise of the plaintiff's vested right of suit, unless the provisions of section 211 (1) be read subject to an implied exception in cases where these provisions would otherwise absolutely destroy the plaintiff's right of suit, which was in existence when the Act came into force. In addition to the cases cited in that judgment, I may refer to the recent decision of a Full Bench of five Judges of the Calcutta High Court, *Gopeshwar Pal v. Jiban Chandra* (3), where Jenkins, C. J., delivering the judgment of the Court after citing *Commissioner of Public Works (Cape Colony) v. Logan* (12) and *Colonial Sugar Refining Company v. Irving* (5) and *Jackson v. Woolley* (13) observed: "Here the plaintiff at the time when the Amending Act was passed had a vested right of suit, and we see nothing in the Act as amended that demands the construction that the plaintiff was thereby deprived of a right of suit vested in him at the date of the passing of the Amending Act."

These observations are applicable to the present case and I think the appeals must be allowed, the decrees of the lower Courts be reversed, and the case remanded for disposal according to law. The respondents will pay the appellant's costs of the appeals. Other costs will abide and follow the event.

SESHAGIRI AIYAR, J.—With the greatest reluctance, I have ventured to differ from the conclusion at which the learned Chief Justice has arrived.

The circumstances which raise the question of law are these. Before the passing of the Estates Land Act, suits for arrears of rent

(12) (1903) A. C. 355; 72 L. J. P. 91; 89 L. T. 799; 19 T. L. R. 545.

(13) 8 El. & Bl. 778; 120 E. R. 289; 27 L. J. Q. B. 448; 4 Jur. (n. s.) 656; 6 W. R. 686.

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were cognisable only by the ordinary Civil Courts. Such suits were governed by the Indian Limitation Act. As a necessary incident of such rights, minors were entitled to institute their suits within three years of their attaining majority, if the cause of action for rent arose during their minority. The claim in the suit now under appeal relates to the arrears which accrued due in *Fasli* 1315, when the appellant was a minor. He attained his majority in 1906. The Estates Land Act was passed by the Local Legislature in March 1908. In it a provision was inserted that the Act shall come into force on the 1st of July 1908. His Excellency the Governor gave his assent to it on the 25th March 1908. The assent of His Excellency the Governor-General was given on the 28th June. The Act came into force on the 1st of July. Section 189 of the Act enacts that suits for arrears of rent shall be instituted in the Revenue Courts, and removes such cases from the cognisance of Civil Courts. Section 211 provides that certain sections of the general Limitation Act shall not apply to suits instituted under the Act. The minority section (7) is one of them. The present suit was instituted by the appellant in the Revenue Court after the Estates Land Act came into force. It is conceded that the suit would be barred if section 7 of the Limitation Act did not apply. I am forced to the conclusion that the suit is barred. The pre-existing right, which carried with it the benefit of the Limitation Act, was to institute the suit in the Civil Court. That right could not have been sued upon under the old law in the Revenue Court. The new forum is the creature of the Statute. It was designed to afford a speedy remedy to the parties. The plaintiff was chosen to avail himself of that advantage. He is also bound by the disabilities which the law imposes on such persons. I can follow the argument which claims for the plaintiff the right to institute his suit in the ordinary Civil Courts with the attendant advantage of counting in his favour a period of three years after attaining majority. To such an argument, the plea that the Legislature should not be presumed to have deprived parties of their vested rights by *post facto* legislation may apply. But a litigant cannot approbate and reprobate. He cannot claim the advantage which the new

law gives without submitting to the restrictions which it imposes.

The principle that vested rights should not be taken away by implication cannot apply to the present case. Section 211 lays down that the minority section of the Limitation Act shall not apply. There is no room for speculation here. It is an express prohibition. If a suit is instituted under the Act, it is not open to argument that section 211 is not applicable to it. The clear indication of the Legislature is that it takes this case out of the general rule. See per Lord Hatherley in *Pardo v. Bingham* (14). The closely reasoned judgment of Benson and Sundara Aiyar, JJ., in *Ramakrishna Chetty v. Subraya Iyer* (11) was much relied upon in the course of the argument. I am not differing from the main propositions which that case enunciates. Excepting one matter of detail, to which I shall refer later on, I fully concur in the conclusions therein stated. In my opinion, it is not correct to say that the plaintiff in this case is deprived of his rights by giving retrospective effect to the Estates Land Act. He acquires one of his rights only under the Act, namely, the right to sue in the Revenue Court. He had a vested right for a longer period of limitation before the Act came into force. As has been well stated "a Statute is not retrospective. . . . because a part of the requisites for its action is drawn from time antecedent to its passing," per Lord Denman, C. J., in *Reg. v. St. Mary Whitechapel* (15). That is the position in the present case. Lord Justice Buckley points out in *West v. Gwynne* (16) "As a matter of principle an Act of Parliament is not without sufficient reason taken to be retrospective. There is, so to speak, a presumption that it speaks only as to the future. But there is no like presumption that an Act is not intended to interfere with existing rights. Most Acts of Parliament, in fact, do interfere with existing rights." This dictum is specially applicable to enactments which, while taking away some rights, confer others which are no less important. See

(14) 4 Ch. App. 735; 20 L. T. 464; 17 W. R. 419; 39 L. J. Ch. 170.

(15) (1846) 12 Q. B. 120 at p. 127; 17 L. J. M. C. 172; 116 E. R. 812.

(16) (1911) 2 Ch. 1 at p. 12; 80 L. J. Ch. 578; 104 L. T. 759; 55 S. J. 519; 27 T. L. R. 444.

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also *Ex parte Dawson*; *In re Dawson* (17). On the ground that section 211 is express and on the further ground that the principle of retrospective extinguishment of vested right does not arise in this case, I hold that the decision in *Ramakrishna Chetty v. Subraya Iyer* (11) does not affect this case. In *Manjuri Bibi v. Akkel Mahmud* (1), *Budhu Koer v. Hafiz Husain* (2) and *Gopeshwar Pal v. Jiban Chandra* (3) there was no express provision as in section 211 of the Estates Land Act. Moreover in all those cases a completed pre-existing right was sought to be put an end to by implication.

On the other hand, where the Statute provides for a new procedure for the enforcement of rights, it is always retrospective, per Lord Blackburn in *Gardner v. Lucas* (18). In the present instance it is the procedure by which the arrears are to be recovered that is changed. The plaintiff is directed to seek redress in a Revenue Court instead of in the Civil Court. The decision of the Judicial Committee in *Soni Ram v. Kanhaiya Lal* (4) lays down that the Limitation Act in force at the time the suit is instituted governs the action and not the one under which the rights accrued. That decision governs the present case. See also *Chidambaram Chetty v. Karuppan Chetty* (9) and *Hope Mills Ltd. v. Vithaldas* (10). There is one circumstance which has not been noticed in *Ramakrishna Chetty v. Subraya Iyer* (11). I stated at the outset the material dates regarding the passing of the Act and of the sanction obtained. One underlying principle of the cases which lean against retrospective operation is that if the new Act gives no days of grace for its coming into operation, but makes it law as soon as it is passed, Courts should hold that the Legislature did not intend to interfere with vested rights. But where litigants had previous notice and could have enforced their rights before the Act became law, they cannot claim relief. On the day the Legislature passed the Act it deliberately put off its operation for over three months. It did not say that it shall become law as soon as the Governor-General's assent was obtained. It purposely gave parties a period of grace during which their remedies under

(17) 19 Eq. Cas. 433; 44 L. J. Bk. 49; 32 L. T. 101; 23 W. R. 354.

(18) 3 App. Cas. 582.

the law as it stood could have been enforced. The plaintiff in claiming exception by virtue of an equity should not be heard to say that although he might have enforced his rights between March and July 1908, he can plead that the Act does not apply to him because no time was fixed for its coming into force after the assent of the Governor-General was obtained.

As I feel strongly that the plaintiff has no right to avoid the Statute under which he has come to Court, I respectfully differ from the conclusion at which the learned Chief Justice has arrived and agree with Sankaran Nair, J., in holding that the suit is barred by limitation.

KUMARASWAMI SASTRI, J.—The appellant, who is the Raja of Pittapur and whose estate was under the management of the Court of Wards, attained majority on the 5th October 1906. He filed suits to recover rent due for *Fasli* 1315 and claimed exemption from the bar of limitation, on the ground that he had under section 7 of the Limitation Act three years from the date of his attaining majority to file suits for arrears of rent accrued due during his minority. The Deputy Collector in whose Court the suits had to be filed under section 77 of the Estates Land Act held that section 211 of the Act applied and that the suits were barred, as the plaintiff was not entitled to the benefit of section 7 of the Limitation Act. The District Judge taking the same view confirmed the decree of the Deputy Collector. In second appeal Mr. Justice Sankaram Nair held that section 211 of the Estates Land Act applied retrospectively and barred suits which would have been in time but for the Estates Land Act; while Mr. Justice Sadasiva Aiyar was of a contrary opinion.

The question raised in this appeal is, whether section 211 is retrospective and bars suits which would have been in time if the ordinary law of limitation were applied. The point is not free from difficulty, but I am of opinion that both on principle and on the balance of authority the section ought not to be applied so as to kill causes of action that were alive on the date of the passing of the Act.

It is a well-known rule of construction that retrospective operation ought not to be given to a Statute so as to take away vested rights.

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unless that effect cannot be avoided without doing violence to the language of the enactment, and that except in special cases the new law ought to be construed so as to interfere as little as possible with vested rights. I need only refer to *Reid v. Reid* (19), and *Lauri v. Renad* (20). The same view was taken by the Privy Council in *Mohammad Abdussamad v. Kurban Husain* (21), *Colonial Sugar Refining Co. v. Irving* (5). Section 6, clause (c), of the General Clauses Act and section 8, clause (d), of the Madras Act I of 1891 are statutory recognitions of the same rule.

It is argued that as rules of limitation are rules of procedure and as nobody has a vested right as regards matters of procedure, the plaintiff cannot plead section 7 of the Limitation Act as giving him a longer period of limitation, as at the date of the suit the Estates Land Act had enacted that the section is not to apply to suits for rent. Reference has been made to *Arayil Kali Amma v. Pelappakkara Manakal Sankaran Nambudripad* (8), *Soni Ram v. Kanhaiya Lal* (4). As observed by Mookerjee, J., in *Manjuri Bibi v. Akkel Mahmud* (1), a Statute of Limitation ceases to be a Statute of mere procedure where it shortens the period and is sought to be used to defeat causes of action which had accrued earlier than the length of time prescribed in the new law. The distinction has always to be borne in mind between mere matters of procedure and rights of suit which the procedure affects. The effect of the decision of the Privy Council in *Soni Ram v. Kanhaiya Lal* (4), on cases like the present, has been discussed by the Full Bench of the Calcutta High Court in *Gopeshwar Pal v. Jiban Chandra* (3), and I agree with the conclusion arrived at by the Full Bench that the provisions of an enactment should not, unless it is absolutely necessary, be construed so as to make it impossible to exercise a vested right of suit. As pointed out by Justice Chatterjee (at page 1129), their Lordships of the Privy Council had not to consider the retrospective

operation of special period of limitation provided by a local law coming into operation at once. In *Arayil Kali Amma v. Pelappakkara Manakal Sankaran Nambudripad* (8), Miller and Krishnaswami Aiyar, JJ., seem to rest their decision on the ground that the new Limitation Act gave time to suitors to make applications under the old Act, as the Legislature postponed the coming into operation of the Act on 1st January 1909. In *Sundaram Iyer v. Muthuganapatigal* (6), Justice Miller who was a party to *Arayil Kali Amma v. Pelappakkara Manakal Sankaran Nambudripad* (8) was of opinion that section 210 of the Estates Land Act cannot be retrospective. As the assent of the Governor-General was received only about three days before the Estates Land Act came into operation and as it is doubtful if the public knew of the assent before 1st July 1908, it cannot be said that the public had due notice. It cannot be said that they were bound to assume that consent was a mere matter of form and would be given as a matter of course, especially as petitions had been sent by landlords against the measure.

The question as to the retrospective operation of section 210 was discussed in *Ramakrishna Chetty v. Subraya Iyer* (11), where it was held that the rule of limitation in Madras Act I of 1908 was inapplicable to cases when the period of three years provided by it had expired before the Act came into force. The judgment of Benson and Sundara Aiyar, JJ., deals exhaustively with the whole question and I see no reason to dissent from the view taken by the eminent Judges who decided the case.

I do not think it makes any difference whether the alteration of the period of limitation is due to a special provision in Schedule A to the Act or to a special section in the body of the Act. So far as I can see, there is no difference in principle between the present case and the one reported as *Ramakrishna Chetty v. Subraya Iyer* (11). In both cases the Legislature shortened the period of limitation for suits for rent so far as the plaintiff was concerned and if the three years' rule in Schedule A applied, the suit would have been barred.

(19) 31 Ch. D. 402; 55 L. J. Ch. 294; 54 L. T. 100; 34 W. R. 333.

(20) (1892) 3 Ch. D. 402; 61 L. J. Ch. 580; 67 L. T. 275; 40 W. R. 679.

(21) 31 I. A. 30; 26 A. 119; 8 C. W. N. 201; 6 Bom. L. R. 338.

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Some considerations were urged during the argument which I think are beside the point. It has been argued that as the Estates Land Act has prescribed a new forum which the plaintiff has elected to sue in he is precluded from seeking the benefit of the exemption conferred by section 7 of the Limitation Act. Section 77 of the Estates Land Act gives the plaintiff no option as to the forum and there is in the present case neither election nor benefit so far as he is concerned. It has also been suggested that the object of the Legislature was to preserve tenants from long standing demands. This may be so as regards causes of action arising after the Act came into force or running at its date, but I can see no grounds for supposing that the Legislature intended to deprive landlords of rents justly due to them at the date of the passing of the Act.

The correct rule seems to me to be that though laws affecting limitation might abridge or enlarge periods of limitation in cases of suits or causes of action which were alive at the date when the new enactment came into force and which under the old law would expire afterwards, the change cannot, unless there is a clearly expressed intention to the contrary, either by apt words in the enactment or otherwise, be retrospective so as to destroy rights of suits which were alive on the date.

I agree with the Chief Justice and would allow the Letters Patent Appeals and reverse the decisions of the Courts below and remand the suits for disposal. The respondents will pay the appellant's costs of these appeals. Other costs will abide and follow the result.

Appeal allowed; Suits remanded.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 669 OF 1913.

March 9, 1915.

Present:—Mr. Justice Shadi Lal and
Mr. Justice LeRossignol.

SHAHAMAD AND OTHERS—PLAINTIFFS—
APPELLANTS,

versus

IBRAHIM AND OTHERS—DEFENDANTS—
RESPONDENTS.

Shamilat—Sale of khewat land, whether includes shamilat—Intention of parties.

It is a question of the intention of the parties as to whether a sale of the *khewat* lands includes the *shamilat* pertaining to the lands, a determination of which depends upon the facts and circumstances of each particular case. [p. 101, col. 1.]

Where the ancestor of the plaintiffs in 1862 sold to the ancestors of the defendants his entire well with all the culturable and unculturable land attached to it, this being the only property he owned, and after selling it he migrated to and settled in another district, and the *shamilat* of the village being partitioned in 1905, the plaintiffs sued the representatives-in-interest of the vendees to recover that area:

Held, that the vendor having severed all his connection with his original village and having taken no interest during all these long years in the *shamilat* area, it was evident that he meant to transfer all the rights he possessed in the village to the vendees and that both the parties to the transaction intended at that time that the vendees should step into the shoes of the vendor. [p. 101, col. 1.]

Ahmad v. Ahmad, 6 Ind. Cas. 1003; 75 P. W. R. 1910, distinguished.

Second appeal from the decree of the Additional Divisional Judge, Shahpur Division, at Lyallpur, dated the 13th January 1913.

Messrs. *Fazal-i-Hussain* and *Bahadur Ghund*, for the Appellants.

Mr. *Taq-ud-din*, for the Respondents.

JUDGMENT.—This is a second appeal from the decree of the Divisional Judge, upholding the decree of the Court of first instance dismissing the plaintiffs' suit for a share in the village *shamilat*. We have heard Mr. *Fazal-i-Hussain* on behalf of the appellants and, though we agree with him that the reasons assigned by the Divisional Judge in support of his finding are not quite correct, we are nevertheless of opinion that the plaintiffs' suit was rightly dismissed by the Court of first instance and that this appeal must fail.

The sale-deed, dated the 14th June 1862, shows that *Jahana*, the ancestor of the plaintiffs, sold for a consideration of Rs. 100 to the ancestors of the defendants his entire well called *Kasabwala*, with all the culturable and unculturable land attached

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to it. This was all the property the vendor owned, and after selling it he left the village and migrated to, and settled in, the Multan District.

It appears that in 1905 the *shamilat* of the village was partitioned and the area proportionate to the *khevat* land sold in 1862 was awarded to the vendees. The plaintiffs have brought the present action to recover that area from the defendants who are the representatives-in-interest of the vendees.

It is true that the *shamilat* land is not specifically mentioned in the sale-deed but we have, in the circumstances of the case, no doubt whatever that the vendor meant to transfer all the rights he possessed in the village to the vendees and that both the parties to the transaction intended at that time that the vendees should step into the shoes of the vendor.

It is to be remembered that land was not in those days regarded as a valuable property and it is significant that the price for the entire well was, as stated above, only Rs. 100. We fail to understand what possible object there could have been in separating the *shamilat* from the proprietary holding and reserving the former for the original owner.

The learned Counsel for the appellants has drawn our attention to a judgment of this Court reported as *Ahmad v. Ahmad* (1), in which a Division Bench decided that the sale in that case did not include a proportionate share of the *shamilat*. But it seems to us clear that each case of this kind must depend upon its own particular facts and circumstances and it is impossible to lay down a hard and fast rule which would be applicable to all cases. That the vendor in this case severed all connection with his original village and that he settled in another district and took no interest during all these long years in the *shamilat* area, are circumstances which distinguish this case from that cited on behalf of the appellants and we entertain not the slightest doubt that at the time of the sale both the parties fully intended that all the rights of the vendor, whether in the *shamilat* or in the proprietary holding, should pass to the vendees.

On this ground we have no hesitation in

upholding the decree of the learned Divisional Judge. The appeal, therefore, fails and is dismissed with costs.

Appeal dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL NO. 1495 OF 1912.

April 1, 1915.

Present:—Mr. Justice Sadasiva Aiyar and
Mr. Justice Tyabji.

SEGU CHIDAMBARAMMA—PLAINTIFF—
APPELLANT
versus

SAREDDI HUSSAINAMMA AND OTHERS—
DEFENDANTS—RESPONDENTS.

Hindu Law—Widow's estate—Alienation by widow not for necessity—Burden of proof—Reversionary interest whether liable to attachment in execution of decree against husband—Civil Procedure Code (Act V of 1908), s. 60 (m).

An alienation by a Hindu widow of her deceased husband's property not made for legal necessity is valid only during her life-time. [p. 103, col. 1.]

Singaram Chettiar v. Kalyanasundaram Pillai, 26 Ind. Cas. 1; (1914) M. W. N. 735; 1 L. W. 687, followed.

An absolute estate vested in a widow becomes by her alienation for her own purpose (valid during her life-time) divided into two estates (1) a life estate enjoyable by the purchaser during her life-time and (2) a reversionary estate to be enjoyed after her life-time. The ownership of the latter continues in her as part of the estate which she inherited from her husband and is available to her husband's creditors [p. 103, cols. 1 & 2.]

Kakralapudi Lakshmi v. Rajah Kanduluri Veera Sarabha, 29 Ind. Cas. 241; 17 M. L. T. 419; 28 M. L. J. 650, distinguished.

Such reversionary interest does not come under section 60 (m) of the Civil Procedure Code and is not exempt from attachment where the judgment-debtor is not the presumptive or contingent reversioner but a widow representing her husband's estate fully and the transfer which would be made by the attachment and Court sale of the reversionary interest is not made by any contingent reversioner or of the rights of the contingent reversioner in execution of a decree against him but by the Court acting upon the judgment-debtor's rights and upon the husband's estate vested in the judgment-debtor (widow.) [p. 104, col. 1.]

The burden of proving as against a creditor of the husband or as against a reversioner that an alienation by the widow is binding on the reversioner is on the alienee. [p. 102, col. 1.]

Second appeal against the decree of the District Court of Kurnool, in Appeal Suit No. 27 of 1911, preferred against that of the Court of the District Munsif of Nandyal, in Original Suit No. 173 of 1913.

(1) 6 Ind. Cas. 1003; 75 P. W. R. 1910.

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Mr. V. C. Seshachari, for the Appellant.

Mr. T. M. Krishnaswami Aiyar, for the Respondents.

This second appeal coming on for hearing on the 16th July 1914, the Court delivered the following

JUDGMENT.—The learned District Judge is justified in his view on the burden of proof to this extent, namely, that the burden of proving that the alienation by the widow (1st defendant) to the 3rd defendant was nominal or without consideration, lay on the plaintiff who attached the plaint property for realizing the amount decreed to him as due by 1st defendant's deceased husband. We must accept his finding that the plaintiff has not discharged that burden. But there is the further question whether the alienation by the widow was made for such a necessary purpose as would bind the property after the widow's death and whether the plaintiff is not entitled to attach and bring to sale the said reversionary estate in execution of his decree.

The burden of proving as against a creditor of the husband or as against a reversioner that an alienation by the widow is binding on the reversion is clearly on the alienee.

The learned District Judge says that "the defendants, no doubt, have not satisfactorily proved the necessity for the sale," but we are loath to accept and act upon that finding as the District Munsif had come to a different conclusion and the learned District Judge's above observation appears as a sort of *obiter dictum* in his judgment.

We shall, therefore, call for a fresh finding on the evidence already on the record on the question whether the alienation by the 1st defendant to 3rd defendant in 1899 was made for purposes binding on the reversionary interest in the plaint property.

The finding should be submitted within six weeks from the date of receipt of records and 10 days are allowed for filing objections to the finding.

In obedience to the above order the acting District Judge of Kurnool submitted the following

FINDING.—A finding has been called for on the following issue:—

"Whether the alienation by the 1st defendant to 3rd defendant in 1899 was made for purposes binding on the reversionary interest in the plaint property?"

2. In order that this issue may be found in the affirmative, it is necessary for the defence side to show that the alienation was for a purpose that comes under the category of legal necessity. For such proof, reliance is placed on the documents Exhibits II and III. Exhibit II is the sale-deed under which the property was sold by 1st defendant to third defendant in 1899, and it recites that the consideration amount was made up of three items:—

Rs. 28-8-0 due on a bond executed to 3rd defendant by 1st defendant's late husband;

Rs. 10 due for miscellaneous items.

Rs. 41-8-0 borrowed for the obsequies of 1st defendant.

Exhibit III is a bond executed for Rs. 25 to the 3rd defendant, on 21st April 1898, and has been produced by 3rd defendant's son, the 3rd defendant having died pending the suit. But there is no proof of this document, which is intended to be evidence of the first item of the consideration amount stated in Exhibit II; and for the other two items that make up the consideration stated in that document there is no evidence at all. The second item of Rs. 10 for miscellaneous items would, it would appear, even if substantiated, have to be ruled out as not being one of necessity.

3. As the burden of proof which is on the defence has not been discharged, I find the issue in the negative.

This second appeal coming on for final hearing on Tuesday the 30th day of March 1915 after the return of the finding of the lower Appellate Court upon the issue referred by this Court for trial, and having stood over for consideration till this day, the Court delivered the following

JUDGMENT.

SADASIVA AIYAR, J.—The facts are as follows. The plaintiff is the decree-holder in Original Suit No. 311 of 1901 on the file of the Nandyal Munsif's Court. The judgment-debtor is the first defendant, a Hindu widow who represented her husband's estate fully, and the decree was passed for a debt due by her husband. The plaint property was attached by the plaintiff (decree-holder) as belonging to her husband's estate. The attachment was made on the 11th November 1908, but the widow (the first defendant) had sold the property in 1899 itself to the third defendant, who sold it in his turn to the

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second defendant in 1905. The widow's sale was not made for necessity and was invalid beyond her life-time.

On these facts the question in second appeal is whether the plaintiff, who is the appellant before us, is or is not entitled to attach and bring to sale in execution of his decree in Original Suit No. 311 of 1901 that portion of the husband's estate which is left unaffected by the sale executed by the widow, that sale-deed, as we said before, not affecting more than that interest in the property which could enure during the widow's life-time. There are no doubt observations in several cases deprecating the description of a Hindu widow's estate as a life-interest, because she fully represents the estate for most purposes and nobody else represents any interest in the estate during her life-time and she is not a trustee for any body (See paragraphs 624 and 625 of Mayne's Hindu Law). My own opinion is that when once it is admitted that she represents the estate fully, some of the Hindu Law texts which direct her not to alienate the estate except for necessary purposes are merely moral admonitions and a sale by her in contravention of those moral precepts does not fail to convey the absolute ownership to the purchaser. But authorities which cannot possibly be got over have held that an alienation not for legal necessity is only valid during her life-time, that is, it conveys to the purchaser only a right to enjoy during the widow's life-time. [See the very recent case of *Singaram Chettiar v. Kalyanasundaram Pillai* (1).] When the full estate is vested in her and yet owing to the restrictions, which from being moral restrictions have become legal restrictions, she can convey only an interest to last during her life-time by a conveyance not for legal necessity, it seems to me to follow that the absolute estate vested in her becomes by her alienation for her own purposes (valid during her life-time) divided into two estates, (1) a life estate enjoyable by the purchaser during her life-time and (2) a reversionary estate to be enjoyed after her life-time, both of which estates or rather the total of which belonged to her husband at his death. So far as her life-interest is con-

cerned, it became by her alienation not available to the creditors of her husband, but the ownership of the remaining reversionary estate continues in her as part of the estate which she inherited from her husband. That seems to me to be available to her husband's creditors. Mr. T. M. Krishnaswami Aiyar relied upon the cases which have held that a presumptive reversioner has no interest in the property during the widow's life-time which can be attached by his creditor. [See the latest case of this Court *Kakaralapudi Lakshmi v. Rajah Kandukuri Veera Sarahha* (2).] In my opinion, these decisions are irrelevant in the consideration of the question whether the widow as heir of her husband has still left in her some property belonging to her husband's estate which could be attached by her husband's creditor after she had made an alienation binding on her during her life-time. No person can claim during the widow's life-time, after the alienation of the widow's life-estate, to be the owner of that reversionary interest, but it does not follow therefrom that no reversionary interest, in property forming part of the husband's estate, is left after her alienation of her life-estate. If an interest belonging to the husband's estate is left, some legal person must be its owner. If a presumptive and contingent reversioner is not the legal person in whom the reversionary right exists, it must be the widow in whom the whole legal estate vested at her husband's death. If so, the decree-holder, who obtained a decree against her as fully representing her husband, must be entitled to attach that reversionary interest remaining in her as part of her husband's estate.

Section 60, clause (m) of the Civil Procedure Code and section 6, clause (a) of the Transfer of Property Act, are also relied on by Mr. T. M. Krishnaswami Aiyar. Section 60 (m) of the Civil Procedure Code prohibits the attachment of a judgment-debtor's expectancy of succession. Section 6 (a) of the Transfer of Property Act prohibits the transfer of the chance of an heir-apparent's succession by such heir-apparent. These statutory provisions again are, in my opinion, irrelevant to the consideration of the question

(1) 26 Ind. Cas. 1; (1914) M. W. N. 736; 1 L. W. 687.

(2) 29 Ind. Cas. 241; 17 M. L. T. 419; 28 M. L. J. 650.

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before us, because the judgment-debtor here is not the presumptive or contingent reversioner but the widow representing her husband's estate fully, and the transfer which would be made by the attachment and Court sale of the reversionary interest is not made by any contingent reversioner or of the rights of the contingent reversioner in execution of a decree against him, but by the Court acting upon the judgment-debtor's rights and upon the husband's estate vested in the judgment-debtor (widow).

I would, therefore, answer the question which I put to myself in the beginning of the judgment in the affirmative, and setting aside the judgments of the lower Courts give a declaration to the plaintiff that the attachment made by him in execution of the decree in Original Suit No. 31 of 1901 is valid in respect of the reversionary interest in the properties subject to the life-interest of the widow. The parties will bear their respective costs throughout.

TYABJI, J.—I agree. It seems to me that the widow was a party to the proceedings in two capacities, (1) as to a life-interest in her own absolute right and (2) as to the reversion as the representative of her deceased husband's estate which is to devolve on his reversioner. She had no doubt purported to convey the property in both capacities, but it has been found that in so far as she purported to alienate the property in her latter capacity she had stepped beyond her legal powers and was not competent to bind the reversioner. She was on that account brought on the record so that the reversionary interest of her husband's estate may also be bound. The authorities to the effect that the presumptive reversioner's interest is such a mere expectancy as is referred to in the Transfer of Property Act, section 6 (a), support this view. For, if the reversionary interest in the widow's husband's estate is a mere expectancy so far as the reversioner is concerned, the only person in whom "the legal estate" (I use that expression for brevity perhaps at the sacrifice of accuracy) can be said to be vested must be the widow.

Appeal allowed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL NO. 1724 OF 1912.

March 26, 1915.

Present:—Justice Sir Donald Johnstone, Kt.,
and Mr. Justice Shah Din.

CHUNI LAL AND OTHERS—PLAINTIFFS—

APPELLANTS

versus

BELI RAM AND OTHERS—DEFENDANTS—

RESPONDENTS.

Mortgage—Decree for redemption on payment of mortgage-money not executed—Claim to redeem on basis of that decree, whether maintainable—Appeal for reduction of mortgage-money—Court-fee payable.

The sons of a mortgagor brought a suit in 1888 against the original mortgagees for redemption of certain mortgages and obtained a decree for possession of the mortgaged property conditional on payment of Rs. 3,404-3-0. This decree was never executed and the possession remained with the mortgagees as before. On the 18th November 1909 the present plaintiffs, claiming under the original mortgagor, sued for possession of the land by redemption on payment of the decretal amount. Defendants, successors-in-title of the original mortgagees, claimed Rs. 6,947 on the basis of the original mortgage deeds and the lower Courts decreed redemption on payment of this sum. On second appeal to the Chief Court:

Held, (1) that Court-fee was payable on the value of the subject-matter in dispute in this appeal, namely, the difference between Rs. 6,987, the amount fixed by the lower Courts, and Rs. 3,404-3-0, the amount which the plaintiffs were prepared to pay; [p. 105, col. 2.]

(2) that the previous decree not having been executed within limitation had become inoperative so far as the amount of the incumbrance on the land was concerned and a fresh suit for redemption was only maintainable on the basis of the original mortgage-deeds. [p. 105, col. 2.]

Second appeal from the decree of the Divisional Judge, Jullundur Division, dated the 22nd July 1912.

The Hon'ble Bakhshi *Sohan Lal*, R. B., for the Appellants.

Rai Bahadur Pandit *Sheo Narain*, for the Respondents.

JUDGMENT.—By a registered mortgage-deed, dated the 1st May 1871, and by three additional mortgage-deeds, dated the 2nd December 1871, the 15th February 1872 and the 21st July 1879, respectively, one Gonda Mal, predecessor-in-title of the plaintiffs, mortgaged the land in suit with possession to Jai Dial and Gopi, under whom the defendants claim, for a total consideration of Rs. 1,799. The first mortgage-deed did not carry interest, but in the three additional mortgage-deeds provision was made for payment of interest on the mortgage-money

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at the rate of Rs. 1-12-0 per cent. per mensem.

The sons of the original mortgagor, Gonda Mal, who had meanwhile died, brought a suit in 1888 against the original mortgagees for redemption of the mortgage on payment of the principal mortgage-money. On the 13th February 1889 they obtained a decree for possession of the property mortgaged conditional on payment of Rs. 3,404-3-0 to the mortgagees. This amount was made up of the principal mortgage-money Rs. 1,799 and interest thereon amounting to Rs. 1,605-3-0. This decree was never executed, and possession of the land mortgaged remained with the mortgagees as before.

On the 1st November 1909 the present plaintiffs, who claim under the original mortgagor, brought this suit for possession of the land by redemption and claimed to redeem the mortgage on payment of Rs. 3,404-3-0, which was the amount of the charge on the land as fixed by the decree of the 13th February 1889. The defendants, who are successors-in-title of the original mortgagees, pleaded that the plaintiffs were not entitled to effect redemption on payment of Rs. 3,404-3-0 on the strength of the decree of 1889; that the said decree, not having been executed within limitation, was ineffectual so far as the determination of the amount of the incumbrance on the land was concerned; and that the defendants were entitled to receive from the plaintiffs, on the footing of the original mortgage-deed and the three additional mortgage-deeds of 1871, 1872 and 1879, a sum of Rs. 6,987. The first Court decreed redemption on payment of the said sum of Rs. 6,987; and on appeal by the plaintiffs the learned Divisional Judge maintained the decree of the first Court.

The plaintiffs have preferred a second appeal to this Court, and for purposes of Court-fee they have valued the appeal at Rs. 1,799, the principal mortgage-money secured by the four instruments of mortgage. The first question we have to decide is as to whether the memorandum of appeal is sufficiently stamped. The question is concluded by authority, and we hold, following *Banwari Das v. Nathu Shah* (1) and *Dyal* (1) 9 Ind. Cas. 676; 5 P. R. 191; 48 P. L. R. 191; 59 P. W. R. 1911.

Singh v. Ram Rakha (2), decided on the 30th January 1912, that the proper amount of Court-fee is that payable on the value of the subject-matter in dispute in this appeal, viz., Rs. 3,582-13-0, which is the difference between Rs. 3,404-3-0, which the plaintiffs are prepared to pay to the defendants, and Rs. 6,987, which has been fixed by the lower Courts as the amount on payment of which redemption can be effected. The total amount of Court-fee leviable on the memorandum of appeal was thus Rs. 205, and since the appellants have already affixed on the memorandum of appeal a Court-fee stamp of the value of Rs. 115, they must pay the additional Court-fee of Rs. 90. The appellants' Pleader undertakes to pay in this additional amount of Court-fee at once, and we proceed to deal with the merits of the appeal.

On the merits, the concurrent decision of the Courts below is perfectly sound and must be maintained. The argument that the amount of the incumbrance on the land was fixed once and for all by the decree of the 13th February 1889 and that since it was held in the judgment upon which that decree was based that no future interest was to be allowed on the amount decreed, the respondents were not entitled to claim any interest after the date of the decree in question, is obviously untenable. As the decree was not executed within the period of limitation, it ceased to have any legal effect after the expiry of the period of limitation, so far as the amount of the incumbrance on the land was concerned; and the fresh suit for redemption which has been brought by the present respondents is maintainable, according to the uniform practice of the Courts in this Province, on the basis of the original mortgage-deeds, and not on the strength of the decree dated the 13th February 1889. If the appellants had the option of instituting a second suit for redemption, as according to the rulings of this Court they have, long after the decree of the 13th February 1889 ceased to be executable, it is obviously erroneous to say that the amount of the incumbrance on the land remains always the same as that fixed by the said decree. That decree having ceased to operate between the parties, so far as regards the right of the (2) 14 Ind. Cas. 78; 122 P. W. R. 1912; 109 P. R. 1912.

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mortgagors to recover possession of the land on payment of Rs. 3,404-3-0, it must be left out of consideration in the present suit; and the amount of the incumbrance on the land must be determined afresh on the basis of the mortgage-deeds on the strength of which redemption is sought to be effected by the mortgagors.

Reference was made in argument to certain recitals contained in a registered deed of sub-mortgage, dated the 18th June 1900, and a registered deed of sale, dated the 4th September 1908, executed by the predecessors-in-title of the respondents, and it was urged that those recitals amounted to admissions to the effect that the mortgage-debt had been fixed once and for all by the decree of 13th February 1889 at Rs. 3,404-3. As pointed out by the learned Divisional Judge, these alleged admissions do not amount to an estoppel and they were the result of a misconception of the legal position on the part of the mortgagees.

We have no hesitation in agreeing with the Courts below that the amount due to the respondents on the footing of the mortgage-deeds of 1871, 1872 and 1879 is not less than Rs. 6,987; and we accordingly maintain the decree of the lower Appellate Court and dismiss this appeal with costs.

Appeal dismissed.

MADRAS HIGH COURT.

CIVIL APPEALS NOS. 225 AND 136 OF 1912.

April 29, 1915.

Present:—Sir John Wallis, Kt., Chief Justice, and Mr. Justice Coutts-Trotter.

RAJA DAMARA KUMARA VENKATAPPA NAYANIM BAHADUR VARU

— PLAINTIFF—APPELLANT IN NO. 225 AND RESPONDENT IN NO. 136

versus

DAMARA RANGA RAO GARU—

DEFENDANT—RESPONDENT IN NO. 225 AND APPELLANT IN NO. 136.

Hindu Law — Adoption — Preferential right of senior widow—Junior widow, whether can validly adopt without consulting senior widow—Consent of sapindas.

A senior widow has a preferential right to adopt and so long as such preferential right exists, an adoption by the junior widow without consulting the senior is invalid even if made with the consent of the sapindas. [p. 109, col. 1.]

Per Wallis, C. J.—Even on the view that a widow can adopt with the consent of the sapindas in the absence of any authority from her deceased husband, the senior widow is one of the kinsmen whom it is the duty of the junior widow to consult. Failure to do so renders the adoption invalid. [p. 109, cols. 1 & 2.]

The law of adoption as applied in various Presidencies discussed. [p. 108, col. 1.]

Appeals against the decrees of the District Court of North Arcot, in Original Suit No. 23 of 1910.

Mr. A. Krishnaswamy Aiyar, for the Appellant in Appeal No. 225 of 1912 and for the Respondent in Appeal No. 136 of 1912.

Messrs. T. V. Venkatarama Aiyar and V. Ramesam, for the Respondent in Appeal No. 225 of 1912 and for the Appellant in Appeal No. 136 of 1912.

JUDGMENT.

WALLIS, C. J.—The plaintiff-appellant in this case bases his claim to succeed to the estate of the late Gangadhara Rama Nayanam, on the ground that he was duly adopted by the junior widow with the consent of the sapindas after the senior widow had refused to adopt a boy. The District Judge has found, and we agree with him, that no such refusal is proved. On the other hand the evidence shows that the senior widow who left the family house shortly after her husband's death set up almost at once that her husband had authorised her to adopt during his life-time. It also appears that two days after the adoption of the plaintiff by the junior widow, and as soon as she heard of it, she went through the form of adopting the defendant purporting to act under the alleged authority from her husband. The District Judge found that this authority had not been proved, but this finding did not affect the result, as he also found that the plaintiff's adoption by the junior widow was invalid on the ground that it was made by her without consulting the senior widow and obtaining her consent, and also because it was made without consulting one of the nearest reversioners of the deceased, and that consequently he had no right to sue.

The view taken by the District Judge as to the senior widow's consent is in accordance with a subsequent and very recent decision of Sankaran Nair and Spencer, JJ., in *Kakerla Chukkamma v. Kakerla Pun-*

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namna (1), where it was held that the senior widow has a preferential right to adopt, and that, so long as such preferential right subsists, the junior widow has no right to adopt. The learned Judges, one of them a Hindu Judge of long experience, based the decision not only on the decisions of the Bombay and Calcutta Courts, but also on the preferential right of the senior widow to perform religious acts such as adoption.

The question which is one of considerable importance and had previously come before this Court has again been very ably and elaborately argued before us by Mr. A. Krishaswamy Aiyar for the appellant and by Mr. T. V. Venkata Rama Iyer for the respondent; and after careful consideration of their arguments I see no reason to differ from the conclusion arrived at by the learned Judges or the grounds on which it was based.

The preferential right of the senior wife as regards religious acts is, in my opinion, clearly established. The *Mitakshara*, Book I, Chapter III, verse 88, which has been specially translated for us, first cites the text of Yajñavalkya: "When there is a wife of an equal class present, never do acts of religion with any other. When there is more than one wife of the same class as yourself, in matters of religion never employ any but the eldest." On this Vijnaneswara comments as follows:—"When there is a wife of equal class never do acts of religion with wives of any other class. When there are several wives of the same class in matters of religion do not pass over the eldest wife and do not employ either the second or the third, (lit. the middle or the youngest one)." See also Colebrooke, Volume 2 Digest, pages 124 to 126. The senior widow's preferential right of adoption is expressly recognised in Steel's Law and Custom of Hindu Castes, page 48, which embodies the results of an inquiry held in the year 1831 as to the Hindu customs and usages prevailing in the Deccan; and in *Padajirav v. Ramrav* (2), Sargeant, C. J., after referring to this passage observed that

the superior right of the elder widow was doubtless based on her being the *patni* and as such entitled to take part with her husband in all religious ceremonies. I think that here the learned Judge was only offering an explanation of the usage prevailing in the Deccan, and even if, as contended by the appellant, he was mistaken in supposing that the senior wife alone was entitled to be styled *patni*, I do not think that matters much, as it does not affect the preferential right of the senior wife to perform religious acts. As regards the meaning of *patni*, it appears from the passage in the *Mitakshara* and *Viramitrodaya* referred to in *Janaki Nath Mukhopadhyaya v. Mothuranath Mukhopadhyaya* (3), that the celebrated grammarian Panini considered that the word had been formed by affixing the particle *ni* to *pati* (husband) to signify one who partakes in the holy sacrifices. Fanciful as this may be, it was, of course, accepted on Panini's authority by the commentators, and Vijnaneswara after referring to it states that all the wives were to be regarded as *patnis* and as such entitled to share in the inheritance. The omission in Colebrooke's translation of the *Mitakshara* of this passage, which is now accepted as genuine, was responsible for Strange's view that the senior widow alone was entitled to succeed, a view which has been overruled by *Kissen Lala v. Javallah Prasad Lala* (4), and by the Privy Council in *Gajapathi Nilamani v. Gajapathi Radhamani* (5), which only left her the exclusive right of management until partition. Admitting, however, that the junior wives are *patnis* in the sense of being capable of partaking in sacrificial acts, it remains true, on the express authority of the *Mitakshara* already cited, that the senior wife has the preferential right as regards religious acts, and this appears to me to be a sufficient foundation for her preferential right as to adoption.

It is then said that the learned Judges were wrong in applying the Bombay rulings, *Rakhmabai v. Radhabai* (6) and *Padajirav v. Ramrav* (2), to this Presidency and that

(3) 9 C. 580 at p. 583; 12 C. L. R. 215; 7 Ind. Jur. 532.

(4) 3 M. H. C. R. 346.

(5) 1 M. 290; 1 C. L. R. 97; 4 I. A. 212; 1 Ind. Jur. 589; 3 Sar. P. C. J. 753; 3 Suth. P. C. J. 365.

(6) 5 B. H. C. R. A. C. J. 181.

(1) 27 Ind. Cas. 775; 28 M. L. J. 72; 16 M. L. T. 612; 2 L. W. 24; (1915) M. W. N. 19.

(2) 13 B. 160 at p. 166.

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these decisions are opposed to the decisions of the Privy Council with reference to adoption in this part of India beginning with the *Ramnad* case; *Collector of Madura v. Moottoo Ramalinga Sathupathy* (7). But, as pointed out by their Lordships in that case, the law of adoption in all these Presidencies rests on the text of Vasishta, "Nor let a woman give or accept a son without the consent of her lord," and the main difference is as to the circumstances in which such consent should be considered to have been given evidence of express authority being required in Bengal, whereas in Bombay it is presumed, except in cases where the husband was a member of a joint family where the consent of the managing member is required, while in Madras, as held by their Lordships in the *Ramnad* case, *Collector of Madura v. Moottoo Ramalinga Sathupathy* (7), on a variety of considerations the want of the husband's consent may be supplied by the consent of his kindred. Following the Bombay decisions the Calcutta High Court has recently held that, where the husband authorised his two widows to adopt, he must be held to have intended the senior widow to have the preferential right. The Bombay decisions, Jenkins, C. J., observed, "rest upon fundamental principles and on views of Hindu life and economy which appear to me to be fully applicable here. Any other view would merely lead to an unseemly scramble for the purpose of performing this solemn act." These observations in my view are equally applicable in this Presidency.....where, as observed by their Lordships in *Sri Varada Pratapa Raghunada Deo v. Sri Brozo Kishore Patta Deo* (8), the law in this respect is something intermediate between the stricter law of Bengal and the wider law of Bombay. Further in view of the inconveniences attendant on simultaneous rights of adoption and in the significant absence of any evidence that such an equal right has ever been claimed in our Courts for junior widows prior to these two cases, I think the onus is on those who assert it to show that the law in Madras differs in this respect from that which prevails in

the adjoining Presidency. In the case of impartible estates the estate necessarily vests in the senior widow, and the result of holding that the junior widow with the consent of a majority of the *sapindas* has the right to adopt without reference to the senior widow, would be to render the latter's tenure of the estate exceedingly precarious. The absence, until now, of any such attempt by the junior widow and *sapindas* goes far to show that the rule in this Presidency has been the same as in Bombay, and that we should effect an innovation by holding otherwise.

It is then argued that the equal right of the junior widow is to be deduced from decisions of their Lordships of the Judicial Committee in which the question was not raised or considered. These arguments must be received with great caution, as their Lordships' observations were only directed to the questions before them. In the *Ramnad* case, *Collector of Madura v. Moottoo Ramalinga Sathupathy* (7), it was held not only on the authority of the *Smriti* Chandrika and *Dattaka Meemansa* but also on the ground of proved usage, that in Madras a Hindu widow not having her husband's permission might lawfully adopt if duly authorized by his kindred, the assent of the kinsmen being apparently required by reason of the presumed incapacity of women for independence. The question of priority among co-widows did not arise and was not considered in the case. The further explanation of that decision by their Lordships in *Sri Virada Pratapa Raghunada Deo v. Sri Brozo Kishore Patta Deo* (8), as to what amounts to a sufficient consent of kinsmen does not affect the present question. In the next case, *Vellanki Venkata Krishna Rao v. Venkata Rama Lakshmi* (9), where the question was whether an adoption made by a widow with the assent of the kindred after the death of her natural son was valid, their Lordships held that the husband during his life-time might have authorised his wife in the event of the death of the natural son to adopt another son, and, if she could have done it with the husband's assent she could equally do it with the assent of the kindred. Their Lordships, no doubt, laid down generally, but of course with reference to the facts before them,

(7) 12 M. L. A. 397; 10 W. R. (P. C.) 17; 1 B. L. R. 1 (P. C.); 2 Suth. P. C. J. 135; 2 Sar. P. C. J. 361; 20 E. R. 389.

(8) 1 M. 69 at p. 81; 3 L. A. 154; 11 Mad. Jar. 188; 25 W. R. 291; 3 Sar. P. C. J. 583; 3 Suth. P. C. J. 263.

(9) 1 M. 174; 26 W. R. 21; 4 L. A. 1; 1 Ind. Jur. 63; 26 W. R. 21; 3 Sar. P. C. J. 609; 3 Suth. P. C. J. 353.

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that a widow without permission from her husband may, if duly authorized by her kinsmen, adopt a son to him in every case in which such an adoption would be valid if made by her under written authority from her husband. This is the major proposition of the syllogism. The minor is to be found in the observation of their Lordships in *Annapurni Nachiar v. Forbes* (10): "It seems not to be doubted that a man may authorize a single one of several wives to adopt after his death, or that she would on adoption stand in the place of the natural mother." We are then asked to conclude that a junior widow with the consent of the kinsmen may adopt without reference to the senior widow. The fallacy of this argument, in my opinion, consists in applying the general expressions of their Lordships in *Vellanki Venkata Krishna Rao v. Venkata Rama Lakshmi* (9) to a case which was not before them and which involves, as I have sought to show, considerations of authority, usage, and convenience which were not presented to them.

The decision of the Bombay High Court in *Rakhamabai v. Radhabai* (6), that the senior widow is entitled to adopt without the consent of the junior widow, and the decision of this Court in *Narayanasami Naick v. Mangammal* (11), that in this part of India the senior widow with the consent of the kinsmen may proceed without the consent of the junior widow, must be considered as proceeding on a recognition of the senior widow's preferential right, and are no authority for holding that the junior widow may adopt without the senior's consent.

Mr. Venkatarama Aiyar for the respondent also argued that in any case the senior widow was entitled to be consulted as one of the kindred, while on the other side it was argued that a widow is not a *sapinda* but only succeeds as one of the enumerated heirs. I do not think it necessary to go into this question, but having regard to the decision of their Lordships in *Collector of Madura v. Moottoo Ramalinga Sathupathy* (7) that the assent of the mother-in-law, Mother-in-law, in that case was operative in support of the adoption, I should be disposed to hold that the senior widow was one

of the kinsmen whom it was the duty of the junior widow to consult and that the adoption was bad for failing to consult her.

I do not consider it necessary to consider whether on the evidence as found by the District Judge there was a failure to consult one of the next reversioners, because for the reasons already given I think the Appeal No. 225 fails and must be dismissed with costs. For the purposes of this appeal it is not necessary to consider the finding as to the adoption of the senior widow of the 1st defendant. It has also become unnecessary to hear the cross-appeal of the 1st defendant against the finding that he was not validly adopted by the senior widow, as that finding has become immaterial to the decision. The Appeal No. 136 is withdrawn by consent. No order as to costs.

COUTTS-TROTTER, J.—I also desire to express my indebtedness to the able and lucid arguments which have been addressed to us, from which I have derived much assistance and instruction. Up to a certain point the law is clear, and its provisions are a common starting point to both parties; and the following propositions may be laid down. In Bengal a widow can only adopt if the husband has before his death given his express authority to her to do so. In Bombay the consent of her husband is always implied and she can adopt without proving any authority on her own motion. In Southern India, she can adopt without express authority if she obtains the consent of the *sapindas* of her husband. When a man has more wives than one, he can associate any one of them with him in adoption, and can give an authority to any one of them to adopt after his death; his choice is in no way restricted and he can prefer the junior widow to the senior, the younger to the elder. It is argued for the appellant here that as the junior widow can adopt with the authority of her deceased husband, she is in exactly the same position if she obtains the consent of the *sapindas*: for the sole object and import of the consent of the *sapindas* is that it should be the equivalent of the authority of the husband. In support of this view of the scope and nature of the authority of the *sapindas*,

(10) 23 M. 1 at p. 9; 26 I. A. 156.

(11) 28 M. 315; 15 M. L. J. 143.

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reliance was placed on the judgment in *Vellanki Venkata Krishna Rao v. Venkata Rama Lakshmi* (9), and particularly on the observations of Sir James Colville at pages 184 and 187.

For the respondent reliance was placed on the fact that both in Bengal, where the rule is stricter, and in Bombay, where it is laxer than the Madras, the junior widow is not allowed to adopt in preference to or without the consent of the senior. See *Padajirav v. Ramrav* (2) and *Ranjit Lal Karmakar v. Bejoy Krishna Karmakar* (12). In the Bengal case, the question arose and only could arise where a husband had given an authority to his wives to adopt, without distinguishing between them: the Court read the authority distributively, and held that its exercise was restricted in the first instance to the senior widow. In the Bombay case, where there was no question of express authority, it was held that the power was not exerciseable by the junior widow without the consent of the senior. Mr. Krishnaswami Aiyar, while prepared if necessary to say that these cases are wrong or at any rate have no application to Madras, distinguishes them from the present case. He points out that the Calcutta case only laid down a rule for the construction of an authority given to two persons, and that the Bombay case applies the same construction to an implied authority. Here we have an express authority, that of the *sapindas*, to a definite person and he contends that there is nothing in either decision to prevent our giving effect to it.

An English Judge in deciding a question of English Common Law is in theory declaring what custom on the subject has subsisted immemorially in the country (Stephen's *Blackstone*, Vol. I, Introduction, section 1). An Indian Judge in deciding a question of Hindu Law is in theory expounding the true construction of mandatory utterances to which a divine origin is ascribed, aided or impeded in his task by ancient commentaries, text-books of authority, and judicial decisions of the Indian Courts and of the Privy Council. Now-a-days there is little but fiction in either theory, and a Judge in both countries has only to apply the principles of previous decisions to particular

sets of facts. But I think that the theoretical objection has just this much effect, that the argument that a suggested result is not in accordance with known practice will have less weight in India, if it can be shown to be the logical deduction from the authorities. In the present case, I feel it very difficult to escape from the conclusion that *Vellanki Venkata Krishna Rao v. Venkata Rama Lakshmi* (9) has declared the consent of the *sapindas* to be in all respects the equivalent of express authority from the husband. On the other hand, it is quite clear from the books that to give effect to the appellant's contention would be quite contrary to what every one has hitherto supposed to be the law, and to legalize what in practice is a complete innovation. It is also a practice likely to lead to extreme inconvenience, to use no stronger term. In this state of things, I find that two Judges of this Court have in *Kakerla Chukkamma v. Kakerla Punnumma* (1) decided this question adversely to the appellant; one of those Judges being Sankaran Nair, J.; whose authority on such a subject has the weight of his great experience. Further, I find that my Lord in the present case takes the same view. That being so, I think it would be quite wrong for me to give expression to any opinion that might tend to unsettle the former decision of this Court, or give any encouragement to its challenge in other cases. The expressions used by the Privy Council in *Vellanki Venkata Krishna Rao v. Venkata Rama Lakshmi* (9) were not really necessary to the decision; and I think if the decision in *Kakerla Chukkamma v. Kakerla Punnumma* (1) is to be challenged, it must be challenged elsewhere than in this Court. The appeal fails and is dismissed with costs. I agree with the order proposed in my Lord's judgment.

Appeal No. 225 dismissed.

GANESH BHAGAT v. SARADA PRASAD.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 430
OF 1912.

June 18, 1914.

Present:—Mr. Justice D. Chatterjee and
Mr. Justice Walmsley.GANESH BHAGAT—PLAINTIFF—
APPELLANT

versus

SARADA PRASAD MUKERJEE—

DEFENDANT—RESPONDENT.

[Court Fees Act (VII of 1870), s. 7, sub-s. (4), cl. (c)
—Suit to set aside decree—Court-fee to be paid on
what amount—Valuation of suit.

In a suit to set aside a decree as bad the plaintiffs should pay Court-fees upon the amount at which they value their loss and not on the whole decretal amount. [p. 112, col. 1.]

Appeal against the decree of the Subordinate Judge of Bhagalpore, dated November 27th, 1912.

Babu Mohini Mohan Chatterjee and Probodh Chandra Dutt, for the Appellant.

Babus Nares Chandra Sinha and Kalidas Sirkar, for the Respondent.

JUDGMENT.—This is an appeal against an order of the Subordinate Judge of Bhagalpore rejecting a plaint as being insufficiently stamped. The suit of the plaintiffs was for a declaration that a decree for over Rs. 22,000 obtained by the defendant against themselves and their relations was bad so far as they were concerned, as they never took the loan, were not benefited by the loan and were not properly represented in the suit, and that their share in the family property which was three annas and valued at Rs. 9,000 had been improperly sold in execution of that decree. They paid Court-fee on their plaint upon ten times the Government revenue. They were, however, willing to pay upon Rs. 9,000, the value of their three-annas share of the property sold under the mortgage-decree. The learned Subordinate Judge, however, thought that they were not entitled to maintain the suit upon that Court-fee and must pay Court-fee upon the whole amount of the decree which was over Rs. 22,000.

It has been contended before us that the learned Judge is wrong, and on the ground that the loss to the plaintiffs must be the index to the value of the action so far as the plaintiffs are concerned.

If the plaintiffs' loss on account of the decree was small they would not be bound to value their suit according to the decree. In support of this contention, the learned Vakil for the appellants has relied upon the remarks of the Privy Council in the case of *Phul Kumari v. Ghanshyam Misra* (1) where their Lordships are reported to have said: "The value of the action must mean the value to the plaintiff. But the value of the property might quite well be Rs. 1,000, while the execution debt was 10,000. It is only if the execution debt is less than the value of the property that its amount affects the value of the suit." This case was, no doubt, a case under section 283 of the Code of Civil Procedure and it was held that it came under sub-section (1) of Article 17 of Schedule II of the Court Fees Act, namely, a suit to alter or set aside a summary decision or order of a Civil Court not established by Letters Patent. In the portion which we have quoted above, their Lordships explain the meaning of the words 'value of the action' as meaning the value to the plaintiff; and to that extent it may be a guide for the decision of this case.

On the other hand, the learned Vakil for the respondent has drawn our attention to the case of *Harihar Prasad Singh v. Shyam Lal Singh* (2). That was a case to some extent analogous to the present case. In that case, in execution of a decree for Rs. 2,794 a property worth Rs. 7,000 had been sold and their Lordships held that the plaintiff must value his suit according to the value of the decree. The value of the decree in that case was less than the value of the property and the judgment was in accordance with what their Lordships of the Privy Council said in the case of *Phul Kumari v. Ghanshyam Misra* (1) namely, "it is only if the execution debt is less than the value of the property that its amount affects the value of the suit." In that case the Court-fee was directed to be paid upon the value of the decree, which was less than the value of the property which the plaintiff wanted to recover.

(1) 35 C. 202; 12 C. W. N. 169; 35 I. A. 22 (P.C.); 7 C. L. J. 36; 5 A. L. J. 10; 17 M. L. J. 618; 2 M. L. T. 506; 10 Bom. L. R. 1; 14 Bur. L. R. 41.

(2) 21 Ind. Cas. 404; 40 C. 615.

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In this case, however, the loss that the plaintiffs have suffered is the loss of their property which is valued at Rs. 9,000. The value of the action to them, therefore, is Rs. 9,000, and the prayer in the plaint that the decree may be set aside to the extent of the share of the plaintiffs which has been added to the plaint, does not indicate that the plaintiffs were increasing the value of the action so far as they were concerned. Taking their share as three annas, the share of the decree so far as they would be affected would be much less than Rs. 9,000. As the plaintiffs, however, valued their loss at Rs. 9,000, we think that the Court-fee must be paid upon that, according to section 7, sub-section (4), clause (c), and that the plaintiffs must value their plaint accordingly.

The order, therefore, requiring the plaintiffs to pay Court-fee on Rs. 22,876-7-6 is wrong and must be set aside, and the case sent back to the lower Court to be dealt with in accordance with law. The plaintiffs must have their costs of this appeal.

The plaintiffs will be allowed to pay Court-fees within eight weeks from this date.

Let the record be sent down without delay.

Appeal allowed; Case remanded.

LOWER BURMA CHIEF COURT.
CIVIL MISCELLANEOUS APPEAL No. 91 OF 1915.
July 13, 1915.

Present:—Mr. Justice Twomey and
Mr. Justice Ormond.

U WILATHA—PLAINTIFF—APPELLANT
versus

U THIRI—DEFENDANT—RESPONDENT.

Burmese Buddhist Law—Buddhist monk's arrest in execution of decree—Presumption as to power of disposal—Civil Procedure Code (Act V of 1908), O. XXV, r. 1.

Under the Buddhist Law a man's interest in his property ceases when he is ordained as a Buddhist monk, though according to certain texts he may receive gifts after ordination.

There is a strong presumption that a Buddhist monk has no property over which he has rights of disposal.

Expediency of supplementing Order XXV, rule 1, Civil Procedure Code, so as to include cases in which a Buddhist monk is the sole plaintiff recommended.

Maung Talok v. Ma Kon, U. B. R. (1892-96), Vol. II, p. 78; *Ma Pwe v. Maung Myat Tha*, U. B. R. (1897-1901), Vol. II, p. 54, referred to.

Mg. Kin, for the Appellant.

Mr. Po Han, for the Respondent.

JUDGMENT.

TWOMEY, J.—The appellant, U Wilatha, a Buddhist Pongyi, has been committed to the civil jail in execution of decree in a civil suit in which he was the plaintiff. The suit was dismissed and U Wilatha was ordered to pay costs which amount to over Rs. 600, the greater part of this sum being made up of Advocate's fees. It appears that he is in occupation of certain Kyaungs but it is not shown that he has any power of alienating them and even if they are *poggalika* property, it seems doubtful whether he could do so—*Vide Maung Talok v. Ma Kon* (1). The position of Buddhist monks generally with regard to the holding of property was fully considered by Mr. Burgess in *Ma Pwe v. Maung Myat Tha* (2), in which case he held that a man's interest in his property ceases when he is ordained as a Buddhist monk, though according to certain texts he may receive gifts after ordination.

There is, to say the least, a strong presumption that a Buddhist monk has no property over which he has rights of disposal and that presumption has not been rebutted in the present case.

We direct the appellant's release. It is a hardship on the respondent that he has no means of recovering his costs. Order XXV, rule 1, does not provide for the case and we think that the expediency of supplementing that rule so as to include cases in which a Buddhist monk is the sole plaintiff and in which the defendant applies for security for costs might be considered with advantage.

ORMOND, J.—I concur.

Release ordered.

(1) U. B. R. (1892-96), Vol. II, p. 78.

(2) U. B. R. (1897-1901), Vol. II, p. 54.

EMPEROR v. UPENDRA NATH DAS.

CALCUTTA HIGH COURT.
FULL BENCH.

ORIGINAL CRIMINAL JURISDICTION.

September 3, 1914.

Present:—Sir Lawrence Jenkins, Kt., Chief Justice, Justice Sir Harry Stephen, Kt., Mr. Justice Woodroffe, Justice Sir Asutosh Mookerjee, Kt., and Mr. Justice Holmwood.

EMPEROR—PROSECUTOR

versus

UPENDRA NATH DAS—ACCUSED.

Jury trial—Misdirection—Letters Patent (Cal.) (1865), cl. 26—Certificate of Advocate-General—Penal Code (Act XLV of 1860), ss. 299, 300, 304—Culpable homicide not amounting to murder, conditions of—Exceptions—Not raised nor relied upon by accused—Judge refraining from directing Jury as to exceptions, effect of—Majority verdict, effect of—Jury's powers—Judge, duty of—Criminal Procedure Code (Act V of 1894), ss. 297, 305—Scintilla of evidence—Judge's decision—Accused's case—Sudden and grave provocation, no charge as to—Evidence to go to Jury—Trial Court's proceedings—Evidence Act (I of 1872), s. 105, scope of—Burden of proof—Defending Counsel, duty of—Review.

Per Jenkins, C. J.—A certificate granted by an Advocate-General under clause 26 of the Letters Patent should reflect his judgment and not mere surmise; it should be granted in the interests of justice after a careful consideration of all available materials; it should be in conformity, and not in conflict, with the statement of the Judge who presided at the trial; and it should formulate and give effect to the accused's real grievances. [p. 115, col. 2.]

The certificate of an Advocate-General is entitled to respect and whether he grants it after a careful consideration of all available materials or without doing so, once it is granted, the Court has to deal with the case. [p. 115, col. 2; p. 116, col. 1.]

The statement of the trial Judge as to what actually took place before him is conclusive. [p. 115, col. 1.]

Reg. v. Pestonji Dinsha, 10 B. H. O. R. 75, referred to.

Culpable homicide may not be murder, (1) where notwithstanding the mental state it is sufficient to constitute murder, still one of the exceptions applies, or (2) where the mental state, though within the description of section 299, Indian Penal Code, is not of the especial degree of criminality required by section 300 of the Code. [p. 116, col. 2.]

Queen v. Gorachand Gope, B. L. R. Sup. Vol. 443; 5 W. R. Cr. 45; 1 Ind. Jur. (N. s.) 177 and *Reg. v. Govinda*, 1 B. 342, referred to.

It is erroneous to suppose that a case cannot be left to the Jury under section 304, Indian Penal Code, if the exceptions enumerated in section 300 of the Code are held not to apply in the circumstances of the case. [p. 116, col. 2.]

The Judge's duty is to determine whether any evidence has been given non which the Jury could properly find the question for the party on whom the onus of proof lies, for that is a question of law. [p. 116, col. 2.]

It is not enough to say that there was some evidence. A scintilla of evidence would not justify the Judge in leaving the case to the Jury. There must be evidence on which they might reasonably and properly conclude the fact to be established. [p. 117, col. 1.]

Ryder v. Wombwell, (1864) 4 Ex. 32 at p. 38; 38 L. J. Ex. 8; 19 L. T. 491; 17 W. R. 167, referred to.

It is for the Jury to say whether and how far the evidence is to be believed. And if the facts as to which evidence is given, are such that from them a further inference of fact may legitimately be drawn, it is for the Jury to say whether that inference is to be drawn or not. But it is for the Judge to determine, subject to review, as a matter of law, whether from those facts that further inference may legitimately be drawn. [p. 117, col. 1.]

Metropolitan Railway Company v. Jackson, (1877) 3 A. C. 193; 47 L. J. C. P. 303; 37 L. T. 679; 26 W. R. 175, referred to.

The burden of proof of the existence of circumstances bringing his case within an exception is upon the accused who must support the exception by evidence giving a full and true account of the transaction from which the charge has arisen against him. [p. 117, col. 1.]

The conduct of a case by Counsel is not a negligible factor even in a Criminal Court, though it may not necessarily conclude the accused. [p. 117, col. 2.]

Rea v. Bridgwater, (1905) 1 K. B. 131 at p. 135; 74 L. J. K. B. 35; 69 J. P. 26; 63 W. R. 45; 91 L. T. 858; 21 T. L. R. 69; 20 Cox C. C. 737, referred to.

Where grave and sudden provocation was no part of the defence case in the Sessions Court nor is any direct evidence given at the trial of such grave and sudden provocation or of facts from which this exception can be legitimately inferred, the trial Judge is quite justified in excluding inquiry into the exception. In fact it would be an error on his part to lay down law as to a matter which is not legally and properly before the Jury. [p. 118, col. 1.]

Where a trial for culpable homicide is proceeding before a Jury, it is not an appropriate mode of laying down the law to discourse on all branches and departments of this complicated topic of crime. To do so is calculated to confuse the Jury and possibly to direct their deliberations into channels that have nothing to do with the case. The duty of the Judge is to lay down the law in reference to the case presented to the Court and the facts of the case, and not to perplex the minds of the Jury with considerations that are outside the legitimate scope of the inquiry. [p. 118, cols. 1 & 2.]

It is the duty of the Judge to keep the Jury within proper limits, and for this purpose, to simplify as far as he can the issues fairly and properly before the Court and direct the minds of the Jurors to those issues and those issues alone. [p. 118, col. 2.]

Queen v. Hari Giri, 10 W. R. Cr. 26; 1 B. L. R. Cr. 11, referred to.

Where there is no misdirection or other error as certified, the certificate is misconceived and the Court has no power to interfere under clause 26 of the Letters Patent. [p. 119, col. 1.]

Per Stephen, J.—If a Judge omits to draw the attention of the Jury to any matter a consideration

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of which might lead them to return a verdict of culpable homicide not amounting to murder, instead of murder, he commits an error, though the defence did not suggest the existence of any such matter. [p. 119, col. 2.]

In laying down the law it is the duty of the Judge to show how the law applies to the facts on the record. [p. 119, col. 2.]

The absence of any evidence as to the circumstances immediately preceding a homicide is not by itself a fact from which the Jury can properly infer that the homicide was committed under provocation. [p. 119, col. 2.]

It would be a serious error on the part of a Judge to put a suppositious case before the Jury, in order to establish the existence of grave and sudden provocation. [p. 119, col. 2.]

The propriety and not the possibility of an inference is the test by which a Judge should decide whether or not he should suggest a case for the consideration of the Jury on his own initiative. [p. 120, col. 1.]

But a Judge fails in his duty if he makes a case himself on which he thinks the Jury cannot properly convict. For to do so is to mislead the Jury. [p. 120, col. 1.]

It is the duty of a Judge to make a case for the accused on which he thinks that a verdict of not guilty may be properly returned, though the case has not been suggested by or on behalf of the accused. [p. 120, cols. 1 & 2.]

It is the duty of the defending Counsel to make the Judge aware of any case that he considers may be made on behalf of the accused though he has not made it himself. [p. 120, col. 2.]

When defending Counsel hears a Judge omit in summing up, a point that he considers may be made on behalf of the accused, it is a dereliction of duty on his part not to bring the point to the notice of the Judge. [p. 120, col. 2.]

Per *Woodroffe, J.*—If there were 8 to 1 in favour of verdict of murder, there could not be in law an unanimous verdict of culpable homicide not amounting to murder. [p. 120, col. 2.]

A Court can and should consider a case in favour of the accused which he has not raised. [p. 120, col. 2.]

On the question whether an inference does arise in favour of the accused, the fact, that a particular defence has or has not been taken, may affect the significance of the evidence given. [p. 121, col. 1.]

In reviewing a case under clause 26 of the Letters Patent, the Court is not concerned with the merits of the case until it is established that there has been an error in law which opens out the case for the Court's judgment. [p. 121, col. 1.]

Per *Mookerjee, J.*—When the Court is called upon to review a case under clause 26 of the Letters Patent, it will accept as unquestionable the statement of the trial Judge as to what actually took place before him. [p. 121, col. 2.]

In section 297, Criminal Procedure Code, the expression "lay down the law" does not signify "lay down the whole law on the subject irrespective of the facts of the particular case before the Court." The reasonable construction of the section is that the Judge should lay down the law, only in so far as it bears upon the evidence adduced in the particular case. [p. 121, col. 2.]

All unnecessary and extraneous discussion and argument should be avoided by the Judge, and the summing up should be strictly confined to the evidence adduced and the mode of application of the law to such evidence. [p. 122, col. 1.]

Emperor v. Mahmudkhan, 9 Bom. L. R. 153; 5 Cr. L. J. 168, referred to.

The mere fact that Counsel for the accused has failed to present to the Court a particular aspect of the case, cannot justify an omission on the part of the Judge to draw the attention of the Jury to what appears to be a possible answer to the charge against the accused even on the prosecution evidence; it would be the duty of the Judge to draw the attention of the Jury to such possible view of the case on the evidence, notwithstanding that it may have escaped the Counsel for the accused. [p. 122, col. 2.]

To determine whether there was or was not evidence to go to the Jury, regard must be had to the whole course of the proceedings in the trial Court. [p. 122, col. 2.]

More non-direction is not necessarily misdirection; those who allege misdirection must show that something wrong was said or that something was said which would make wrong that which was left to be understood; every summing up must be regarded in the light of the conduct of the trial and the questions which have been raised by the Counsel for the prosecution and for the defence respectively. [p. 123, col. 1.]

Rea v. Stoddart, (1909) 2 Cr. App. Rep. 217 at p. 246; 73 J. P. 348; 53 S. J. 578; 25 T. L. R. 612, referred to.

Where no error of law is established, the Court is not called upon to express an opinion as to the propriety of the conviction and sentence. [p. 123, col. 1.]

Per *Holmwood, J.*—No error of law is committed by a Judge who refrains from directing the Jury as to exceptions which have neither been raised nor relied upon by the accused and have no basis in evidence on the record. [p. 123, col. 1.]

Where there is no evidence bringing a case directly within an exception it would be a misdirection to ask the Jury to come to a finding of fact on a hypothetical state of circumstances which do not bring the case within the exception as a matter of law. Indeed the Court must presume the absence of those circumstances. Section 105 of the Evidence Act is imperative. [p. 123, col. 2.]

It would be a most undesirable practice for Judges to put hypothetical defences not taken by the accused before the Jury and might cause serious prejudice to the accused. [p. 123, col. 2.]

Jamsheer, *In the matter of*, 1 C. L. R. 62 and *Queen-Empress v. Chakauri*, A. W. N. (1898) 209, referred to.

Section 305, Criminal Procedure Code, is mandatory. If the Judge agrees with the opinion of the majority of the Jury, he shall give judgment in accordance with such opinion. [p. 123, col. 2.]

On a verdict of murder being given, it is not competent to the Court to take any verdict on the lesser charge of culpable homicide. [p. 123, col. 2; p. 124, col. 1.]

A majority verdict with which the Judge agrees has exactly the same legal force as a unanimous verdict, and if it be a verdict of murder, the Court cannot go behind it and take any further verdict upon the facts which have been found by the Jury to amount to murder. [p. 124, col. 1.]

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Application under Clause 26 of the Letters Patent for review on a certificate of the Advocate-General.

Messrs. E. Norton, C. Bagram and P. K. Sinha, for the Appellant.

Messrs. B. C. Mitter, K. S. Bonerjee and P. N. Dutt, for the Crown.

JUDGMENT.

JENKINS, C. J.—Upendra Nath Das was tried at the last Criminal Sessions of this Court before Stephen, J., and a Special Jury on charges under sections 302, 304 and 326 of the Indian Penal Code. The Jury found the accused guilty under section 302 by a majority of 8 to 1. The learned Judge agreeing with them gave judgment in accordance with the opinion of the majority and sentenced the accused to death.

The Advocate-General subsequently on the representation of the accused's Counsel as to the direction given by the learned Judge in his charge to the Jury purported to grant a certificate under clause 26 of the Letters Patent. Certain alleged errors of decision on points of law were attributed to the learned Judge, but when the case came on for argument it was found that in some respects the certificate was in direct conflict with what was stated by the Judge, and in other respects was manifestly unsustainable, or failed to formulate the accused's real grievance as placed before us by Mr. Norton on his behalf. It has been decided by the leading case of *Reg. v. Pestonji Dinsha* (1) that the statement of the Judge who presides at the trial is conclusive and accordingly Mr. Norton was, on his own application, allowed to apply for a fresh certificate that might be in conformity with the learned Judge's statement, and might also give effect to the accused's real grievance to which I have already alluded. This grievance was in substance that the learned Judge had directed the Jury that he could not see evidence that would establish any of the exceptions set forth in section 300, Indian Penal Code, when in fact there was such evidence. The Advocate-General has now granted a fresh certificate which is in these terms:—

"I certify that in my judgment the following points of law were erroneously decided by the learned Judge and should be further considered by the High Court under the provisions of section 26 of the Letters Patent (1) 10 B. H. C. R. 75.

of 1865.

"1. That the learned Judge told the Jury that he 'did not see that there was any evidence of any of those provided for' (meaning exceptions to section 300, Indian Penal Code), thereby:

"(a) wrongly withdrawing from the Jury the charge of culpable homicide not amounting to murder under section 304 instead of leaving the case to the Jury upon that charge; and

"(b) wrongly omitting to explain to the Jury that they were the sole Judges of the evidence and that notwithstanding his expressed opinion it was competent to them upon the facts to find a verdict under section 304; and

"(c) thereby misdirecting the Jury.

"2. The learned Judge 'mentioned the existence of exceptions of such as self-defence,' but omitted to explain to the Jury the application of the exception of provocation to the facts of the case, thereby failing to comply with section 297 of the Criminal Procedure Code.

"3. That the Jury not being unanimous and having returned a majority verdict only on the charge under section 302, Indian Penal Code, the learned Judge erred in law in not taking their verdict on the charge under section 304: inasmuch as in the event of a unanimous verdict under section 304 the majority verdict under section 302 could not legally have been accepted.
31st August, 1914.

G. H. B. KENRICK,
Advocate-General, Bengal."

The certificate of an Advocate-General is naturally entitled to respect; the Letters Patent require that it should reflect the judgment of the Advocate-General and not mere surmise, and the certificate is presumably granted in the interests of justice after a careful consideration of all available materials. Here the error ascribed to the Judge obviously depends on the evidence in the case, and until that is perused it is difficult to see how the Judge can be said to have erred in directing the Jury as to its effect. I, therefore, feel Mr. Norton must have been under some misapprehension when he stated to the Court that no note of the evidence was read by or to the Advocate-General before he granted his certificate. But whatever may have been done, the certificate

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has been granted and we, therefore, have to deal with the case.

The first paragraph of the certificate imputes to the Judge (a) that he withdrew from the Jury the charge of culpable homicide not amounting to murder and so forth and (b) that he wrongly omitted to explain to the Jury that they were the sole Judges of the evidence and so forth. The learned trial Judge positively and definitely denies the accuracy of these allegations, and this denial is conclusive.

The second paragraph complains that the learned Judge omitted to explain to the Jury the application of the exception of provocation to the facts of the case. But the learned Judge was of opinion that there was no evidence of any of the exceptions enumerated in section 300 and among those exceptions is that which I will for brevity call grave and sudden provocation. So that in plain language what we have to see is whether the Judge misdirected the Jury when he said he did not see there was any evidence of any of the exceptions. To arrive at a conclusion as to this it is necessary to see what the law is as to culpable homicide.

Section 299 of the Indian Penal Code provides that whoever causes death by doing an act with the intention of causing death or with the intention of causing such bodily injury as is likely to cause death or with the knowledge that he is likely by such act to cause death commits the offence of culpable homicide.

But culpable homicide is of two degrees, it may be murder or culpable homicide not amounting to murder.

Murder is defined by section 300 and four states of mind are there indicated, any one of which is sufficient to constitute murder where death is caused. The precise significance of these four several states of mind is sometime missed, but there is no reason why this should be, for each mental state is aptly explained by one or other of the four several illustrations appended to the section.

But then the section goes on to formulate five exceptions, any one of which suffices to reduce the degree of criminality from murder to culpable homicide not amounting to murder. These exceptions substantially are those cases (1) where the offender

is deprived of the power of self-control by grave and sudden provocation, (2) where the offender exercises the right of private defence in good faith, (3) where the offender is or aids a public servant acting for the advancement of public justice, (4) where there is a sudden fight and so forth, and (5) where the victim consents.

Culpable homicide may, therefore, not be murder, (1) where notwithstanding the mental state is sufficient to constitute murder, still one of the exceptions applies, or (2) where the mental state, though within the description of section 299, is not of the especial degree of criminality required by section 300. The law on this subject is fully expounded in *Queen v. Gorachand Gope* (2) and in *Reg. v. Govinda* (3), and in relation to the cases falling within the second of the above categories the essential differences are indicated by the contrast in the language of sections 300 and 304. It is then erroneous to suppose that a case cannot be left to the Jury under section 304, if the exceptions enumerated in section 300 are held not to apply in the circumstances of the case, and it is this erroneous view and the fallacy founded on it that have been the foundation of much of the argument before us. The learned Judge could, and he conclusively assures us he did, leave the case to the Jury under section 304, though he told them he could see no evidence that would establish any of the exceptions. The duty of the Judge in a trial with a Jury is defined by section 297 of the Criminal Procedure Code, which provides that the Judge shall proceed to charge the Jury summing up the evidence for the prosecution and the defence and laying down the law by which the Jury are to be guided.

The Judge's duties are further elaborated under section 298 and include the duty to decide all questions of law arising in the course of the trial.

It would, therefore, come within the duty of the Judge to determine whether any evidence had been given on which the Jury could properly find the question for the party on whom the onus of proof lies, for that is a question of law.

(2) B. L. R. Sup. Vol. 443; 5 W. R. Cr. 45; 1 Ind. Jur. (N. S.) 177.

(3) 1 B. 342.

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We have heard much of a scintilla of evidence and its paralysing effect on the power of the Judge to assist the Jury; that is an argument that might possibly have possessed some force in the early part of the last century. But the scintilla theory is now exploded.

It is not enough to say that there was some evidence. A scintilla of evidence clearly would not justify the Judge in leaving the case to the Jury. There must be evidence on which they might reasonably and properly conclude the fact to be established: *Ryder v. Wombwell* (4). This case was quoted with approval in *Mertopolitan Railway Company v. Jackson* (5), where Lord Blackburn said: "It is for the Jury to say whether and how far the evidence is to be believed. And if the facts as to which evidence is given, are such that from them a further inference of fact may legitimately be drawn, it is for the Jury to say whether that inference is to be drawn or not. But it is for the Judge to determine, subject to review, as a matter of law, whether from those facts that further inference may legitimately be drawn." It is true that these remarks were made in a civil case, but they are of universal application.

How then do matters stand as to this question of grave and sudden provocation? It is an exception, and the burden of proving the existence of circumstances bringing the case within the exception was upon the accused and the Court had to presume the absence of such circumstances, that is to say, it had to regard the absence of such circumstances as proved, unless and until the contrary was proved (Evidence Act, sections 105 and 104). To apply this to the circumstances of this case the Court was bound to regard the absence of grave and sudden provocation as proved until the contrary was proved.

It is admitted that there is absolutely no direct evidence proving grave and sudden provocation, and this is amply shown by the notes of evidence, the whole of which was read out to us.

But it is said there is circumstantial evidence, and so it has to be seen whether the Judge

was entitled to hold as a matter of law that there were no facts from which the inference of grave and sudden provocation could legitimately be drawn.

In *Wills on Circumstantial Evidence*, 5th edition, page 361, it is said that the distinct and proving power of circumstantial evidence depends upon its incompatibility with any reasonable hypothesis other than that of the truth of the principal fact in proof of which it is adduced, and this statement has been incorporated into the judgment of Hill, J., who delivered the principal judgment of the Full Bench in *Hurjee Mull v. Imam Ali Sircar* (6).

In approaching the question whether the Judge rightly decided as a matter of law that there was no evidence of any of the exceptions, it is relevant to consider how the accused's case was placed before the Court, for, I think, this may fairly and properly be taken into consideration.

The conduct of a case by Counsel is not a negligible factor even in a Criminal Court, though it may not necessarily conclude the accused, and that it is not without its influence is forcibly illustrated by the judgment of the Lord Chief Justice in *Rex v. Bridgwater* (7), with which all the Judges hearing the case concurred.

It is admitted by Mr. Norton who appeared for the accused at the Sessions, that the case he made was that his client had no hand in the killing of Jamini, and that he never suggested and certainly never argued that the exception of grave and sudden provocation had any application to the case. He has very fairly stated before us that to have advanced the defence of grave and sudden provocation would have been in conflict with his instructions. His argument in the Sessions Court was that the case was one of murder or nothing, and he pressed upon the Jury their responsibility if they convicted the accused of the offence of murder on what he regarded as the meagre and unsatisfactory testimony before the Court. This may be a very potent argument when skilfully handled before a Calcutta Jury and no one would be a better Judge of its value than Mr. Norton. The whole of the evidence has been placed before us and I can find nothing in the cross-examina-

(4) (1864) 4 Ex. 32 at p. 38; 38 L. J. Ex. 8; 19 L. T. 419; 17 W. R. 167.

(5) (1877) 3 A. C. 19; 47 L. J. C. P. 30; 37 L. T. 679; 26 W. R. 175.

(6) 8 C. W. N. 278 (F. B.).

(7) (1905) 1 K. B. 131 at p. 135; 74 L. J. K. B. 35; 69 J. P. 26; 53 W. R. 415; 91 L. T. 838; 21 T. L. R. 69; 20 Cox, C. C. 737.

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tion of any of the prosecution witnesses that is not in harmony with this.

When the Judge summed up, he expressed his inability to see any evidence that brought the exceptions in section 300 into play, and though this was done in the presence of Counsel for the accused, no protest was advanced, nor was any suggestion made to the Judge of a defect in this charge or of a disregard of any of the lines of defence.

In the argument before us, it is candidly admitted that the real purpose even now is not to have it adjudged that there was grave and sudden provocation and so to have the quality of the offence reduced, but to obtain a decision that no crime at all has been proved against Upendra Nath Das; in other words, to obtain a decision which would of necessity negative the theory of grave and sudden provocation as applied to him.

The accused apparently made no statement in the Sessions Court, but his statement before the Committing Magistrate was, "I know nothing about this matter, what shall I say about it?"

I think then in view of all these circumstances it may fairly be said that grave and sudden provocation was no part of the defence case in the Sessions Court, and this, I think, has to be borne in mind when estimating the propriety of the Judge's intimation that he did not see that there was any evidence of the exceptions.

In my opinion this decision in the circumstances was right, and I think the Judge correctly laid down the law.

In the absence by any direct evidence of grave and sudden provocation or of facts from which this exception could be legitimately inferred—for I hold that there were no such facts—it would, in my opinion, have been an error on the part of the learned Judge to have laid down the law as to a matter which was not legally and not properly before the Jury. Where a trial for culpable homicide is proceeding before a Jury, it is not an appropriate mode of laying down the law to discourse on all branches and departments of this complicated topic of crime: to do so is, I think, calculated to confuse the Jury and possibly to direct their deliberations into channels that have nothing to do with the case. The duty of the Judge is (in my

opinion) to lay down the law in reference to the case presented to the Court and the facts of the case, and not to perplex the minds of the Jury with considerations that are outside the legitimate scope of the inquiry. It is, I think, the duty of the Judge to keep the Jury within proper limits, and for this purpose, to simplify as far as he can the issues fairly and properly before the Court, and direct the minds of the Jurors to those issues and those issues alone.

To apply these remarks to the facts of the case, the Judge was, I think, justified on the evidence and on the facts before him in excluding inquiry into the exceptions, for their applicability had not been made even the matter of conjecture or surmise before him, much less the subject of proof or positive defence.

There is authority in this Court which fully supports the view taken by the Judge at the trial. In *Queen v. Hari Giri* (8) it was said that to give the accused the benefit of exception 1, it ought to be shown *distinctly* not only that the act was done under the influence of some feeling which took away from the accused all control over his actions, but that that feeling had an adequate cause.

And in *Jumsheer, In the matter of* (9) it was ruled in regard to the exception of private defence which stands on the same footing, that it must be supported by evidence giving a full and true account of the transaction from which the charge against an accused person arises. "No accused person," it is said, "can at the same time deny committing an act and justify it. The law does not admit of justification by putting forward hypothetical cases; it must be by proof of actual facts." No case is reported which throws a doubt on these decisions. It is not, however, necessary for me on this occasion to go to the whole length of this last decision, for I am content to hold, on the general principles I have endeavoured to formulate, that there was no error in anything decided at the trial in reference to grave and sudden provocation.

But there is another erroneous decision imputed to the learned Judge by the

(8) 10 W. R. Cr. 26; 1 B. L. R. Cr. 11.

(9) 1 C. L. R. 62.

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certificate and it is expressed in these terms:

"3. That the Jury not being unanimous and having returned a majority verdict only on the charge under section 302, Indian Penal Code, the learned Judge erred in law in not taking their verdict on the charge under section 304, inasmuch as in the event of a unanimous verdict under section 304 the majority verdict under section 302 could not legally have been accepted.

I have no hesitation in holding that the law as propounded in this paragraph is erroneous. It was hardly made the subject of serious argument before us, and it could not be, for it is manifestly opposed to the law.

The result then is that the certificate granted is misconceived, in part it is opposed to the learned Judge's conclusive statement of what occurred, and in no respect can I find that it discloses an error in the decision of a point of law decided by the Judge at the trial.

In this view of the case, it is not within my power to re-open the case, and I regard myself as not entitled to express any opinion as to its merits. In fact I am not in a position to deal with the merits, for they have not been discussed before us, nor have those conditions been established on which alone they could be considered by us.

Our powers are circumscribed, for we can only act in conformity with clause 26 of the Letters Patent. If there was no misdirection or other error as certified, the certificate was misconceived, and we have no power to interfere.

If the merits of the case or the sentence are to be further considered, then that must be not by this Court, but by some other authority vested with the requisite power.

STEPHEN, J.—I agree generally with what the Chief Justice has said: but I wish to add a few words rather to explain the course that I took in this case than to prove that it was correct according to decided cases that were not in my mind at the time I took it.

The error in my proceeding certified by the Advocate-General is, as I understand it,

that I omitted to direct the attention of the Jury to a defence that might have been raised on the facts proved in the trial. This defence was that though the facts proved might show that the accused had killed the deceased in such circumstances that his act fell under one of the first four paragraphs of section 300, Indian Penal Code, yet they might be taken as showing that it also came within the scope of exception 1; and that if the Jury thought that this was so, the offence would be reduced from murder to culpable homicide not amounting to murder. Instead of doing this, I "omitted to explain to the Jury the application of the exception of provocation to the facts of the case," which is a correct statement of what I did, in that I advisedly did not tell the Jury that grave and sudden provocation had anything to do with the case.

If I omitted to draw the attention of the Jury to any matter a consideration of which might properly lead them to return a verdict of culpable homicide not amounting to murder, instead of murder, I no doubt committed an error, though the defence did not suggest the existence of any such matter. If, however, I had told the Jury the existence of grave and sudden provocation had anything to do with the case, it would have been my duty to point out to them the evidence that supported the exception, since in laying down the law it is the duty of the Judge to show how the law applies to the facts on the record. This would have been impossible, as I had no doubt that there was no such evidence in the case; for the absence of any evidence as to the circumstances immediately preceding the killing of the deceased is not by itself a fact from which the Jury could properly infer the existence of the circumstances constituting provocation. In order to establish the existence of grave and sudden provocation it would have been necessary to put a suppositious case before the Jury, by which I mean a case founded on suppositions as to facts, and not on evidence. In my opinion it would be a serious error on the part of a Judge to do any such thing. If I was wrong in thinking that

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there was no evidence on which the Jury could properly find the existence of grave and sudden provocation, again I was in error. But on reconsidering the matter I am of opinion that I was not wrong in taking the view that I did.

I have said that absence of evidence was a fact from which the Jury could not properly infer provocation, for I consider that the propriety and not the possibility of an inference is the test by which a Judge should decide whether or not he should suggest a case for the consideration of the Jury on his own initiative. A Judge always puts any case to the Jury, which is seriously made on behalf of the accused even though he may consider it unfounded or even absurd. But he fails in his duty if he makes a case himself on which he thinks the Jury cannot properly convict. For to do this is to mislead the Jury.

These were the general considerations which caused me to act as I did. And in so acting I have no doubt that I was acting in accordance with the rules followed by Judges in England in charging Juries, and I believe that the same rules have always been followed by Judges in this Court and in the Mofussil. And I have no doubt that these rules should be followed here; for the law as to murder, and its reduction to manslaughter or culpable homicide, are practically the same here that they are in England. In England manslaughter is rightly not charged in addition to murder, unless it is thought that it ought to be considered as a specific offence. And if it is not charged, a Judge does not refer to it unless it is alleged, or is in his opinion indicated by the facts proved. The view of the law indicated by the Advocate-General implies that the Judge is to perform the functions that are properly performed by defending Counsel, a course which would be fatal to the proper discharge of his duty.

In conclusion, I may state the following propositions, which I consider elementary, but which seem to have been lost sight of in this case. It is the duty of a Judge to make a case for the accused on which he thinks that a verdict of not guilty may be properly returned, though the case has not been suggested by or on

behalf of the accused. It is the duty of the defending Counsel to make the Judge aware of any case that he considers may be made on behalf of the accused, though he has not made it himself. When defending Counsel hears a Judge omit in summing up a point that he considers may be made on behalf of the accused, it is a dereliction of duty on his part not to bring the point to the notice of the Judge.

WOODROFFE, J.—As regards clause (1) of the certificate, the allegations there made are not in accordance with the learned Judge's statement. Mr. Justice Stephen says that he neither directed the Jury that there was no evidence of grave and sudden provocation nor did he say that he himself saw no such evidence, that is, I understand, this exception was not specially named in this connection. Further, so far as it refers to grave and sudden provocation, this point is affected by the remarks made later as regards that special defence. The point here taken, therefore, fails. The ground in clause (3) also, in my opinion, fails. If there were 8 to 1 in favour of a verdict of murder, there could not be in law an unanimous verdict of culpable homicide not amounting to murder. And if such a verdict had been returned, it would have shown that the Jury did not understand the law. Stephen, J., tells us that under his orders no verdict was taken on the second and third counts. The trial was, therefore, in this respect in order.

There remains, then, the ground in clause (2). Stephen, J., tells us that he said to the Jury there were exceptions, but that he need not tell the Jury about them, and that he said this because, in his opinion, there was, in fact, no evidence of grave and sudden provocation or other case within the exceptions. The question then resolves itself into this: was there or not such evidence upon the depositions which have been read to us? It is to be observed in the first case that no such defence was raised by the accused or his experienced Counsel. I am not prepared to hold as a general proposition of universal applicability that a Court cannot and should not consider a case in favour of the accused which he has not raised. For such a case may properly arise on the prosecution

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evidence, and if it did, I myself should put it to the jury for their consideration, whatever line might have been taken by the accused or his Counsel. But on the question whether an inference does arise in favour of the accused, the fact that a particular defence has or has not been taken, may affect the significance of the evidence given. Mr. Norton has argued that if the learned Judge had discussed this question of grave and sudden provocation, it is possible the Jury might have arrived at a different verdict. I cannot say that this is impossible. For Juries are sometimes ready to seize any point which may relieve them from a verdict possibly involving a capital sentence. But what we have to see is whether the learned Judge was bound in law to do so. I hold that the alleged error of law is not established on the ground, *firstly*, that this special defence was not raised by the accused, and *secondly*, that reading the evidence in the light of that fact it cannot be said to be such as to have cast on the Court the duty of asking the Jury to consider whether the evidence disclosed circumstances which would have established such a defence had it been specifically raised.

There is indeed an air of unreality about the contention. Mr. Norton does not even now ask us to hold that his client committed the act charged under grave and sudden provocation. What he asks us to do is to hold that there was a misdirection on this point which would enable him to argue the case on the facts, to show that the accused never committed the act at all, and that he has been found guilty of the offence with which he was charged on practically the testimony of a single witness whose evidence he impugns. With the merits, however, we are not concerned until it is established that there has been an error in law which opens out the case for our judgment. The same ground precludes me from dealing with the question of sentence, which may arise on the facts above stated, and the possibility, if the verdict be correct, of the act having been committed without premeditation on a sudden access of passion. This is, however, a matter for the Crown to consider. I can only hold that no error of law has been shown which entitles me to re-open a verdict or to consider a sentence which has already been passed.

MOOKERJEE, J.—On anxious consideration of the arguments addressed to us in this matter, I have formed the opinion that the application for review must be dismissed. The reasons for this conclusion are identical with those stated by Woodroffe, J., in the judgment he has just read, and I shall accordingly touch briefly upon the main points in issue.

It is well settled that when the Court is called upon to review a case under clause 26 of the Letters Patent, it will accept as unquestionable the statement of the trial Judge as to what actually took place before him: *Reg. v. Pestonji Dinsha* (1); *Reg. v. Grant* (10); *Everett v. Youells* (11); *Gibbs v. Pike* (12); *Reg. v. Mellor* (13). From this point of view, the certificate granted by the Advocate-General must be deemed to have been based in part on a misapprehension of the facts. The two questions which remain for consideration are, *first*, was it misdirection not to explain to the Jury the scope and effect of the first exception in section 300 of the Indian Penal Code; and *secondly*, was Stephen, J., bound to take the verdict of the Jury on the second count, namely, that of culpable homicide not amounting to murder.

As regards the first point, it is to be observed that section 297 of the Criminal Procedure Code requires the Judge to charge the Jury, summing up the evidence for the prosecution and defence and laying down the law by which the Jury are to be guided. In the present case, it is not disputed that the Judge did lay down the law, but it is argued that this exposition of the law was imperfect, as he did not explain to the Jury the bearing of the first exception in section 300. I do not think it can reasonably be maintained that the expression "lay down the law" signifies "lay down the whole law on the subject irrespective of the facts of the particular case before the Court." If this view were not adopted, the inference would follow that in every case where an accused is charged with an offence, say the offence of murder, it would be incumbent upon the trial Judge to lay before the Jury an exhaustive commentary on the law of

(10) (1834) 5 B. & Ad. 1081; 3 N. & M. 106; 110 E. R. 1092.

(11) (1833) 4 B. & Ad. 681; 1 N. & M. 530; 110 E. R. 612.

(12) (1842) 9 M. & W. 351; 60 R. R. 749; 1 Dowl. (N. S.) 409; 12 L. J. Ex. 257; 6 Jur. 465.

(13) (1858) 7 Cox, C. C. 454; Dear, & Bell 468; 27 L. J. M. C. 121; 4 Jur. (N. S.) 214; 6 W. R. 322.

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murder in all its possible aspects; he would thus have to deal with matters entirely foreign to the inquiry before the Court and the Jury would be distracted by the discussion of legal questions which could be of no assistance in the solution of the problem laid before them. The reasonable construction of section 297 of the Criminal Procedure Code is that the Judge should lay down the law, only in so far as it bears upon the evidence adduced in the particular case; as has been said, all unnecessary and extraneous discussion and argument should be avoided by the Judge, and the summing up should be strictly confined to the evidence adduced and the mode of application of the law to such evidence: *Queen v. Nobo Kisto Ghose* (14). The case of *Emperor v. Mahmadkhan* (15), to which reference has been made on behalf of the prisoner, is really not opposed to this view. Consequently, the mere fact that Stephen, J., did not explain to the Jury specifically the effect of the first exception in section 300 does not show that there has been a misdirection. The petitioner has to establish that the question of grave and sudden provocation did require consideration in the circumstances of this case. I am unable to hold, upon the notes of the evidence which have been read to the Court, that the question did properly arise at all. The trend of the cross-examination of the prosecution witnesses points unmistakably to the conclusion that the case for the defence was that the accused was not in the house when the woman was killed; the defence, presented by an able and experienced Counsel, was that the case was one of murder or nothing at all. It was never hinted before the trial Judge that the case might possibly be one of grave and sudden provocation. Indeed, even in this Court, although it has been strenuously argued that the Judge should have invited the attention of the Jury to the first exception in section 300, Counsel for the prisoner has frankly intimated that if he can induce the Court to hold that there has been a misdirection and then to examine the case on the merits, he would argue, not that the accused was guilty of the offence of culpable homicide not amounting to murder because the case fell within section 300, exception (1), but that the accused has been

falsely charged and has had no hand in the commission of the crime. Such a position as this seems to me to be entirely untenable. I wish, however, to dissociate myself from the proposition that the mere fact that Counsel for the accused has failed to present to the Court a particular aspect of the case, can justify an omission on the part of the Judge to draw the attention of the Jury to what appears to be a possible answer to the charge against the accused even on the prosecution evidence; it would be the duty of the Judge, in my opinion, to draw the attention of the Jury to such possible view of the case on the evidence, notwithstanding that it may have escaped the Counsel for the accused. The question, consequently, arises, whether, on a fair and reasonable reading of the evidence, we can say in this case that the question of grave and sudden provocation did require consideration and should have been put to the Jury. I am of opinion that the answer must be in the negative. The Counsel for the prisoner has dwelt on his past history and his relations with the deceased woman, and has put forward a plausible and possibly a captivating theory that he could not have killed her except under grave and sudden provocation. It is not disputed that there is no direct evidence on the point, and although circumstantial evidence might be sufficient to justify the plea if taken, I see no answer to the very forcible argument of the Standing Counsel that to determine whether there was or was not evidence to go to the Jury, regard must be had to the whole course of the proceedings in the trial Court. We cannot further overlook the provisions of section 105 of the Indian Evidence Act, illustration (b) whereof has an obvious application to this matter. From these points of view, I think Stephen, J., was fully justified in the opinion he expressed, namely, that none of the exceptions in section 300 (it is immaterial that he mentioned specifically only one) had any application to the case. It is erroneous to say that he withdrew from the Jury the charge under section 304; that charge remained, and it was open to the Jury, if they were not satisfied as to the existence of any of the four alternatives specified in the substantive portion of section 300, to return a verdict of not guilty on the first count and guilty on the second count. What Stephen,

(14) 8 W. R. Cr. 87.

(15) 9 Bom. L. R. 153; 5 Cr. L. J. 168.

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J., omitted to do was to lay down the law as to grave and sudden provocation; this omission did not constitute misdirection in the circumstance of this case. As Lord Alverstone, C. J., said in *Rex v. Stoddart* (16), quoting with approval the words of Lord Esher, M. R., in *Abrath v. North-East Ry. Co.* (17), mere non-direction is not necessarily misdirection; those who allege misdirection must show that something wrong was said or that something was said which would make wrong that which was left to be understood; every summing up must be regarded in the light of the conduct of the trial and the questions which have been raised by the Counsel for the prosecution and for the defence respectively.

As regards the second point, it is plain that after the majority of the Jury had returned a verdict of guilty of murder, they could not possibly, without gross inconsistency, bring in a unanimous verdict of guilty of culpable homicide not amounting to murder. The direction given by Stephen, J., in this respect was obviously right.

In the view I take, no error of law has been established, and, consequently, the Court is not called upon to express an opinion as to the propriety of the conviction and sentence, although as Woodroffe, J., has pointed out, if the Court could examine the case on the merits, there might be matters for careful consideration.

HOLMWOOD, J.—I desire to express my entire concurrence with all that has fallen from my Lord the Chief Justice as regards the certificate, the law and the facts in this case. But I wish to say a few words on the only two points which are now before us.

I have never had any doubt, and I still have no doubt, that no error of law is committed by a Judge who refrains from directing the Jury as to exceptions which have neither been raised nor relied upon by the accused and have no basis in evidence on the record. As to what is necessary to bring a case legally within the

exception of grave and sudden provocation this is very clearly laid down in numerous English and Indian cases of which I need only refer to the case of *Queen v. Hari Giri* (8).

Where there is no evidence bringing the case directly within any such exception it would, in my opinion, be a misdirection to ask the Jury to come to a finding of fact on a hypothetical state of circumstances which do not bring the case within the exception as a matter of law. Indeed the Court must presume the absence of those circumstances. Section 105 of the Evidence Act is imperative.

It would be a most undesirable practice for Judges to put hypothetical defences not taken by the accused before the Jury, and might cause serious prejudice to the accused. The practice has been condemned both by this Court and by the Allahabad Court: *Jamsheer, In the matter of* (9) and *Queen-Empress v. Chakauri* (18).

The point seems to me so elementary as to admit of no argument.

I am unable to understand how the learned Advocate-General raised the point, since he did not and could not certify that there was evidence sufficient in law to bring the case within the exception of grave and sudden provocation, and until that is established as a matter of law, there is no case to go to the Jury whose function is only to draw the further inference that the provocation found to exist in law is sufficiently grave and sudden to cause the accused to lose the power of self-control. This was really the only point that was seriously contended before us.

As regards the point which was raised as to the necessity of taking a verdict on the charge of culpable homicide not amounting to murder when the original verdict on the charge of murder is only a majority verdict, the contention is clearly contrary to the plain provisions of the Code. Section 305 is mandatory. If the Judge agrees with the opinion of the majority of the Jury, he shall give judgment in accordance with such opinion. On a verdict of murder being given, it is certainly not competent to the Court to

(16) (1909) 2 Cr. App. Rep. 217 at p. 246; 73 J. P. 348; 53 S. J. 578; 25 T. L. R. 612.

(17) (1886) 11 App. Cas. 247; 52 L. J. Q. B. 620; 49 L. T. 618; 32 W. R. 50.

(18) A. W. N. (1898) 209.

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take any verdict on the lesser charge of culpable homicide.

It would not only be superfluous, but impossible—since if the Jury found the accused guilty under the minor charge, it would negative the verdict of murder and the same res it would follow on a verdict of “not guilty” of culpable homicide. It is admitted that to take a verdict on the charge under section 326 would have been superfluous. A majority verdict with which the Judge agrees has exactly the same legal force as a unanimous verdict, and if it be a verdict of murder, the Court cannot go behind it and take any further verdict upon the facts which have been found by the Jury to amount to murder.

I am, therefore, of opinion that no error of law has been established.

Application refused.

BOMBAY HIGH COURT.

CRIMINAL REVISION APPLICATION NO. 80
OF 1915.

May 15, 1915.

Present:—Mr. Justice Beaman and
Mr. Justice Macleod.

JESANG MOTILAL—ACCUSED—APPLICANT
versus

EMPEROR OPPOSITE PARTY.

Bombay Prevention of Gambling Act (Bom. Act IV of 1887), ss. 4, 5—Telegrams announcing certain events, whether instruments of gaming—Papers used by brokers for recording transactions.

A telegram announcing the happening or not happening of an event upon which wagers have previously been made cannot possibly be an instrument of gaming within the meaning of the Bombay Prevention of Gambling Act. Nor can such pieces of paper as brokers may carry with them for the purpose of recording a transaction between their clients be brought within the definition of instruments of gaming or wagering.

Criminal application for revision from the decision of the Sessions Judge of Ahmedabad, confirming the conviction and sentence passed by the first Class Magistrate of Ahmedabad.

Mr. Velinkar (with him Messrs. T. R. Desai and H. V. Divatia), for the Accused.

Mr. S. S. Patkar (Government Pleader), for the Crown.

JUDGMENT.

BEAMAN, J.—Speaking for myself I cannot

bring myself to hold that a telegram, for example, announcing the happening or not happening of an event upon which wagers have previously been made can possibly be an instrument of gaming, *i. e.*, an article used either as the subject or the means of wagering. Again, I cannot believe that upon exhaustive and correct logical analysis such pieces of paper as brokers may carry with them for the purpose of recording a transaction between their clients could be brought within the definition of the Bombay Prevention of Gambling Act as instruments of gaming or wagering. There is, however, a considerable body of case-law the other way and the learned Magistrate and the Judge below have found as a fact, no doubt much influenced by those authorities, that certain papers in this case were instruments of gaming. If I were to press my own doubts, it would probably mean that we should have to refer the case to a Full Bench and that I should certainly not feel disposed to do, sitting in criminal revision in a case of this kind, where I am satisfied that no substantial injustice has been done and that whatever technical difficulties may be thrown in the way of the application of the Act by its peculiar language, the very evil which the Act meant to cure existed in this case and has been struck at by the decision which we are called upon to revise.

I am, therefore, prepared to agree with my learned brother, who, I understand, does not share my doubts to the same extent as to the theoretical correctness of the decision of the Courts below, that this is not a proper case for us to interfere with upon revision.

I would, therefore, reject the applicant's application and confirm the conviction and sentence.

MACLEOD, J.—I agree with my learned brother. In this case we should not interfere in revision with the decision of the Court below.

Rule discharged.

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SIND JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPEAL NO. 127 OF 1914.

February 16, 1915.

Present:—Mr. Pratt, J. C., and

Mr. Hayward, A. J. C.

DODO AND OTHERS—ACCUSED—APPELLANTS
versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss. 193 (1), 226, 227—Sessions Court, power of, to add charges for offences different from those specified by Committing Magistrate—'Charge', meaning of.

The word 'charge' in the Criminal Procedure Code means a whole series of counts or heads of charge for various offences. [p. 126, col. 1.]

Queen-Empress v. Appa Subhana, 8 B. 200, referred to.

Although under section 193 (1), Criminal Procedure Code, a Court of Session cannot take cognizance of any offence as a Court of original jurisdiction, regard must be had to the exception contained in the words "except as otherwise expressly provided in this Code." [p. 125, col. 2]

Sections 226 and 227 of the Code give the Court of Session power to add a charge for any offence different from that specified by the Committing Magistrate disclosed in the evidence recorded before the Magistrate or at the trial by itself, subject only to the consideration of prejudice to the accused. [p. 127, col. 2.]

Reg. v. Govind Babli Raul, 11 B. H. C. R. 278; *Mutirala Kovilagatha Rama Varma Raja v. Queen*, 3 M. 351, referred to.

Queen-Empress v. Kharga, 8 A. 665; A. W. N. (1886) 254; *Birendra Lal v. Emperor*, 32 C. 22; 8 C. W. N. 784; 1 Cr. L. J. 794, dissented from.

Appeal from an order of Mr. Fawcett, Additional Judicial Commissioner, Sind.

Mr. Lalchand Hassomal, for the Accused.

Mr. E. Raymond, Public Prosecutor, for the Crown.

JUDGMENT.—The three appellants have been convicted (1) Ibrahim of grievous hurt and Abdulla of simple hurt caused to Jalal.

(2) Dodo of grievous hurt caused to Mukhim.

(3) Dodo of simple hurt caused to Janu.

(4) Ibrahim and Abdulla of simple hurt caused to Khalikdino.

Offences (1) and (2) were included in the charge on which the accused had been committed to the Court of Session. Offences (3) and (4) were not included in that charge, but were added by the Sessions Court under section 226 of the Code of Criminal Procedure.

It is objected that the Sessions Court had no jurisdiction to add charges for hurt caused to Janu and Khalikdino when the charge

framed by the Magistrate and on which the accused were committed referred only to injuries inflicted on Jalal and Mukhim; and that in so doing it assumed jurisdiction to take cognizance of the offences committed on Janu and Khalikdino in contravention of section 193 (1) of the Code of Criminal Procedure. Section 193 (1) enacts: "Except as otherwise expressly provided by this Code or by any other law for the time being in force, no Court of Session shall take cognizance of any offence as a Court of original jurisdiction unless the accused has been committed to it by a Magistrate duly empowered in that behalf."

The section should, no doubt, be strictly interpreted and means committed to the Court of Session for trial for the offence of which that Court takes cognizance. But even so, it is nevertheless subject to the exception contained in the word "except as otherwise expressly provided in this Code." The question of jurisdiction, therefore, depends upon whether section 226 authorized the Court to add charges in respect of the hurts to Janu and Khalikdino.

The combined effect of sections 226 to 231 is to confer a very wide jurisdiction upon the Court of Session. At the beginning of the trial, if the Judge finds that the Magistrate has omitted to frame a charge, he may supply the omission and frame the charge that is made out on the evidence recorded by the Magistrate. If the charge framed by the Magistrate is imperfect or erroneous, the Judge may alter or add to the charge having regard to the offences disclosed in the evidence recorded by the Magistrate. Again, if in the course of the trial evidence is recorded which shows that the offences are different in character from those charged or that other offences also have been committed, the Judge may alter the charge or add to the charge and include the offences so disclosed. The material on which the Judge acts under section 226 is the evidence recorded by the Magistrate and under section 227 is the evidence recorded before himself in the course of the trial.

In *Queen-Empress v. Appa Subhana Mendre* (1) Sargent. C. J., considered that the word "charge" meant charge of a specific offence, but Scott, J., in a dissenting (1) 8 B. 200.

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judgment held that the word "charge" meant a whole series of counts or heads of charge for various offences, so that even the word "alter" gave power to add additional counts to the charge. This construction was evidently approved by the Legislature when the words "or add to" were added in section 227 by the Code of 1898. But even Sargent, C. J., admitted, under section 226 the Court could frame new charges. This is indeed evident from the fact that under that section the Court can frame a charge where no charge at all has been framed by the Committing Magistrate.

It seems clear, therefore, that either under section 226 or section 227 charges for different offences may be added to the original charge.

The subsequent sections 228 to 231 do not imply that this power is limited in any way. On the contrary the provisions for adjourning the trial, for directing a new trial, for recalling witnesses and even for obtaining sanction to the prosecution, indicate very clearly that there need not necessarily be any connection between the added charge and the charge as originally framed. The principle underlying these sections was well stated by West, J., in *Reg. v. Govind Babli Raul* (2) with reference to the corresponding section of the Code of 1872:—

"The intention of the Legislature is that whenever an amendment of the charge in any way tends to the prejudice of the prisoner, steps should be taken to prevent that consequence arising by ordering a new trial, or suspending the trial going on, to enable him to make his defence or to examine any material witness or to recall any witness already examined.....It is only in the case of charges clearly related that a trial goes on forthwith after an amendment."

This is the correct principle, and this statement of it shows that the added charge need not be clearly related to the original charge. Indeed it may be so remote from the original charge that a fresh trial is necessary or sanction is necessary for the prosecution.

But on the other hand, it seems equally clear that the added charge must be for an offence made out by the evidence recorded before the Magistrate if the charge is added under section 226, or by the evidence recorded before the Court of Session in the course of the trial if the charge is added under section 227. This must necessarily be so, for this evidence is the only material on which the Court can act. This point is well illustrated by the case of *Mutirakal Kovilagatha Rama Varma Raja v. Queen* (3). The accused was committed for trial for an offence under section 202, Indian Penal Code. He pleaded guilty in the Sessions and was convicted on this plea, but the Judge then added a charge under sections 201 and 511, Indian Penal Code, tendered a pardon to a female co-accused and examined her as a witness and then convicted the accused of the added charge also. It was held that the Judge had acted without jurisdiction, for there was no material in the evidence recorded before the Magistrate, or indeed in the evidence recorded before the Court of Session, at the time of the amendment of the charge to justify the added count in the charge. As a matter of fact the Judge acted not on evidence, but on an impression he had derived in the course of the trial of another case and this he could not do, for under section 193 his jurisdiction is confined to the case committed by the Magistrate.

I only know of two cases which run counter to the view I take of these sections. The first is *Queen-Empress v. Kharga* (4), and there it was held that if the charge on which the accused was committed was good in the sense that it specified an offence of which he was subsequently convicted, section 226 did not justify the addition of another count, for the charge was not "erroneous" or "imperfect". But if the word charge in section 226 means the series of counts or heads of charge, then surely the charge which omitted one count would be incomplete and, therefore, imperfect. The case is practically overruled by *Queen-Empress v. Gordon* (5), where the Court approved of the dissentient judgment

(3) 3 M. 351.

(4) 8 A. 665; A. W. N. (1886) 254.

(5) 9 A. 525.

(2) 11 B. H. C. R. 278.

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of Scott, J., in *Queen-Empress v. Appa Subhana* (1). The second case is that of *Birendra Lal v. Emperor* (6). There the accused had been committed for trial for an offence under section 471 for using a forged document, and the Sessions Court added a charge of attempting to cheat as the accused had presented the forged document to the Jassore Loan Office to induce the office to grant a loan. The High Court held that the added charge was bad and their reasons are contained in the following extract from the judgment: "The prosecution was instituted by a person who had no concern with the Jassore Loan Office and whose complaint related to antecedent events. He could not be heard upon a complaint with which the Loan Office was concerned, but did not offer to prosecute, and the Magistrate did not commit the accused with reference to an offence committed against the Loan Office. The Sessions Court is not a Court of original jurisdiction and though vested with large powers for amending and adding to charges, can only do so with reference to the immediate subject of the.....indictment." Now the first reason given here that the complainant could not file a complaint because the Jassore Loan Office had not prosecuted, is clearly wrong. The offence of cheating is not one of the offences referred to in sections 195 to 199 of the Criminal Procedure Code. And except as to such offences any person may set the law in motion by a complaint, even though he is not personally interested or affected by that offence. In *re Ganesh Narayan Sathe* (7). It is also erroneous to deny the Sessions Court original jurisdiction. It has original jurisdiction but exercises it on commitment made by a Magistrate. The second and the only other reason is that the power of the Sessions Court of amending and adding to charges is limited to "the immediate subject of the indictment." It is difficult to attach any definite meaning to this expression. It cannot mean the particular offence specified in the charge, for the judgment uses the phrase "adding to charges" which must then mean adding counts or heads of charge in respect of other offences. It might mean the same transaction, and in that view the added charges can

only be of offences connected with the original offence under section 235 by being one of a series of offences forming the same transaction. But there are two objections to this construction of the phrase: (1) that the offence of attempting to cheat was part of the same transaction as the forgery for the accused forged the mortgage-deed and then tried to raise the money on it and (2) that this limitation is superfluous, for unless the added charge was for an offence arising out of the same transaction, section 233 would be a bar to the charges being tried together.

The case of *Birendra Lal v. Emperor* (6), therefore, affords no assistance in the construction of sections 226 and 227 of the Code. Those sections seem to me to give the Court of Session power to add a charge for any offence disclosed in the evidence recorded before the Magistrate or at the trial, subject only to the consideration of prejudice to the accused. If there is prejudice to the accused then the subsequent procedure is indicated by sections 229 to 231.

Here the added charges were in respect of offences which were disclosed in the evidence taken before the Magistrate and there was no prejudice to the accused, for the learned Judge very properly asked the accused if they objected to the trial proceeding on the added charges and their Pleader replied that there was no objection.

No appeal lies from the convictions (1) and (2) in respect of injuries to Jalal and Mukhim, for the convictions were on the verdict of the Jury and no misdirection is alleged. The appeal on the merits only refers to the convictions (3) and (4), where the trial was with the aid of Assessors. The case of the appellants is that Ibrahim went to remonstrate with Jalal and that Jalal beat him, that Ibrahim struck Jalal and Khalikdino in self-defence, that accused Dodo and Abdulla went to rescue Ibrahim and were attacked and also struck Jann and Khalikdino in self-defence. We are unable, however, to accept this version of the fight although some of the witnesses are inclined to favour the accused. The main facts point to the accused being the aggressors, for they had a grievance about the girl, who was not given as promised to Dodo; they are brothers and, therefore, it is more probable that they all came together to make good their

(6) 32 C. 22; 8 C. W. N. 784; 1 Cr. L. J. 794.

(7) 13 B. 609.

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claim; and lastly none of the accused party was injured except Ibrahim.

We, therefore, confirm the convictions and sentences and dismiss this appeal.

*Convictions and sentences confirmed;
Appeal dismissed.*

For the correct understanding of a case, the Court may visit the place of occurrence. [p. 130, col. 2.]

Where it is not shown that the guilt of the accused is so probable that a prudent man ought to act upon the supposition that he is guilty, the accused should not be given merely the benefit of the doubt but must be acquitted as absolutely innocent. [p. 132, col. 2.]

Original criminal trial, before a Special Bench under Act XIV of 1908, on a commitment by the Chief Presidency Magistrate of Calcutta, dated the 19th January 1915.

The Hon'ble Sir S. P. Sinha and Messrs. N. Gupta, K. N. Chaudhuri and A. Sinha, for the Crown.

Messrs. Langford James, L. Palit and Arabinda Roy, for the Accused.

JUDGMENT.

JENKINS, C. J.—On the evening of November 25th last, at or about 7-30, two bombs were exploded in a lane off Harrison Road known as Mussalmanpara Lane. It resulted in the death of a Police officer, Ram Bhujan Singh, and in severe injuries to two other Police officers, Monoranjan Chuckerbutty and Someswar Dutt Panday, and also to a man named Harabilas Ghosal.

Of the two bombs one was thrown through the open street door into a room of the house No. 10-4-1, Mussalmanpara Lane, the other struck the front wall of the house to the west of that door. It is the prosecution's case that both bombs were thrown by a party of three or more Bengali youths in furtherance of the common intention of all and that the accused Nogendra Nath Sen Gupta not only was of the party, but actually threw one of the bombs. Eight charges have accordingly been framed against the accused Nogendra. Four impute to him that he himself threw a bomb, the other four impute to him that if he did not throw the bomb, still he was a member of the party that did and that this establishes his guilt. Objection was taken on behalf of the accused that even on the case made by the prosecution the charge in reliance on section 34 of the Indian Penal Code could not be sustained. We, however, overruled the objection and have heard the case on the merits. The charges as drawn would seem to impute to the accused that he was

CALCUTTA HIGH COURT. ORIGINAL CRIMINAL JURISDICTION.

March 22, 1915.

Present:—Sir Lawrence Jenkins, Kt., Chief Justice, Justice Sir Asutosh Mookerjee, Kt., and Mr. Justice Holmwood.

EMPEROR—PROSECUTOR

versus

NOGENDRA NATH SEN GUPTA—

ACCUSED.

Criminal Law Amendment Act (XIV of 1908), s. 9—Special Bench of High Court—Powers—Penal Code (Act XLV of 1860), ss. 34, 302—Charge—Trial—Counsel for the prosecution, duty of—Criminal Procedure Code (Act V of 1898), s. 342—Local inspection by Court—Benefit of the doubt—Guilt—Innocence—Acquittal.

An accused can be charged, in the same trial, with an offence under section 302 as also an offence under section 302 read with section 34. [p. 128, col. 2.]

It is the duty of the Counsel for the Crown to assist the Court in arriving at the truth and not to secure a conviction. [p. 129, col. 2.]

In a trial before the Special Bench an accused may be given an opportunity of explaining the circumstances appearing against him and a truthful explanation coming from the accused cannot injure him, innocent as he is presumed to be. [p. 129, col. 2.]

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the thrower of both bombs, for they charged him with having directly caused the injury both to Harabilas Ghosal and to the other three men, though it is fairly obvious that the injury to Harabilas was occasioned by the bomb that fell within the room and that to the other three by that which struck the wall. In the argument before us, the case made was that the accused threw the bomb that struck the wall or the second bomb as it has been termed. This view rests on the evidence of Someswar. He describes the man who threw the bomb as wearing an *alwan* and this is probable; but according to evidence on which reliance can safely be placed, the accused had no *alwan* that evening. Apart from this, we regard Someswar as a patently unreliable witness, as will later appear, and it would be absolutely wrong to base any conclusion on an identification purporting to be made by him. Beyond this, there is no evidence that could justify the conviction of the accused on the first, third, fifth or seventh charges.

It has then to be seen whether the bomb was thrown by a party of men and whether the accused was of that party. It is beyond question that two bombs were thrown and that there were two or more men of the party by whom they were thrown. The object of the attack was undoubtedly Basanta Kumar Chatterji, a Deputy Superintendent in the C. I. D. and the occupier of No. 10/4/1, Mussalmanpara Lane. Those by whom this dastardly attack has been made have been assumed to be members of a society described as anarchist. With the commendable fairness that has marked his conduct of this case, Sir Satyendra Sinha has stated that, apart from what is disclosed in these proceedings, the prosecution know nothing of the accused that would associate him with any anarchical movement. At the same time, we know that he is a student of the Presidency College residing in the Oxford Mission Hostel, and it is apparent that he is as far removed from the class of degenerates as a lad well can be.

Undoubtedly, the accused was in the immediate neighbourhood of the explosions; he admits as much, and the injuries he received point to the same conclusion. Could he, then, have been there consistently with his innocence? To ascertain this, it was thought that the accused should be asked to give his explanation, and, notwithstanding an objection taken by Mr. James, we thought

and still think that was the right course to follow. An innocent man cannot well injure himself by a truthful explanation, and it would be deplorable were we to hold that it was beyond the competence of the Court, when dealing with a case under Act XIV of 1908, to give an accused an opportunity of explaining the circumstances appearing against him. And there is high authority in favour of a similar view, for Sir Alfred Wills has recently cited with approval the opinion of the Court of Criminal Appeal that in the case of an innocent man the failure even to offer evidence is an unwise course (Wills on Circumstantial Evidence, page 102). The explanation in this case has certainly been of service to the accused, for, taken with the prosecution's admission as to the place at which the accused's brother resided last November, it demonstrates that there was nothing impossible or even unreasonable in the accused's presence in the lane. The fact, therefore, that the accused was injured in the lane, though calculated to arouse suspicion if unexplained, cannot be regarded in itself as incompatible with his innocence. This was recognised in the argument before us, and so the prosecution rely on other facts as inculpatory of the accused, and with these we will now deal.

The first suggestion was that the accused was at the Alipore Magistrate's Court on the 24th of November in circumstances which were suggestive of a design against Deputy Superintendent Basanta Kumar Chatterji, either immediate or prospective. Norendro Nath Mukerji, differing in this from Basanta, purports to identify the accused. We were far from being satisfied with this evidence, and the testimony of Mr. Holmes of the Oxford Mission amply justified our doubt. Mr. Holmes spoke with caution, but his testimony is, on that account, entitled to the greater weight. And we would here remark that it was certainly right of the prosecution to call Mr. Holmes, for the duty of Counsel for the Crown is not to secure a conviction but to assist the Court in arriving at the truth. We are satisfied that this attempt to create a prejudice against the accused has no foundation in fact.

Next, there is the evidence of Monoranjan and Someswar. That they were present is beyond doubt, but an essential part of the story each has told is manifestly untrue,

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Monoranjan's testimony would place him in a part of the lane not far from the dust-bin, and it is in reference to that position that he describes the incidents and individuals he professes to have observed. He would place the party of bomb-throwers nearer the actual explosions than he himself stood. And yet we find that while he is most seriously injured, they—if the accused be excluded—apparently escaped untouched. Nor is this all, for the evidence, furnished by the scene itself after the explosions, affords cogent proof that Monoranjan was, at the time of the explosions, not near the dust-bin, but close to the lamp-post, standing at the corner to the east of the street door. It is our belief that this misdescription was deliberate and was an endeavour to improve the case by supporting the story that Someswar has since placed before the Court. If regard be had to probabilities, then we agree with the argument that to secure escape from injury and capture, the most favourable position for throwing the bombs would be slightly to the north of the dust-bin, and this would be naturally followed by flight towards the east. The prosecution evidence shows that two youths did actually take that course. The traces of preparations for the attack also support this view. Someswar swears that he pursued three men, the number that Monoranjan had described as passing to his right. He has detailed his pursuit of these men along Mussalmanpara Lane to Harrison Road, and from that point the pursuit of one of them along the pathway towards Akhil Mistry's Lane, till his chase was cut short by his stumbling over a stone and falling on his hands, thereby, as he says, causing a state of unconsciousness from which he recovered after a short but appreciable measure of time. Then he returned to 10/4/1, Mussalmanpara Lane. This story is palpably untrue. Sheik Hingoo, who appeared to us to be a truthful witness, gives a narrative of events which absolutely negatives Someswar's version and shows that Someswar cannot have been in pursuit and that three men cannot have been in flight; in fact, the only man seen was walking, not running. Nor is this all, for the evidence of Satish Chander Banerji, another witness who impressed us favourably, is inconsistent with the idea that Someswar ever left 10/4/1, Mussalmanpara Lane. Someswar was un-

doubtedly so affected by the shock of the explosion as to be in a state of great and unbalanced excitement, and his story may represent what he would have wished to have done, but certainly not what he did. We are convinced that there is no foundation in fact for the pursuit or any of its incidents.

Then we come to the story of Sarafat. If true, it would be a most important link in the evidence against the accused and almost conclusive of his guilt. But we do not hesitate to pronounce this story false, and, indeed, Sir Satyendra Sinha on behalf of the Crown did not even refer to it in his reply. Our view rests not merely on an appreciation of the evidence as given before us, which left no room for doubt as to its worthlessness, but also on our personal observations on the spot, which convinced us that the story told by this witness was in its most important details an absolute impossibility. We would here desire to explain that we visited the locality, at the urgent request of both parties who felt, and we now think rightly, that this was almost necessary to a correct understanding of the case.

The next step in the case is that the accused was found in the narrow part of Akhil Mistry's Lane which runs east and west. This undoubtedly is true; but so far as it goes, it bears out his story that he was on his way to his brother's mess, for it is not disputed, and is, indeed, apparent, that this was on the road there from Mussalmanpara Lane. Nor is it without its relevance that while lying there, he at once gave his brother's name and address and begged that information might be given to him. This fact is an answer to the suggestion that the accused endeavoured to conceal his identity by withholding his name. It is at least as reasonable to refer his silence to the state of collapse in which he obviously was. Sudhir's suggestion that the accused wore his *dhoti* in *malkocha* fashion may be dismissed, as he himself conceded in cross-examination that he was unable to support it on oath, and it is a circumstance to which no other witness speaks. The next move was to the hospital, and it is here that Subodh, a C. I. D. officer, attributes to the accused two remarkable and unintelligible replies. He says that the accused, when asked his name, replied "My name is name," and when asked by a European, whether he was a Policeman

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answered, "I am not a Police but a man." Not only is the medical evidence of the accused's condition strongly opposed to the probability of this being true, but there is no confirmation, by any European or by any Bengali doctor, of these answers. On the contrary, the evidence of those called negatives it. Mention may here be made of an incident on which Mr. James has laid much stress, the discovery of the exploded Mauser cartridge. He evidently regarded it as a fabricated discovery designed to prejudice his client. We do not share this view; we see no reason to distrust Mr. Lowman's evidence on the point; and in fact no use of the discovery has been made to the accused's prejudice.

This brings us to the endeavour to show that the accused, when found in Akhil Mistry's Lane, was in possession of a revolver. Sir Satyendra did not exaggerate the importance of this alleged incident when he declared that if it was not established, then he could not ask for a conviction. From what has already been said, it is apparent that there has been an endeavour to import into the case several matters that may well occasion anxious doubt as to the preparation of the evidence by which it was sought to fasten guilt on the accused.

But, in dealing with this revolver incident, we have endeavoured to estimate its worth on its own independent merits. Does, then, the evidence establish, with the degree of assurance that any prudent man would require, the accused's possession of the revolver produced before us in Court? For, if it does, then it goes far to show that the accused is guilty and has merited the law's extreme penalty. We have the lad's positive statement that he had not the revolver, and this the law ordains we may take into consideration. On the suggestion of its later importation, he does not throw any light, nor could he in the collapsed condition in which he was, for he was practically dead to all around him.

The witnesses who speak to the "shining thing," or the revolver which we are invited to regard as its equivalent, are many. There is, however, displayed throughout this evidence an anxiety to make it appear that the "shining thing" was observed before the Police came on the

scene. This anxiety appears to us to cast a needless slur, for if a discovery by the Police squared with the facts, we certainly should not on that account regard it as unworthy of acceptance. But the difficulty we feel in connection with this part of the case is that we find ourselves confronted with stories so difficult to reconcile with each other or to fit in with ordinary probabilities that after serious consideration, we unhesitatingly come to the conclusion that we must regard this part of the case with great distrust. In dealing with it, we have been materially assisted by Mr. James, who, with his junior, Mr. Palit, has obviously made a most searching inquiry into all that relates to this alleged discovery of the pistol, and has spared no effort to master and understand all the details of the problem with which he had to deal. Unless something has been kept back, the constables Nawrang and Paltoo, two most important witnesses, should, according to their evidence, have been at the spot where the accused was lying in Akhil Mistry's Lane not later than 7-45; and yet the case presented for our acceptance by the prosecution, and apparently as an essential feature of the case, is that their arrival at the west end of the lane was absolutely synchronous with the arrival of Sub-Inspector Belcher and Head Constable Mohangoo Misser at its eastern end. But Sub-Inspector Belcher cannot have reached the lane before 8-20, that is, 35 minutes later than the time at which the two constables, on their own evidence, ought to have arrived. We should have attributed little importance to this, if it could fairly have been ascribed to a mistaken estimate of time. But it is nothing of the kind; and having followed the case day by day as it was unfolded before us, we feel that this is not the true explanation of the remarkable discrepancy which resulted in the equally remarkable coincidence of simultaneous arrival. We cannot resist the conclusion that there has not been a complete disclosure of all that occurred, and that something has been withheld from our knowledge.

Then, again, the evidence of Sarat and Sudhir, two other witnesses of importance,

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so far from clearing up matters, rather tends to increase the perplexities of the case. Both of them agree in this that they will not pledge themselves to more than "a shining thing," and curiously enough they were neither of them shown the revolver with a view to identifying it in appearance with what they profess to have seen. Sarat before us has deposed to the presence of a constable before the arrival of Belcher, and describes him as handling the pistol. At the same time he does not identify him as either Nawrang or Paltco, and in this he probably is right, as the man of whom he speaks did not wear a *pugri*. This man, obviously a most important witness if Sarat spoke the truth, has not been called, and it seems to be the prosecution's case that they do not know of any such constable as Sarat describes. Mr. Belcher declared that when he arrived, he saw the pistol and took possession of it. We do not say that it may not have been so, but when we bear in mind Belcher's evidence of its spotless condition and its freedom from all trace of blood or mud or water, we find it difficult to reconcile this with what must have been the condition of the lane and of the accused. It would seem to be the prosecution theory that the revolver was carried in the accused's hand; but if in his right hand, one would have expected traces of blood, having regard to the injuries and the profusion of blood on that side; if on the left hand, equally would one expect traces of blood, from the wound in the palm of that hand, for it was sufficiently severe to be dressed and sutured at the hospital. It is difficult to speculate as to whether it may not have been in the accused's coat pocket, for, so far is this from being the case for the prosecution, that the coat has not even been put in evidence before us, and we do not know what pockets (if any) there were in it. The reason for this doubtless was that the prosecution felt that it was impossible to square the prosecution evidence as to the position of the revolver with any other theory than that it was in the accused's hands.

We have dealt with some of the difficulties in the way of accepting that view.

But there is yet another circumstance to be noticed, and that is that Sheik Hingu, who certainly might have been expected to see a revolver in the accused's hand, did not observe one, nor was it observed by Monoranjan or Someśwar or, as far as we know, by any one else. Then, again, if the pistol was really in the accused's hand, we find it difficult to account for the several positions from time to time attributed it, or how it was not visible from the first.

The whole story of the revolver is surrounded by difficulties and is enveloped in mystery, and observing that standard of care which the positive enactment of the law imposes on us, we hold it not to be established that the accused was in possession of the revolver. But if possession of the revolver is not brought home to the accused, there clearly is not evidence on which we can hold his guilt proved, and this Sir Satyendra himself declared.

We desire to make it clear that in our judgment we do not merely give the accused the benefit of the doubt, but after considering the matters before us, we decline to hold that he is shown to be guilty, or that his guilt is so probable that a prudent man ought under the circumstances of this case to act upon the supposition that he is guilty. That is the test prescribed by law, and it is amply satisfied in the accused's favour in the circumstances of this case.

The Court accordingly acquits the accused of the several charges brought against him and directs that he be set at liberty.

MOOKERJEE, J.—I am in full agreement with the views set out in the judgment of the Court, which has just been read out by the Chief Justice and to which I am a party. I desire only to emphasise that, after anxious consideration of every element in the case as it was developed before us from day to day, I am strongly convinced of the absolute innocence of the accused. My deliberate conclusion is that the endeavour made to establish a connection between this innocent lad and a dastardly crime, by means of evidence tainted in a large measure by manifest untruths and manufactured incidents, has been completely unsuccessful.

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HOLMWOOD, J.—I am in entire agreement with the judgment of the Court to which I am a party, and I only wish to add that I am convinced of the absolute innocence of the accused. He was the victim of an unfortunate train of circumstances which made the case at first appear very black against him; but the assiduity of those whose duty it was to investigate the facts, in endeavouring to elaborate and clench those circumstances, has served the purpose of clearly demonstrating to my mind that he can have had no hand in the diabolical crime with which he was charged.

Accused acquitted.

BOMBAY HIGH COURT.

CRIMINAL REFERENCE No. 35 OF 1915.

May 15, 1915.

Present:—Mr. Justice Beaman and
Mr. Justice Macleod.

EMPEROR—PROSECUTOR

versus

BARKYA TIKU—ACCUSED.

Bombay Public Conveyances Act (Bom. Act VI of 1863), s. 2—Conveyance licensed for labour, whether can be used for passengers.

A person who has his conveyance licensed for labour only cannot use it for passengers, and is liable under section 2 of the Bombay Public Conveyances Act if he does so.

Criminal reference made by the District Magistrate of Thana.

OPINION.—This is a reference from the District Magistrate of Thana in the case of *Imperator v. Barkya Tiku Bhandari* who was convicted by the second class Magistrate of Bassein on the 3rd of February 1915 and ordered to pay a fine of Rs. 2 under section 2 of the Bombay Public Conveyances Act (Bom. Act VI of 1863).

It appears that the accused had carried passengers in his cart, which was licensed only for labour, from Virar to Agashi. The District Magistrate is of opinion that because under section 9 of the Bombay Public Conveyances Act the Superintendent of Police may, in his discretion, suspend or revoke the license if a conveyance is used for passengers when licensed only for labour, the accused

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cannot be convicted under section 2. But under section 2 no person shall keep or let for hire any public conveyance without having license in force for the same, and in the case of a license to carry passengers there is to be painted or branded on such part of the conveyance as may be directed a number corresponding with that of the license granted to such conveyance, together, in the case of a land conveyance licensed to carry passengers, with the number of passengers that it is licensed to carry. Any person keeping or letting for hire any public conveyance without such a license as aforesaid will be liable, on conviction before a Magistrate, to a penalty. The accused in this case was keeping or letting for hire a public conveyance for carrying passengers without the requisite license. He is clearly guilty of offence under section 2.

Therefore, we cannot agree with the District Magistrate who recommends that the conviction be quashed and the accused acquitted.

Reference answered.

LOWER BURMA CHIEF COURT.

CRIMINAL APPEAL No. 411 OF 1915.

June 26, 1915.

Present:—Mr. Justice Twomey.

NGWA SHWE KIN—APPELLANT

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), ss. 87, 90, 304—Death caused by consent under misconception of fact—Intention or knowledge of accused.

The deceased, a middle-aged man, believed himself to have been rendered *da*-proof by charms and asked the accused to try a *da* on his right arm. The accused believed in the pretence of the deceased and inflicted a blow with a *da* with moderate force, with the result that the arteries were cut and the deceased bled to death.

Held, setting aside the conviction under section 304, Indian Penal Code, that the case was governed by sections 87 and 90, Indian Penal Code, and that the accused had no intention of causing death or grievous hurt and that he might not even have known that his act was likely to cause any such result. [p. 134, col. 2.]

Appeal from an order of the Sessions Judge of Prome, dated the 26th May 1915, passed in Sessions Trial No. 31 of 1915.

JUDGMENT.—The deceased Pan Zan, a middle-aged man, was a believer in charms and

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apparently believed that he had rendered himself *da*-proof. In the course of an ordinary conversation he said to the appellant, Shwe Kin, "I am *da*-proof. I am not afraid of *da* or stick" and he told Shwe Kin to "test and see." Uttering the words of some charm he put out his right arm and Shwe Kin cut the arm with his *da*. It then appeared that Pan Zan was not invulnerable after all. Pan Zan did not reproach the appellant with having given too vigorous a cut, but only said "I made a mistake. I ought to have taken my coat, then the *da* could not have cut my arm." Unfortunately arteries were cut and Pan Zan's companions being ignorant of the proper method of checking arterial bleeding, he bled to death. The place of occurrence was far from medical aid in a remote part of the Prome District. The learned Sessions Judge has found Shwe Kin guilty of culpable homicide not amounting to murder under section 304, Indian Penal Code, sentenced him to suffer rigorous imprisonment for three years, holding that he must have intended to cause such injury as was likely to cause death and that though Shwe Kin believed Pan Zan to be *da*-proof, that belief did not justify him in inflicting so severe a wound by way of experiment.

The wound is described as follows:—An incised wound, below and in front of the right elbow $3\frac{1}{2}$ inches long, 2 inches broad, cutting through all the soft structures including the main blood vessels and into the bone to the extent of about quarter an inch.

The *da* had a blade $16\frac{1}{2}$ inches long and the weight of the *da* was 60 *tolas*. The Medical Officer says that with such a weapon "moderate" force would be required to cause the wound.

The case is governed by sections 87 and 90, Indian Penal Code. The deceased gave his consent under a misconception of fact, erroneously believing that he was proof against *da* cuts. But it cannot be said that the appellant knew of this misconception or had reason to believe that the deceased was mistaken in thinking himself invulnerable. He is a youth of 19 and the probability is that he really believed in the pretence of the deceased, a much elder man than himself. Burmese cultiva-

tors are notoriously credulous and seeing that Pan Zan was willing to put his pretensions to proof on his own person, Shwe Kin probably expected the edge of the *da* to be chipped or turned aside. The appellant certainly had no intention of causing death or grievous hurt, and I think it is highly doubtful whether he can properly be said to have known that his act was likely to cause any such result. In the *first* place, he did not use great force, *secondly*, he had Pan Zan's assurance that he was invulnerable and the appellant was too ignorant to see the absurdity of it, *lastly*, he inflicted the cut on the part of the body specially presented for the purpose by the deceased and this, moreover, was a part not ordinarily regarded as a vital part.

I am of opinion that the case was within the exception set forth in section 87, Indian Penal Code, which deals with acts done by consent which are not intended and not known to be likely to cause death or grievous hurt.

The conviction and sentence are set aside and the appellant is acquitted and will be released, unless he is liable to be detained on any other charge.

Conviction set aside.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION PETITION No. 525 OF 1915.
July 28, 1915.

Present:—Mr. Justice Chamier.

MUHAMMAD ASGHAR KHAN—

APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 110 (f)—Evidence—Being nuisance to neighbours and making indecent overtures to passers-by, if sufficient for proceedings under s. 110.

Where the evidence produced against a person amounts to no more than this that he is a nuisance to his neighbours, refuses to pay his debts, abuses people who sell goods to him and makes indecent overtures to school boys who pass by his shop, it does not justify proceedings against him under section 110 of the Criminal Procedure Code. [p. 135, col. 2.]

Application in revision of an order of the Magistrate of Azamgarh.

FACTS of the case appear from the judgment;

In re NALLI NARASIGADU.

Mr. *Nehal Chand*, for the Applicant:—The finding of the District Magistrate in appeal, that the accused is a man of a “crabbed and cantankerous nature, given to quarrels and threats and that he has made himself specially obnoxious by threatening the boys of the Muhammadabad School”, does not justify proceedings under section 110. The evidence produced consists of some boys, who complain that the accused used to make indecent overtures to them. There is also the evidence of persons who had had dealings with the accused as also some evidence of general repute, which is hardly relevant. Under these circumstances it cannot be said that any offence mentioned in section 110 (f) has been committed.

Mr. *Malcomson* (Assistant Government Advocate), for the Crown:—The accused is certainly a dangerous man. He has been in the habit of threatening everybody with whom he had had any dealings. He also threatened a number of schoolboys who passed by his shop. These facts are sufficient to show that if the man is not bound down, there is likely to be a breach of the peace.

JUDGMENT.—This is an application for revision of an order of the District Magistrate of Azamgarh dismissing the applicant's appeal against an order of a Magistrate of the 1st class, requiring the applicant to give security for his good behaviour for one year. The evidence against the applicant is of a most unusual character. There is first the evidence of several boys who say that the applicant made indecent overture to them when they passed his shop on their way to school. Then there is the evidence of some witnesses who say in a general way that the applicant is a bad character. The third class of evidence against the applicant consists of the statements of trades-people and others living near him who have had trouble with him for one reason or another. The oil-seller, for instance, says that the applicant bought from him a bottle of oil worth $1\frac{1}{2}$ anna and afterwards refused to pay for it and abused the seller. A butcher says that the applicant is of a cantankerous nature and insists upon having another piece of meat instead of the piece which is offered to him. The *darzi* says that he has worked for the

applicant, but got only abused when he asked for his wages. The milk-seller says that the applicant took some milk from him without payment. A neighbour says that he bought some shoes from the applicant on approval and when he returned the shoes the applicant abused him. The evidence of the 3rd class, *i. e.*, of the shop-keepers and neighbours appears to me to be totally irrelevant. The applicant has been required to give security under section 110, Criminal Procedure Code clause, (f), *i. e.*, he is said to be so desperate and dangerous as to render his being at large without security hazardous to the community. The third class of evidence mentioned by me at best shows no more than that the applicant is a very troublesome person and a man who declines to pay his debts and abuses people who sell goods to him. Such evidence does not bring the applicant within clause (f), section 110, Criminal Procedure Code. The general evidence of bad character may be disregarded. It amounts to no more than that the applicant is a nuisance to his neighbours. I have no doubt that the real reason why proceedings were taken against this man is that several boys complain that he had made indecent overtures to them. Their complaint was made to the school master who passed it on to the Tahsildar and the Police. In my opinion if the evidence is proved it does not justify proceedings against the applicant under section 110, Criminal Procedure Code. I allow this application and set aside the order requiring the applicant to give security.

Order set aside.

MADRAS HIGH COURT.

CRIMINAL APPEALS NOS. 60, 61 AND 62 OF 1915.

July 21, 1915.

Present:—Mr. Justice Ayling and Mr. Justice Tyabji.

In re NALLI NARASIGADU AND OTHERS.—PRISONERS—APPELLANTS.

Penal Code (Act XLV of 1860), ss. 201, 300—*Murder, conviction for—Separate conviction for offence under s. 201, legality of.*

A separate sentence under section 201, Indian Penal Code, along with a conviction of the accused of murder is illegal. [p. 136, col. 2.]

NARASINGA RAO v. VITTOBA RAO.

Appeal against the order of the Court of the Godaveri District, in Case No. 1 of the Calendar for 1915.

Mr. P. Chenchia, Counsel (*Amicus Curie*), for the Appellants.

Mr. C. Sidney Smith, for the Government.

JUDGMENT.—The appellants have been convicted of the murder of one Mala Durgadu on the night of October 27th. The body was fished out of the Godaveri river on November 2nd after three days' search within half a mile of the garden where the deceased was employed and where he was last seen alive on the afternoon of October 27th. We see no reason to doubt the identity of the corpse. The deceased undoubtedly met his end by violence: and the circumstance of the 3 survey stones found tied to the body leaves little doubt that it was at or near the garden referred to.

We have very carefully considered the evidence of P. Ws. Nos. 6 and 9, on which the prosecution must mainly rely. If this is accepted it proves beyond doubt that the appellants murdered Durgadu, and with the help of P. W. No. 9 took his body in a boat into the middle of the river and sank it there weighted by the survey stones which were procured from the garden.

As regards P. W. No. 9, it seems pretty clear that he was, at least in a minor degree, privy to the conspiracy for the murder of Durgadu. He may have had nothing to do with the crime itself: but his attempt to represent that he was coerced into assisting the criminals in disposing of the corpse is futile. His evidence is, therefore, to some extent tainted and has to be received with caution. It is, however, powerfully corroborated both directly (*vide* P. W. No. 12) and circumstantially: and no inconsiderable value attaches to it. The argument that because the 4th accused, who is really a shepherd, can 'ply a boat', the aid of the witness, who is a fisherman by trade, was unnecessary is not very convincing.

The evidence of the shepherd (P. W. No. 6) is of even more importance; and we can see no reason to regard it as in any way tainted by complicity in the crime. The two chief points against it are: (1) that it was unnecessary for the accused to take him into their confidence, (2) that his delay in coming forward is suspicious. But it must be borne in mind that if the deceased were killed at

the time and place indicated by the prosecution, the accused could hardly hope to keep this witness (who has his cooking shed in the same garden) in the dark and may have reasonably thought the boldest course was safest. Nor does it seem very unnatural that the witness should keep quiet, until he found his master (P. W. No. 10) and the Village Munsif (P. W. No. 11) actively investigating the crime in the garden itself. We think his explanation in this respect may be fairly accepted.

P. W. No. 10, under whom accused Nos. 1, 2 and 4, Durgadu and P. W. No. 6 were all employed in different capacities, appears to be a respectable man entitled to credence: and no acceptable explanation is put forward for his aiding in fastening the crime on three of his own men. His evidence and that of Durgadu's widow establishes such enmity as might account for the murder.

The other prosecution evidence calls for little comment: and the confessional statements of accused Nos. 2 and 4 are only used against the persons making them, and do not take the case very far.

In our opinion the evidence as a whole justifies the convictions of murder, which, with the sentences, are hereby confirmed. The separate sentences for offences under section 201 of the Indian Penal Code are both unnecessary and illegal, and are hereby set aside.

Appeal dismissed.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 648 of 1914.

CRIMINAL REVISION PETITION No. 547
OF 1914.

March 4, 1915.

Present:—Mr. Justice Tyabji.

T. NARASINGA RAO—COUNTER-PETITIONER
—PETITIONER

versus

VITTOBA RAO AND OTHERS—RESPONDENT.

Magistrate, Jurisdiction of—Review of order.

A Magistrate has no power to alter or review the order once passed by him. [p. 37, col. 1.]

Parbati Charan Roy v. Sajjad Ahmad Chowdhury, 35 C. 350; 12 C. W. N. 605; 7 Cr. L. J. 401; *In re Hari Lal Buch*, 22 B. 949, followed.

Petition, under section 435 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Deputy

EMPEROR v. A GOODHEW.

Magistrate of Gooty, in R. M. C. No. 7 of 1914.

Mr. J. Krishna Rao, for the Petitioners.

Mr. P. R. Grant, for the Government.

ORDER.—The Magistrate had no power to alter or review the order of 18th February 1904, *Parbati Charan Roy v. Sajjad Ahmad Chowdhury* (1), *In re Hari Lal Buch* (2). His order of 23rd August 1914 is, therefore, set aside.

Order set aside.

(1) 35 C. 350; 12 C. W. N. 605; 7 Cr. L. J. 401.

(2) 22 B. 949.

BOMBAY HIGH COURT.

CRIMINAL APPEAL No. 120 OF 1915.

April 30, 1915.

Present:—Mr. Justice Beaman and

Mr. Justice Macleod.

EMPEROR—PROSECUTOR

versus

A. GOODHEW—ACCUSED.

Merchant Seamen Act (I of 1859), s. 83—*Articles of agreement*—*Provision as to transhipment, whether ultra vires*—*Merchant Shipping Act* (57 & 58 Vic., c. 60), s. 114 (3)—*Order of transhipment by Marine Superintendent in presence of Chief Officer of ship.*

The applicant signed the usual articles of agreement with the Captain of the steamship "Arcadia" for a term of one year's service. In addition to the stereotyped conditions the applicant agreed to accept a transfer from that to any other of the P. & O. Company's steamships. The Company disposed of the "Arcadia" and the applicant was ordered by the Marine Superintendent in the presence of the Chief Officer of the "Arcadia" to tranship to the "Salsette." The applicant refused to obey the order:

Held, (1) that having regard to section 114, clause (3), of the Merchant Shipping Act and to the fact that the additional terms of the agreement had been initialled by an Officer of the Board of Trade, the terms were not *ultra vires*; [p. 137, col. 2.]

(2) that the order of tranship though not given actually by the Chief Officer himself, was obviously with his sanction and approval and, therefore, should have been obeyed by the applicant. [p. 138, col. 1.]

Criminal revision application from conviction and sentence recorded by the Chief Presidency Magistrate of Bombay.

Mr. Kolaskar (with him Mr. K. F. Nariman), for the Applicant.

Mr. F. S. Taleyarkhan (with him Messrs. Little & Co.), for the P. & O. S. N. Company.

JUDGMENT.—The applicant has been convicted by the Chief Presidency Magis-

trate of the offence under section 83 of the Merchant Seamen Act and sentenced to one day's simple imprisonment and to forfeit two days' pay. He has applied to this Court and a Rule was issued by Heaton and Shah, JJ. We take it then that we are dealing with this case in revision. It was contended that the applicant had a right of regular appeal; but in view of what has already passed and the applicant's Counsel being unable to support his contention by reference to any section in the Code of Criminal Procedure, it is clear that this was not the view of Heaton and Shah, JJ., and the present contention cannot be sustained.

Now the material facts are that the applicant signed the usual articles of agreement with the Captain of the Steamship "Arcadia" for a term of one year's service. In addition to the stereotyped form certain clauses were added under which, *inter alia*, the applicant agreed to accept a transfer from that to any other of the P. and O. Company's steamships. These additional terms have been challenged in the course of this argument as being *ultra vires*. Having regard, however, to section 114, clause (3), of the Merchant Shipping Act and to the fact that they have been initialled by an officer of the Board of Trade, we cannot accede to that contention. We have no doubt that the terms were *inter vires* and that they were subscribed by the applicant with full knowledge.

That being so, the next question which arises is whether or not, when the ship "Arcadia" had been disposed of by the P. and O. Company and this member of the crew was ordered by the Marine Superintendent to tranship to the "Salsette," that order was one which he was bound to obey under section 83. He has been convicted of disobedience of a lawful order, and the only question, in our opinion, of any importance here is whether or not the order given by the person and in the circumstances stated is such a lawful order as was contemplated in the section. Of the liability of the applicant to tranship under the clause we can entertain no doubt whatever, but looking to the language of that agreement, it appears that the applicant bound himself to obey the Master of the Ship, his successor in office, should any such

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be appointed, and the other superior officers (for such we take to be the meaning of the words "their superior officers") of the ship. This would not ordinarily comprise the Marine Superintendent and had the order been given by the Marine Superintendent alone, it might reasonably have been contended that the applicant was under no obligation to obey such an order or recognize the authority of that individual. This point has not been made as clear as it should have been in the Chief Presidency Magistrate's Court, considering the importance attached to the case by the P. and O. Company. This much, however, is clear that when the order was given by Captain Daldy to the applicant, the Chief Officer of the "Arcadia" was standing by. It has been stated to us on behalf of the Company that what in fact happened was that the Marine Superintendent had sent his orders for the transhipment of this member of the crew of the "Salsette" to the Chief Officer and that the Chief Officer had given that order to the applicant. The applicant refused to obey it, in consequence of which the Marine Superintendent in the presence of the Chief Officer repeated the order. Unfortunately these statements are not supported by any evidence. It appears clear, however, on the virtually admitted fact that the order was given in the presence of the Chief Officer, that the applicant could have been under no real misunderstanding as to the authority behind it. We think, therefore, that the contention is little better than quibbling and no substantial effect ought to be given to it.

All the requirements of section 83 have been sufficiently complied with. The applicant was liable to be transhipped. He was ordered to tranship if not actually by, still in the presence of, the Chief Officer and obviously with his sanction and approval. And we take it that he knew perfectly well that the order came to him weighted with that authority which, by his own agreement, he was bound to acknowledge and obey.

We are, therefore, satisfied that no injustice has been done to the applicant and that the conviction and sentence which are made the subject of this revisional appli-

cation ought not to be disturbed. We, therefore, discharge the Rule.

Rule discharged.

ALLAHABAD HIGH COURT.
CRIMINAL APPEAL No. 186 OF 1915.

April 21, 1915.

Present:—Mr. Justice Chamier and
Mr. Justice Piggott.

EMPEROR—PROSECUTOR

versus

RAHMAT AND OTHERS.—RESPONDENTS.

Criminal Procedure Code (Act V of 1898), s. 345—Compoundable offence, whether can be compounded by heirs of deceased—Penal Code (Act XLV of 1860), s. 325.

An offence punishable under section 325 of the Penal Code is compoundable with the permission of the Court, but it is compoundable by the person to whom the hurt was caused. In a case where the person to whom the hurt was caused is dead the case cannot be compound by his heir. [p. 139, col. 1.]

Criminal appeal by the Local Government against an order of acquittal passed by the Officiating Sessions Judge, Agra.

Mr. A. E. Ryves, for the Crown.

Messrs. J. M. Banerji and Benode Behari (for Mr. C. R. Alston), for the Accused Moti, son of Pir Bakhsh.

JUDGMENT.—This is a Government appeal against an order of acquittal and is brought under the following circumstances. There were four accused persons, Rahmat, Moti, son of Pir Bakhsh, Jhandu and Moti, son of Khilari, all of the Banjara caste, and the case against them was that they had beaten with *lathis* their caste-fellow Pir Bakhsh, inflicting serious injuries, which, as a matter of fact, resulted in the death of the said Pir Bakhsh. The Magistrate who inquired into the case, for reasons given by him, framed a charge under section 325, Indian Penal Code, but committed the accused persons for trial before the Court of Session. The case unfortunately came before a Sessions Judge of very limited experience. He rejected an application made on behalf of the prosecution for amendment of the charge into one under section 304, Indian Penal Code, or section 302, Indian Penal Code, and then permitted the case to be compounded upon an arrangement come to between the accused persons and the widow of the deceased,

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He thus acquitted the accused without taking any evidence at all. The order is obviously illegal. An offence punishable under section 325, Indian Penal Code, is, no doubt, compoundable with the permission of the Court, but it is compoundable by the person to whom the hurt was caused. In this case the person to whom the hurt was caused was dead and the case was certainly not compoundable by his widow.

In dealing with this matter to-day we are placed in a certain difficulty. Moti, son of Pir Bakhsh, has been arrested and has had notice of to-day's hearing. He has been represented before us by Counsel. The other three accused persons cannot be found and are presumably absconding. The warrant issued by this Court for their arrest has not hitherto been executed. Notices of to-day's hearing were issued to them and they have been served on their near relatives, but they themselves cannot be found. The Government Advocate, who appears in support of the appeal, informs us that he is willing to withdraw the appeal as against the three absconding accused, provided this Court is prepared to take up the case so far as they are concerned in the exercise of its revisional jurisdiction. The case is a very clear one and there is no question of convicting any of the accused on evidence upon the record. Over and above setting aside the order of acquittal, all that we could do would be to direct these persons to be tried. Under these circumstances we think that the three absconding accused have been given a reasonable opportunity of being heard to-day in their defence, within the meaning of the 2nd clause of section 439, Code of Criminal Procedure, and that we can take up the question as regards them in the exercise of our revisional jurisdiction.

With regard to Moti, son of Pir Bakhsh, therefore, we so far accept this appeal that we set aside the order of acquittal passed in respect of the said Moti and direct that he be put on his trial before the Court of Session. As regards Rahmat, Jhandu and Moti, son of Khilari, the Government appeal against their acquittal is withdrawn. Taking up the matter in the exercise of our revisional jurisdiction we set aside the order acquitting these three men; which is clearly an illegal order.

We leave the local authorities to take such steps with regard to the prosecution of these three men as they may consider suitable.

Appeal decreed.

PUNJAB CHIEF COURT.

CRIMINAL CASE No. 1324 OF 1914.

April 23, 1915.

Present:—Sir Alfred Kensington, Kt.,
Chief Judge, and Mr. Justice LeRossignol.

EMPEROR—PETITIONER

versus

WALTER TURNER—CONVICT—

RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 307 (1)
—*Jury, trial by—Disagreement of Judge with verdict*
—*Reference to High Court—Duty of Judge before making reference.*

Where in a trial by Jury, a brief verdict of 'not guilty' is given and the Sessions Judge disagrees, he should before making a reference under section 307, Criminal Procedure Code, put such further questions to the Jury as may bring out their meaning more precisely. [p. 140, col. 2.]

Case referred by the Additional Sessions Judge, Shahpur Division at Lyallpur, with his No. 614, dated the 1st of July 1914, under section 307 (1) of the Code of Criminal Procedure, for orders of the Chief Court.

The *Government Advocate*, for the Petitioner.

Mr. *Clarence Kirkpatrick*, for the Respondent.

ORDER.—In this case the respondent, Mr. Turner, aged about 26, was tried by the Sessions Judge with a Jury consisting of three Europeans on two separate charges of cheating. The Jury was unanimous in favour of the respondent on both charges. The Sessions Judge disagreed with the verdict and, therefore, submitted the case under section 307 (1), Criminal Procedure Code. As required by clause (3) of the same section we have had to consider the entire evidence, recorded at great length in the Sessions Court, covering a mass of very confusing detail which required looking into closely. The hearing in this Court was in consequence prolonged over three days during which the argument covered a number of small points, which need not be discussed in our judgment. Our final conclusion is such

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that we can deal with this unsatisfactory case more briefly. We cannot conceal an opinion that far too much has been made of comparatively simple matter which might well have been dealt with departmentally. The result of what strikes us as an ill-advised prosecution is that an inordinate amount of time has been taken up in the Courts with a result altogether disproportionate to the labour involved in going through the petty items concerned.

We understand that after some years of service the respondent was appointed an Inspecting Telegraph Master on Rs. 85 a month in March 1913. His duties involved much travelling and substantially the charges against him are that in July 1913, he drew travelling allowance bills for June, charging for journeys taken and expenses incurred in excess of what he was entitled to. More precisely the charges are explained as follows:—

(1) that after certain deductions made by the countersigning authority from a total bill for Rs. 163, the sum of Rs. 135 was passed and paid for in respect of travelling done between 15th and 30th June, whereas the sum which could be rightly claimed should have been Rs. 32 only;

(2) that for the same period a sum of Rs. 22-11-4 was wrongly drawn as an authorised allowance of one-third of *tum tum* hire.

We may say at once that in our opinion the second charge has broken down hopelessly. There is apparently trustworthy evidence that Turner did keep up a *tum tum* for the period, and did pay the full amount of which he recovered one-third. It cannot be said that he cheated in this respect, though he may have been extravagant in claiming for such work as did not require him to employ a *tum tum* continuously. He, however, so far kept within the rules applicable to him.

On charge (1) the gravamen underlying the actual charge is that Turner falsified various departmental book entries and other documents and induced subordinates to assist him (or tried unsuccessfully to do so), in order to represent that he made journeys which he either did not make at all or made unnecessarily. We had to examine into all this part of the case, though it was properly speaking, a side issue

on the main question. Our conclusion on the point is that Turner did on some occasions do what is alleged against him in a highly improper manner, but this covers his conduct as a Government official rather than the particular offence for which he was charged.

On the actual charge as framed we found it impossible to arrive at any certainty in respect of many of the details, and it seems to us that Turner so far did no more than try to arrange his journeys more with a view to making travelling allowance than to the necessity for repeated office inspections. How far he was merely continuing irregular practices which had grown up under lax supervision in the Telegraph Department we are not prepared to say, but it is obvious that a young officer employed on this sort of work on a low rate of pay must be exposed to great temptation, and both this and the apparent lack of efficient control of a beginner by his superiors should be taken into account.

When we had gone through the various journeys charged for, we found that in some cases the journeys cannot have been performed at all, and in others roundabout routes were unnecessarily taken. In other cases this was not satisfactorily established, and the general conclusion is that Turner did make improper charges though not to the full extent alleged by the prosecution. In round figures he may have been fairly entitled to about half the sum of Rs. 103 still in dispute (that is Rs. 135 less by Rs. 32).

Considering the difficulty in distinguishing accurately on details, it is not altogether surprising that the Jury should at the end of a trial lasting over several days have contented themselves with a brief verdict of not guilty. The Sessions Judge should, however, in view of his disagreement, have put such further questions to the Jury as would bring out their meaning more precisely, and much of the difficulty of the present reference would have been avoided if he had done so. We are satisfied that the Jury went wrong to some extent and that the Sessions Judge's view was correct on certain of the points specified in his order under consideration.

We accordingly acquit the respondent of any offence under charge (2).

In respect of charge (1) we order his formal conviction under section 420, Indian

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Penal Code, on some of the items which do not require specification, covered by his travelling allowance bill for the period 15th to 30th June 1913.

As regards sentence we take account of several matters. In the *first* place, the respondent was a young and comparatively inexperienced officer whose movements should have been more closely supervised by his immediate superiors. In the *second*, his domestic circumstances during the latter part of June entitled him to some consideration at their hands. In the *third*, and this is the most important point of all, we must recognise that the decision of the responsible authorities to proceed against this young man by prosecution has put him to expense and trouble out of all proportion to his actual offence. His conviction is in itself a very serious matter to him as it may involve loss of employment as a Government servant, and we think it quite unnecessary to impose anything more than such nominal sentence as will comply with the law, section 420 being one of the sections for which a sentence of imprisonment is compulsory.

The order passed at the hearing was that Mr. Turner be detained till the rising of the Court, and this sentence having been duly carried out he was discharged from bail on release.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION PETITION NO. 381. OF 1915.

May 21, 1915.

Present:—Mr. Justice Piggott.

MADHO SONAR—APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), s. 353—House search by Police Officer within limits of another Police Station—Assault—Criminal Procedure Code (Act V of 1898), ss. 165, 168.

A Police Officer conducted a search in the house of the accused, who did not reside within the limits of his jurisdiction, accompanied by a constable of the Police Station which had jurisdiction, but the constable had no order, either written or verbal, from his own Sub-Inspector. While engaged in the search they were assaulted by the accused who was convicted under section 353 of the Indian Penal Code.

Held, that as the provisions of sections 165 and 166 of the Criminal Procedure Code were not complied with, conviction under section 353, Indian Penal Code, could not be maintained. [p. 142; col. 1.]

It is of great importance that Police Officers in the discharge of their duty should receive the protection of such sections as 33, 333 and 332, Indian Penal Code, but in order to entitle them to the protection of those sections Police Officers must comply scrupulously with the provisions of the law, particularly when they undertake an act such as searching the house against the will of the accused. [p. 141, col. 2; p. 142, col. 1.]

Criminal revision from an order of the Sessions Judge of Allahabad.

Mr. Iqbal Ahmad, for the Applicant.

Mr. R. Malcomson (Assistant Government Advocate), for the Crown.

JUDGMENT.—The conviction in this case has been had under section 353 of the Indian Penal Code. It lay on the prosecution to prove that the public servants assaulted, namely, the Police constables Nazir Husain and Darsan Singh, were in the execution, or in the lawful discharge of their duty as such public servants at the time when the assault was committed. They were endeavouring to search the house of the applicant, Madho Sonar. Not only is it not proved by the evidence on the record that the provisions of section 166, read with clause (3), section 165, of the Code of Criminal Procedure, had been complied with, but, as a matter of fact, a breach of those provisions becomes patent on an examination of the evidence given by Sub-Inspector Taj Dat Pande and constable Darsan Singh. The Sub-Inspector seems to have acted under a belief, and probably quite a *bona fide* belief, that it was sufficient compliance with the law if he sent intimation to the Sub-Inspector of Manda Police Station of his intention to conduct a search within the limits of the latter's jurisdiction and secured the presence at the search of a constable belonging to the Manda Police Station. This is not sufficient compliance with law. Apart from the fact that Police constable Darsan Singh had no order in writing from the Sub-Inspector of Manda directing him to make the search, it is obvious enough from his evidence that he had received no order, either written or verbal, from his own Sub-Inspector. He thought he was doing his duty in coming to the assistance of the Sub-Inspector from another circle on receiving an intimation from the latter that his presence was required. It is no doubt of great importance that Police Officers in the discharge of their

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duty should receive the protection of such sections as 353, 333 and 332 of the Indian Penal Code; but in order to entitle them to the protection of those sections Police Officers must comply scrupulously with the provisions of the law, particularly when they undertake an act such as searching a house against the will of the owner. In the present case the conviction under section 353 cannot be maintained. No doubt on the evidence some lesser offence was probably committed by the applicant, Madho Sonar; but it would seem that he has been undergoing sentence of imprisonment for more than a month, so that I do not think it necessary to go further into the question with a view to deciding whether he can be convicted of some lesser offence. In so far as he may have been guilty of any breach of the law in opposing the Police Officers, I have no doubt that he has been quite sufficiently punished by the imprisonment which he has already undergone. I set aside the conviction and the sentence in this case and direct that the applicant, Madho Sonar, be released.

Conviction set aside.

CALCUTTA HIGH COURT.

CRIMINAL REVISION NO. 503 OF 1915.

May 14, 1915.

Present:—Mr. Justice Chitty and

Mr. Justice Beachcroft.

HARI DAS SAMANTA AND ANOTHER—

1ST PARTY—PETITIONERS

versus

ABDUL MATLEB MALLIK AND OTHERS—

2ND PARTY—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 145, applicability of—Dispute regarding some out of a number of plots—Rent half share of produce, question of—No question of share as between parties.

Where in proceedings under section 145, Criminal Procedure Code, it is found that out of a few plots of land there is no dispute regarding some of them as to what tenants are in possession and there is a dispute as to the remaining plots, and it is declared by the Magistrate that each party should remain in possession of the plots of which they have been respectively receiving the rents:

Held, that with regard to these remaining plots of land the Magistrate ought not to have passed any order in these proceedings in the absence of the tenants, because they might be very seriously prejudiced by an order in favour of one or other of the parties to these proceedings. [p. 142, col. 2.]

Where it is a question of dividing a hitherto undivided share, section 145 of the Criminal Procedure Code may not apply, but where it is a question of rent and it so appears that the rent is half the share of the produce, but there is no question of shares as between the two parties to the proceeding, section 145 applies. The question of the division of the produce only arises where the tenant comes to pay his rent. [p. 143, col. 1.]

Rule against the order of the Sub-Divisional Officer, Uluberia.

Babu Atulya Charan Bose, for the Petitioners.

Babu Jyotish Chandra Hazra for Maulvi A. K. Fuzul Huq, for the Opposite Party.

JUDGMENT.—This is a Rule granted in respect of section 145, Criminal Procedure Code, proceedings taken by the Sub-Divisional Officer of Uluberia with regard to 33 plots of land. All these plots are held by the tenants on a yearly rent of half the produce. The parties to these proceedings are first party, the purchaser at a *putni* sale and so no *putnidar*, and second party, the *lakherajdar*. The dispute between them is, which of them has the right to collect this rent. The order of the Magistrate is not very happily worded but it is easy to see what he means. He has found that the rent of certain plots has been received by the first party and of certain other plots by the second party, and has declared that each party should remain in possession of the plots of which they have been respectively receiving the rents.

As regards 20 of the plots, there is no dispute as to what tenants are in possession. As to the remaining 13 there is a dispute. It is obvious that with regard to those 13 the Magistrate ought not to have passed any order in these proceedings in the absence of the tenants, because they might be very seriously prejudiced by an order in favour of one or other of the parties to these proceedings.

With regard to plots No. 10 in Nasirchak, Nos. 1 and 6 in Salageria and No. 1 in Gharberia, they are not claimed by the second party and the first party may properly remain in possession of the rents of these plots. So also with regard to plots Nos. 1 and 15 in Panadhara. That makes six plots of which the first party is entitled to collect the rents. With regard to plots Nos. 1 to 5 and 7, 8, 9 and 11 of Nasirchak, there is no dispute as to which tenants are

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in possession, nor is there any dispute as to the tenancy of plots Nos. 8 and 9 in Panadhara and Nos. 3, 4 and 5 in Salageria. The order, therefore, of the Magistrate with regard to these plots may stand.

The plots in respect of which the tenancy is in dispute are plots Nos. 1 to 7 and 10 to 14 of Panadhara and No. 2 in Salageria. As to those 13 the order must be set aside.

We should refer to the argument which has been put forward on behalf of the first party that section 145, Criminal Procedure Code, could not refer to a half share of the produce. That argument appears to us to be based on a fallacy. It is perfectly true that if it was a question of dividing a hitherto undivided share, the section might not apply. But here it is a question of rent and it so happens that the rent is half the share of the produce, but there is no question of shares as between the two parties to the proceedings. The question of division of the produce only arises when the tenant comes to pay his rent.

ALLAHABAD HIGH COURT.
CRIMINAL REVISION No. 384 OF 1915.
June 18, 1915.

Present:—Mr. Justice Chamier.

PRAG—APPLICANT

versus

EMPEROR—OPPOSITE-PARTY.

U. P. Excise Act (IV of 1910), ss. 60, 70—Magistrate taking cognizance of case on report of Police Officer—Jurisdiction.

Police Officers, being invested with powers under section 10 of the U. P. Excise Act, are Excise Officers and a Magistrate can take cognizance of an offence under section 60 of the United Provinces Excise Act, 1910, on the report of a Police Officer in charge of a Police Station.

Criminal revision against an order of the Sessions Judge of Allahabad.

Mr. Hamilton, for the Applicant.

The Assistant Government Advocate, for the Crown.

JUDGMENT.—The applicant has been convicted under section 60 of the United Provinces Excise Act of 1910 of having cultivated hemp plants and also of having sold them. He was sentenced by the Magistrate to one month's rigorous imprison-

ment and to a fine of Rs. 100 or in default to one month's imprisonment more. On appeal the Sessions Judge confirmed the conviction and the sentence of imprisonment, but reduced the fine to Rs. 50. It is contended on behalf of the applicant that the Court had no jurisdiction to entertain the case. Counsel referred to section 70 of the Act, which provides *inter alia* that no Magistrate shall take cognizance of an offence punishable under section 60 except on his own knowledge or suspicion or on the complaint or report of an Excise Officer. This case is said to have been started on the report of an Excise Officer. The report in question was made by the Police Officer in charge of the Cantonment Police Station. Under section 3 of the Act "Excise Officer" includes any person invested with powers under section 10 of the Act. Under Notification No. 576 of July 13th, 1910, all Police Officers in charge of stations, amongst other persons, were invested with the powers specified in section 50 of the Act in respect of offences punishable under section 60, clauses (b), (c), (d), (f) and (i). The conviction in this case was under clauses (c) and (d). It is, therefore, clear that the Police Officer who made the report on which the Magistrate took cognizance of this case was an Excise Officer within the meaning of section 10. I hold, therefore, that the Magistrate had jurisdiction to take cognizance of the Code. On the merits I have no doubt that the conviction was right. It was clearly proved that the applicant had cultivated, that is to say, had tended and watered at least, if not sown, hemp plants in the Macpherson Park, Allahabad, and also that he sold some plants to two men who were sent into the park by the Police for the purpose of catching him. The applicant has served a considerable portion of the sentence of imprisonment inflicted on him. I do not think it necessary to send him back to prison for a few days. I, therefore, reduce the sentence of imprisonment to the term already undergone by him and he need not surrender to his bail. In other respects I dismiss the application. The sentence of fine and of imprisonment in default of payment of fine will stand.

Application dismissed.

SWAMINATHA MUDALIAR v. GOPALAKRISHNA.

VANIAMKANDY THAZHA v. THAZHITHATTATH KUTTI.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 54 OF 1915.

CRIMINAL REVISION PETITION No. 46 OF 1915.

March 18, 1915.

Present:—Mr. Justice Ayling.

SWAMINATHA MUDALIAR—PETITIONER

versus

GOPALAKRISHNA NAIDU—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 144—Too often resort to the provisions of—Recourse to section 107, or Chapter XII, of the Code—When time fixed in the order expires.

A Magistrate should not have repeated recourse to the provisions of section 144 of the Code of Criminal Procedure in the same dispute. He must take steps under the provisions of Chapter XII or section 107 of the Code of Criminal Procedure or apply to Government under clause (5) of section 144 of the Code when the period of two months fixed in the order expires.

Petition, under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Sub-Divisional first Class Magistrate of Negapatam, in Revision Case No. 25 of 1915.

Mr. T. V. Gopalaswami Mudaliar, for the Petitioner.

Mr. P. R. Grant, for the Government.

Mr. T. V. Muthukrishna Aiyar, for the Respondent.

ORDER.—The Magistrate had jurisdiction to pass the order sought to be revised and there is no ground for interference with it.

The term of the order expires to-morrow; and it is observed for the guidance of the Magistrate that repeated recourse should not be had to the provisions of section 144 in the same dispute. If it is considered probable that danger to the public peace may remain after the expiry of two months from the date of an order under section 144, steps should be taken in due course to obtain an order of Government under clause 5 of that section, or recourse should be had to the provisions of Chapter XII, or section 107, of the Criminal Procedure Code.

The petition is dismissed.

Petition dismissed.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 206 OF 1914.

March 2, 1915.

Present:—Mr. Justice Seshagiri Aiyar and Mr. Justice Napier.

VANIAMKANDY THAZHA KUNHI—

PARAMBILPARKUM POMMANI—

CHINTAKATH MAMMALI—DEFENDANT

No. 3—PETITIONER

versus

THAZHITHATTATH KUTTI AMMU—

PLAINTIFF No. 1—RESPONDENT.

Penal Code (Act XLV of 1860), s. 188, disobedience to injunction issued by Civil Court, if punishable under—'Promulgated', import of.

The word 'promulgated' in section 188 of the Indian Penal Code refers to orders passed under the Code of Criminal Procedure, and disobedience to an injunction issued by a Civil Court is not punishable under that section. [p. 144, col. 2; p. 145, col. 1.]

In the matter of the petition of Chandrakanta De, 6 C. 445; 7 C. L. R. 350; 5 Ind. Jur. 412, followed.

Petition, under section 115 of Act V of 1908, praying the High Court to revise the order of the District Court of North Malabar, in Civil Miscellaneous Appeal No. 4 of 1914, dated 19th March 1914, preferred against the order of the Court of the District Munsif of Tellicherry, in Miscellaneous Petition No. 2378 of 1913 (Original Suit No. 779 1913).

FACTS.—The appeal arose out of a petition put in by the respondent (1st plaintiff) to prosecute the petitioner (3rd defendant) under section 188, Indian Penal Code, for disobeying an injunction issued by the Civil Court. The District Munsif of Tellicherry dismissed the petition, but on appeal the District Judge sanctioned the prosecution. The 3rd defendant then preferred this civil revision petition.

Mr. K. Kuttikrishna Menon, for the Petitioner:—The disobedience to an injunction does not come within the purview of section 188, Indian Penal Code. The word 'promulgated' has reference only to orders under the Criminal Procedure Code.

Mr. A. Sundaram, for the Respondent, argued *contra*.

JUDGMENT.—The District Judge is wrong in holding that disobedience to an injunction issued by a Civil Court is punishable under section 188 of the Indian Penal Code. The word *promulgated* in that section refers, as pointed out in *In the matter of the*

in the matter of A MUKHTAR.

petition of Chandrakanta De (1), to orders issued under the Code of Criminal Procedure, and not to judgments and orders of Civil Courts.

We must set aside the order of the lower Appellate Court and direct him to dispose of the appeal on the merits.

Costs to abide the result.

Order set aside; Case remanded.

(1) 6 C. 445; 7 C. L. R. 350; 5 Ind. Jur. 412.

ALLAHABAD HIGH COURT.

FULL BENCH.

CRIMINAL MISCELLANEOUS APPLICATION NO.

68 OF 1915.

March 29, 1915.

Present:—Sir Henry Richards, Kt., Chief Justice, Mr. Justice Knox and Justice Sir P. C. Banerjee, Kt.

In the matter of A MUKHTAR.

Legal Practitioner—Mukhtar—Professional misconduct—Circumstances—Changing sides, when allowed.

A professional gentleman should, as far as possible, stick to the side who first employed him.

In a proceeding for an assault upon the servant of a *zemindar*, a Mukhtar appeared for some of the accused to argue an appeal. Later on the *zemindar* brought proceedings under section 145, Criminal Procedure Code, against the accused for the same property a dispute about which led to the assault. The Mukhtar appeared for the *zemindar*. The Mukhtar's first client did not offer to employ him nor took any exception to his appearing in the case until the case was actually at hearing:

Held, that under the circumstances the Mukhtar was not guilty of professional misconduct.

Rule issued to a Mukhtar to show cause why he should not be debarred from practising.

JUDGMENT.—This matter is connected with a report against a certain Mukhtar. It is said that he has changed sides in the course of different legal proceedings. In what is admitted to be the strongest case against him the charge is as follows. Certain persons were accused of an assault upon the servant of a *zemindar*. The Mukhtar appeared on behalf of one or more of the accused persons in the Appellate Court. Later on the *zemindars* brought proceedings under section 145 of the Code of Criminal Procedure. The property, the subject-matter of this application by the *zemindars*, is said to have been the same property a dispute

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about which led to the alleged assault. It is, therefore, said that the Mukhtar "changed sides" and was thereby guilty of unprofessional conduct. It must be borne in mind in the first place that when the Mukhtar first appeared it was merely to argue an appeal upon the evidence that was on the record.

The question in dispute in the proceedings under section 145 would be as to who was in possession of the property. It does not necessarily follow that the Mukhtar received any information from his first clients when he was appearing for them, which could be used to their prejudice when he appeared for the *zemindars* in the proceedings under section 145. There is nothing on the record to show that the Mukhtar's first clients offered to employ him in the second case, or that they took any exception to his appearing in the case until the case was actually at hearing. Speaking generally it is quite clear that a professional gentleman should, as far as possible, stick to the side who first employed him. It might be a very good practice if when gentleman were offered instructions in any connected case that they should at least in the first place inform their first client. In the present case it has not been proved to our satisfaction that the Mukhtar has been guilty of any professional misconduct.

The Rule is discharged.

Rule discharged.

MADRAS HIGH COURT.

FULL BENCH.

CRIMINAL APPEAL NO. 159 OF 1915.

April 30, 1915.

Present:—Mr. Justice Oldfield, Mr. Justice Seshagiri Aiyar and Mr. Justice Napier.

THE PUBLIC PROSECUTOR—

APPELLANT

versus

KOTTAPARAMBATH MALIYAKKAL

KADIRI KOYA HAJI—ACCUSED.

Criminal Procedure Code (Act V of 1898), ss. 235, 421, 537—Presentation of appeals—Rules of Practice of Madras High Court, Rule 1 (1) (i)—Presentation to Division Bench, whether proper—Evidence on different charges recorded at one trial, illegality of—Defective trial.

No special method is enjoined in the Code of Criminal Procedure for presentation of appeals. The

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question is one of administrative convenience; so long as there is an actual presentation to an officer of the Court, a Bench Clerk or one of the Judges, the presentation is not invalid. [p. 146, col. 2; p. 149, col. 1.]

Rule 1 (1) (f) of the Rules of Practice of the Madras High Court which lays down that application for the admission of appeals should be made before a single Judge, does not in terms, and is not intended to, deprive the Divisional Courts constituted for the disposal of criminal business of the right to exercise their powers in special cases. [p. 147, col. 1; p. 149, col. 2.]

The rule providing for the disposal of all applications by the Admission Judge is not intended to restrict the powers of the Benches constituted under clause 14 of the Charter Act. Such Benches have jurisdiction to hear applications and appeals in criminal matters. [p. 149, cols. 1 & 2.]
Haladhar Maiti v. Choytonna Maiti, 30 C. 588 7 C. W. N. 547, followed.

Section 233 of the Criminal Procedure Code must be strictly construed. Failure to conform to the section at any stage of the trial renders the proceeding illegal. [p. 148, col. 1.]

Clause (a) of section 537, which speaks of "errors in proceeding before or during trial", does not cover cases where the trial itself is defective. [p. 150, col. 2.]

Where a Magistrate frames different charges, but allows the evidence on each charge to be recorded at one trial, and does not discriminate between that which is relevant on each of the charges it is not a mere irregularity cured by section 537 of the Code of Criminal Procedure, but an illegality which vitiates the trial in its entirety. [p. 148, col. 1; p. 150, col. 2.]

Gobind Koeri v. Emperor, 29 C. 385; 6 C. W. N. 468; *Subrahmaniya Ayyar v. Emperor*, 11 M. L. J. 233; 3 Bom. L. R. 540; 5 C. W. N. 266; 25 I. A. 257 (P. C.); 25 M. 61; 2 Weir 271; *Raman Behary Das v. Emperor*, 22 Ind. Cas. 729; 15 Cr. L. J. 153; 41 C. 722; 18 C. W. N. 1152; *In the matter of Govindu*, 26 M. 592; 2 Weir 297; *Tanguturi Srinamulu v. Nalam Krishna Rao*, 25 Ind. Cas. 1001; 27 M. L. J. 589; (1914) M. W. N. 646; 16 M. L. T. 303; 15 Cr. L. J. 673; 38 M. 585; *Pataniandy Gounden v. Emperor*, 1 Ind. Cas. 54; 9 Cr. L. J. 146; 5 M. L. T. 218; 32 M. 218; *Emperor v. Madan Mondal*, 22 Ind. Cas. 731; 18 C. W. N. 669; 15 Cr. L. J. 155; 41 C. 602; *Moharuddi Malita v. Jadu Nath Mandul*, 11 C. W. N. 54; 4 Cr. L. J. 415, followed.

Where no action was taken against the accused for over three years for an offence which he was alleged to have committed and when the trial did take place, it was conducted in an illegal manner:

Held, that having regard to the circumstances, a re-trial could not be ordered as the accused would labour under great disabilities. [p. 148, col. 2; p. 150, col. 2.]

Appeal, under section 417 of the Code of Criminal Procedure, 1898, against the acquittal of the aforesaid accused by the Additional District Magistrate of Malabar, in Calendar Case No. 4 of 1914 on his file.

The Hon'ble Mr. T. Richmond and Mr. A. Ramasami Mudaliar, for the Accused.

JUDGMENT.

OLDFIELD, J.—The accused has been acquitted in Calendar Case No. 4 of 1915 on a charge of an offence punishable under section 420, Indian Penal Code, by the Additional District Magistrate of Malabar. A learned Judge thought it necessary to take up the case in the exercise of this Court's powers of revision. Whilst it was under the consideration of a Bench, Government instructed the Public Prosecutor to file the appeals, which are before us, against the acquittals in Calendar Case No. 4 and Calendar Case No. 5, a connected case. I deal at present with the former.

A preliminary objection to the hearing of both appeals has been made, that they were not legally presented and that they cannot be proceeded with, because the provisions of section 421 of the Code of Criminal Procedure have not been complied with, inasmuch as the appeals were not duly presented to this Court and they were not perused and notice was not ordered by a Judge empowered for those purposes. The facts are that the Bench above referred to issued notice to the Public Prosecutor to appear at the further hearing of the revision case and also to inform the Court whether Government intended to appeal. He appeared and then handed in the appeals by Government now under disposal to the learned Judges, who perused them and ordered notice forthwith.

As regards presentation, no special method is enjoined in the Code of Criminal Procedure and, therefore, the question is one of administrative convenience alone. So long as there is, as there was in this case, an actual presentation to an officer of the Court, such as a Bench Clerk, or to one of the Judges, its members, I am not prepared to hold that the present action was invalid. As to compliance with section 421, accused relies on the note published as part of the weekly sitting list: "Urgent Criminal Appellate Side motions will be heard by the Bench before which the criminal work of the week is posted (and must be moved at 11 A.M.), unless an Admission Court is sitting in which case, if the motion can be heard by a single Judge, the application must be made before the Admission Court" and argues that, as an Admission Court

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constituted by a single Judge was sitting on 15th March 1915, the date on which orders were passed under section 421, that Court alone, and not the Bench of two Judges, was competent to peruse the appeals. It is a sufficient answer to this objection that under section 13, Charter Act, rules for the exercise of the High Court appellate jurisdiction by one or more Judges or by Divisional Courts can be made only by such High Court, the powers of the Chief Justice being only those conferred by section 14 to determine which Judges shall sit alone and which in Divisional Courts. It is by reference to the rules so made that the respective powers of Judges sitting alone and of Divisional Courts must be ascertained, not by reference to the notes to the sitting list, which are merely instructions for the guidance of practitioners and parties. The rules made by this Court are contained in the appellate side rules; and under rule 1 (1) (f) applications for the admission of appeals from the judgment of any Criminal Court are ordinarily to be made before a single Judge. This does not in terms, and is not intended to, deprive the Divisional Court, constituted for the disposal of criminal business, of the right to exercise its powers in special cases, such as those before us, in which convenience and the acquaintance with the circumstances, which the two learned Judges concerned had, rendered their intervention specially advisable. This objection must, therefore, fail.

I turn next to the argument relating to the conduct of the proceedings in the lower Court, on which Mr. Richmond, who appeared for the accused, has relied as a comprehensive answer to the appeal, in so far as the substitution of a conviction for the acquittal is asked for, and not merely an order for a re-trial. The relevant facts are that both Calendar Case No. 4 and Calendar Case No. 5 were instituted by the same complainant by the presentation of only one complaint, containing all the allegations necessary to the establishment of both cases, those allegations being shortly that accused had cheated the Bank of Madras in connection with certain bills of exchange and also by a false representation, contained in Exhibit K, as to the

amount of his assets. The Magistrate in spite, Mr. Richmond alleges, of his remonstrances, recorded the prosecution evidence tendered on behalf of the complainant continuously without discriminating between that which was relevant on each of these two charges, examining each witness once as to all he knew regarding both and questioning accused under section 342, Criminal Procedure Code, only once. He then, as his diary shows, "split" the case into Calendar Cases Nos. 4 and 5 and proceeded to the further cross-examination of the prosecution witnesses, which accused had claimed under section 256 (1). It is not clear whether he bore in mind that he had two distinct cases to try during the cross-examination of 1st prosecution witness. For part of it is headed Calendar Case No. 5. But his attempt to do so, if he made one, was ineffective, since that part of the cross-examination is in fact relevant rather to Calendar Case No. 4. And in any case the attempt was abandoned almost immediately, no such distinction being made in the cross-examination of 3rd prosecution witness, who deposed regarding both the bills and Exhibit K, or of other witnesses. Subsequently one written statement was filed by the accused under section 256 (2), and both cases were disposed of in one judgment. Mr. Richmond argues that this was one trial of separate charges of distinct offences, which offended against section 233, that the trial was, therefore, not a legal one, and that, before accused can be convicted by this or any Court, a legal trial must be held.

There is no doubt that the offences in question in the two cases were distinct, and it is not suggested that section 234, 235, 236 or 239 is applicable. It is also, in my opinion, the fact that, although two charges were framed, one trial only was held. For except in that respect the proceedings were, as pointed out above, in every way similar to those which would have taken place in one trial. It has not been shown how section 233 is not in point, and accordingly the learned Public Prosecutor's efforts have been directed mainly towards establishing that there is in question only an irregularity, to which section 537 is applicable.

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This contention requires close scrutiny, because the effect of the leading case on the subject, *Subrahmanya Ayyar v. Emperor* (1), is to discountenance any liberal application of the section and because it is in terms inapplicable, as the Public Prosecutor would apply it here, to sustain the validity of a trial attacked by the accused only incidentally and not to resist directly a claim to the reversal or alteration of a decision in reference, appeal or revision. And there is in any case the direct objection, which I state in words borrowed from the decision already referred to: "When the Code positively enacts that such a trial as that which has taken place here shall not be permitted," it cannot be said "that this contravention of the Code comes within the description of error, omission or irregularity." This principle was applied to facts resembling those now in question in essential respects in *Gobind Koeri v. Emperor* (2) and *Raman Behary Das v. Emperor* (3), the latter case being authority also for a strict construction of section 233. The only conclusion I can reach is that section 537 is inapplicable and it is, therefore, useless to follow the Public Prosecutor in his contentions that no failure of justice has been occasioned by what occurred or that the accused did not raise his objection to it at a sufficiently early stage in the proceedings.

As accused has undergone no legal trial, he cannot be convicted and sentenced by us, and if we are to take action, the only course open to us is to order that he be tried a second time. It is no doubt true that in two respects the case is one in which interference with a decision of acquittal could be justified. For it is one of public importance, since the establishment of the charge would mean that the accused profited largely by conduct subversive of the existing system of mercantile credit; and it is not, in my opinion, legitimate in one judgment to hold that accused has not been tried legally and to reach a conclusion that he is guilty, though the full argument we heard on the merits demonstrated that the Magistrate dealt most inadequately with one

question of fundamental importance and never came to close quarters with the evidence. On the other hand, the charge deals with events in October 1910 and was made over three years later on the 15th May 1914. The explanation given for this delay is that accused's accounts and other documents, on which the prosecution largely depends, were not accessible to the complainant Bank, until proceedings in another case against accused had ended in this Court in September 1912. But I am not satisfied that the subsequent interval is not excessive; and it is clear that after so long accused would labour under great disabilities. In the circumstances I do not think that the case is one for re-trial. In my opinion, therefore, the appeal must be dismissed.

SESHAGIRI AYYAR, J.—I have come to the same conclusion. Mr. Richmond has raised the objection that the appeal is not properly before us. The facts he relies on for this contention are these. The Public Prosecutor presented the appeal petition to Spencer and Coutts-Trotter, JJ., in Court through the Bench Clerk on the 15th March 1915. On that date, Mr. Justice Ayling was sitting in the Admission Court. Consequently it was not competent to the learned Judge to admit the appeal.

Before dealing with the objection, a few further facts may be stated. Under the orders of a learned Judge of this Court, the records of the present case were called for by the High Court. It was numbered as Criminal Revision Case No. 752 of 1914. On the 4th March, the learned Judges who heard the case sent a notice to the Public Prosecutor calling upon him to inform the Court whether the Government was prepared to file an appeal against the acquittal, and whether he would make any further representation in the matter. The revision case was adjourned to the 15th March. On this date, the incident referred to by Mr. Richmond took place. It is conceded that Spencer and Coutts-Trotter, JJ., were constituted a Bench for hearing criminal cases for the week in which the appeal was presented.

Mr. Richmond's first contention is that there was no valid presentation of the appeal. I am unable to agree with this argument. Section 419 contemplates a presentation by the

(1) 25 M. 61; 11 M. L. J. 233; 3 Bom. L. R. 540; 5 C. W. N. 866; 28 I. A. 257 (P. C.); 2 Weir 271.

(2) 29 C. 885; 6 C. W. N. 468.

(3) 22 Ind. Cas. 720; 41 C. 722; 15 Cr. L. J. 153; 18 C. W. N. 1152.

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appellant or his Pleader. The petition of appeal was handed over to the clerk present in Court by the Public Prosecutor. It has not been shown that the clerk had no authority to receive the appeal petition. Even if it be said that the presentation was to the Judges direct, I am unable to see why it is not a presentation to the High Court. Moreover, the learned Judges who heard the revision petition, having issued the notice, were certainly competent to receive the appeal which was presented to them in pursuance of that notice. There is no force in this contention.

The second argument rests on the fact that in the note appended to the cause list for the week it is stated that all applications relating to criminal matters should be made before the Judge sitting in the Admission Court, and that consequently the presentation of the appeal for admission to the two learned Judges while there was an Admission Court was improper. Speaking for myself, I accept the contention of the learned Counsel that when the Public Prosecutor presented the appeal petition to the learned Judges he moved for its admission. Rule I of the Appellate Rules of Practice speaks of it as an application. I do not think that the admission of the appeal is a partial hearing of the appeal itself. I proceed on the assumption that when an appellant asks the Court to admit an appeal, he is making an application in a criminal matter. In this case, it was an urgent application, as the hearing of the revision petition which was stayed depended upon the admission of the appeal. The question then arises, whether the Criminal Bench was deprived of jurisdiction to admit the appeal because an Admission Court was sitting. The rule only says that ordinarily all applications of this kind should be heard by the Admission Judge. Under clause 13 of the Charter Act, the High Court can make rules for the exercise, by one or more Judges, of the original and appellate jurisdiction vested in the Court. Clause 14 empowers the Chief Judge to determine what Judge shall sit alone and what Judges can constitute a Bench. It was under this clause, the two learned Judges were constituted a Bench to hear and determine criminal cases. They had jurisdiction to dispose of

all criminal matters during the week of their sitting. Their jurisdiction was not taken away, because a single Judge was entrusted with the duties of admitting appeals. Stress was laid on the foot-note to the cause list to which I have already referred. I have no hesitation in saying that it was not intended to restrict the powers of the Benches constituted for the week. It was only an intimation to the practitioners as to the course they should adopt. It may be taken also as a suggestion to the Benches not to encourage applications made to them otherwise than in accordance with the note. Every Judge of the High Court would certainly act on the suggestion. But there can be no warrant for arguing that this note deprives the Criminal Bench of its jurisdiction to hear applications. There is nothing in section 14 which would enable such a limitation being placed on the powers of a Bench. Clause 36 of the Letters Patent on which Mr. Richmond relies is not against this view. As pointed out in *Haladhar Maiti v. Choytonna Maiti* (4), the Chief Justice has power to constitute a Bench even in the absence of rules made under clause 13; and when a Bench is constituted, it has jurisdiction to hear applications and appeals in criminal cases. I agree in holding that the appeals were properly before us.

Mr. Richmond finally contends that even if we are satisfied that the judgment of the lower Court is wrong, we ought not to convict his client of the offences charged, as the trial was illegal in that it contravened the provisions of section 233 of the Code of Criminal Procedure. It is to be regretted that such an objection should be taken at this late stage.

Mr. Richmond states that he objected at the outset to evidence being let in without specifying the charges on which the accused is to be tried. Although there is authority for the position [see *In the matter of Govindu* (5)] that the letting in of evidence before framing a charge in respect of separate allegations is not obnoxious to section 233 of the Code of Criminal

(4) 30 C. 582; 7 C. W. N. 547.

(5) 26 M. 592; 2 Weir 297.

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Procedare, I think that the procedure is not calculated to advance justice. In *Tanguturi Srinamulu v. Nalam Krishna Row* (6) and in *Palaniandy Gounden v. Emperor* (7) it was laid down that a trial commences only after the charge is framed. It is no doubt true that as the accused pleads only to the charge, his trial commences really after the charge. Nonetheless, he is practically on his trial from the moment the prosecution starts the case. However that may be, in this case we are concerned only with what happened after the charge was read out. The Magistrate rightly enough framed separate charges and numbered the cases as Calendar Cases Nos. 4 and 5 of 1914. But when the witnesses came to be cross-examined, he lost sight of the necessity for keeping the two trials separate and allowed the witnesses to be cross-examined promiscuously in respect of both the charges. I do not think the fact that he noted the further cross-examination of the 1st witness as in Calendar Case No. 5 is of any consequence, because that examination was not in reference to the charge framed in that case. Under these circumstances, there can be no doubt that the trial offends against the provisions of section 233.

It was argued by the learned Public Prosecutor that as the reading of the charge and the numbering of the cases were not improper, the further irregularity in not recording evidence separately did not vitiate the trials. The section says that each charge shall be tried separately and the failure to conform to it at any stage of the trial renders the proceeding illegal. See *Subrahmaniya Ayyar v. Emperor* (1) *Gobind Koeri v. Emperor* (2) and *Raman v. Behary Das* (3). In *Emperor v. Madan Mondal* (8) the learned Judges point out that if the mode of trial was wrong, the proceedings ought to be set aside.

Mr. Grant's more serious contention was that section 537 cured the defect. In the first place, the section has no application. The language of the first part of the section

(6) 25 Ind. Cas. 1001; 27 M. L. J. 589; (1914) M. W. N. 646; 16 M. L. T. 303; 15 Cr. L. J. 673; 38 M. 585.
(7) 1 Ind. Cas. 54; 32 M. 218; 9 Cr. L. J. 146; 5 M. L. T. 218.

(8) 22 Ind. Cas. 731; 41 C. 662; 18 C. W. N. 668; 15 Cr. L. J. 155.

is against the conclusion which the Public Prosecutor asks us to adopt. In the second place, clause (a) which speaks of error "in proceedings before or during trial" does not cover cases where the trial itself is defective. Consequently, the explanation which introduces the principle of acquiescence under certain circumstances has no application. Moreover, as the Judicial Committee has held that a violation of a plain provision of law is not an irregularity, the section has no application to the present case. In *Moharuddi Malita v. Jadu Nath Mandul* (9) the error related to the framing of the charge, which is distinctly dealt with in clause (a) of section 537 of the Code of Criminal Procedure. Moreover, in that case the trial was perfectly regular. I am, therefore, of opinion that the joint trial of the two calendar cases is opposed to section 233 and that consequently the accused should not be convicted of the offences charged against him.

I feel little doubt on the records before us that the accused is guilty of at least two out of the three counts mentioned in the charge in Calendar Case No. 4. Ordinarily such a failure of justice would warrant a re-trial of the accused. But the offence took place in October 1910 and the accused has been before the Criminal Courts on three occasions. Under these circumstances, I agree in holding that it is not desirable to direct a re-trial.

NAPER, J.—I concur. I do not, however, think that the decision of the Privy Council in *Subrahmaniya Ayyar v. Emperor* (1) compels us to hold that in no case can a misjoinder of charges or a failure to try charges separately be an irregularity within the meaning of section 537 of the Code of Criminal Procedure. In the manner in which this case comes before us that section, however, cannot be relied on and we have only to apply section 233. The only question that remains is, what course we must adopt being satisfied (1) that the accused has been tried illegally, (2) that his acquittal on the merits on two of the charges was wrong, (3) that in the circumstances we do not think that he should be re-tried on those charges. It seems to me that we must do what the lower Court could have done

(9) 11 C. W. N. 54; 4 Cr. L. J. 415.

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if its attention had been drawn to the illegality of the trial before judgment, that is acquit the accused, which in our opinion is done by dismissing the appeal.

Appeal dismissed.

ALLAHABAD HIGH COURT.
CRIMINAL REVISION No. 226 OF 1915.
June 19, 1915.

Present:—Mr. Justice Chamier.

DEBI SINGH AND OTHERS—ACCUSED—
APPLICANTS

versus

EMPEROR—OPPOSITE-PARTY.

*Criminal Procedure Code (Act V of 1898), s. 423—
Appellate Court, when can start new case against accused.*

The powers conferred by the Code of Criminal Procedure upon a Court of Appeal are not intended to be used in such a way as to spring up a new case on the accused without giving him any notice of the charge which he has to meet.

Criminal revision against an order of the Sessions Judge of Etawah.

Mr. Wallack, for the Accused.

The Assistant Government Advocate, for the Crown.

JUDGMENT.—The four applicants and five others were convicted by a Magistrate of the first Class at Etawah on what is probably one of the most remarkable charges ever framed under sections 147 and 325, Indian Penal Code. The charge runs "that you on or about September 20th, 1914, at Bhasan (or elsewhere) fought against Kallu Singh or Hulas Singh (and perhaps others) with *lathis* and inflicted grievous hurt on the head of Kallu Singh". It appears that the Police had reported as the result of an inquiry held under section 202, Criminal Procedure Code, that there had been no riot at all but that there had been an affray with four men on each side. On the evidence recorded by him the Magistrate came to the conclusion that the facts were that when the complainant, Kallu Singh, was passing the door of one Mahindar Singh the latter challenged him; Kallu Singh maintained that he had a right to pass that way and was set upon and beaten to the ground; that Kallu's brother, Hulas Singh, who followed a short distance behind was also beaten. Both Kallu Singh and Hulas Singh said that all nine accused persons had joined

in the attack. The nine men having been convicted by the Magistrate appealed to the Sessions Judge, who disbelieved the witnesses examined by the Magistrate and sent for and examined another batch of witnesses and on the strength of their evidence, came to the conclusion that what had really happened was that *lathis* had been snatched away from two men named Pobpa and Behari, that they accompanied by Kallu Singh and Hulas Singh went to demand the return of the *lathis* from the accused, Debi Singh, and the two complainants were beaten by Debi Singh, Gambhir Singh and two sweepers, Saktu and Kanhaiya. These four are the applicants before me. It is impossible to say that the case accepted by the Sessions Judge is not covered by the charge framed by the Magistrate. For that charge would cover any violent attack on the complainants made by any of the accused at any place whether in the village or out of it, but notwithstanding the charge the case for the prosecution must be taken to have been that presented by the witnesses examined by the Magistrate. Neither the story told by those witnesses nor the story told by the witnesses called by the Sessions Judge appears to be a probable one. It is not unlikely that both are false. In my opinion the powers conferred by the Code of Criminal Procedure upon a Court of Appeal are not intended to be used in the way in which they were used in the present case. A totally new case was sprung up on the accused by the Court of Appeal and the accused were given no proper notice of the charge which they had to meet. I set aside the convictions of the applicants and the sentences passed on them. If they are in custody, they must be released. If they are out on bail, the bail will be discharged.

Convictions set aside.

VELLAYANAMBALAM v. SOLAI SERVAI.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 660 OF 1914.

CRIMINAL REVISION PETITION No. 558 OF 1914.

April 20, 1915.

Present:—Mr. Justice Kumaraswami Sastri.
VELLAYANAMBALAM—COMPLAINANT—
PETITIONER

versus

SOLAI SERVAI AND ANOTHER—ACCUSED—
RESPONDENTS.

Criminal Procedure Code (Act V of 1898), ss. 435, 439—Acquittal, order of—High Court, power of, to interfere—Jurisdiction, revisional, exercise of—Notice of appeal, failure to serve on District Magistrate—Irregularity, effect of.

A High Court should not interfere with an order of acquittal where the question is as to the appreciation of evidence or where there is no patent error or defect in the order of acquittal which has resulted in grave injustice. [p. 154, col. 1.]

The mere fact that a High Court, if it were sitting as a Court of Appeal, would have come to a different conclusion on facts, is no ground for exercising revisional jurisdiction in petitions against orders of acquittal. [p. 154, col. 1.]

An omission to serve notice of appeal on the District Magistrate is an irregularity but the proceedings are not *ab initio* void. [p. 154, cols. 1 & 2.]

Petition, under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Joint First Class Magistrate of Dindigul Division, in Criminal Appeal No. 52 of 1914, preferred against the judgment of the Court of the Stationary Second Class Magistrate of Nelakottai, in Calendar Case No. 144 of 1914.

FACTS.—The complainant, a servant of the Hakdar in a village, complained against the two accused of offences of mischief and hurt and of illegally rescuing cattle under the Cattle Trespass Act. The defence was that the *bund* of the tank from which the trees were said to be cut, belonged to the villagers and as such no question of mischief arose. The Sub-Magistrate held that the Hakdar was absolutely entitled to the land and the trees thereon and convicted the accused. On appeal the Sub-Divisional Magistrate acquitted the accused, holding that the case presented all the features of a questionable civil claim being presented in a Criminal Court.

The complainant preferred a revision petition to the High Court. One of the grounds of the petition was that before the appeal was disposed of by the Sub-

Divisional Magistrate, no notice was given to the District Magistrate under section 422, Criminal Procedure Code read with rule 60 of the Madras Criminal Rules of Practice. A report was called for by his Lordship Mr. Justice Tyabji as to whether, as a matter of fact, notice was issued under that section. The District Magistrate reported that no such notice was issued.

Mr. M. O. Parthasarathy Aiyengar, for Mr. R. Shadagopachariar, for the Petitioner: (1) The Appellate Magistrate reversed the conviction upon an *ex parte* hearing which was clearly illegal. The case should be remanded for proper disposal after notice to the District Magistrate.

Mr. K. S. Jayarama Aiyar for the Respondents: The revision being against the order of acquittal, this Court should not interfere except in cases where grave public injustice had been done. Even though the *ex parte* hearing in the lower Appellate Court might be irregular yet the complainant was not the party prejudiced, as the only person entitled to notice under section 422 was the District Magistrate himself and he did not complain against the want of notice.

Mr. P. R. Grant, for the Public Prosecutor, argued *contra*.

Mr. K. S. Jayarama Aiyar in reply: The support of the Public Prosecutor in favour of the petition would not in any way add to the weight of the arguments for the petitioner as the Public Prosecutor himself had no *locus standi* in this petition. If the District Magistrate had been really prejudiced, he could very well have moved the Local Government to appeal against the acquittal. In the absence of any such appeal, he could not be heard to say anything either for or against the application.

ORDER.—This is an application to revise the order of the Joint First Class Magistrate of Dindigul Division, reversing the conviction and sentence passed by the Stationary Second Class Magistrate of Nelakottai in Calendar Case No. 144 of 1914.

The complainant filed a complaint against the two accused, who are the present counter-petitioners, charging them with offences under sections 352 and 426 of the Indian Penal Code and section 24 of Act I of 1871 (Cattle Trespass Act). The Stationary Sub-Magis-

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trate fined each of the accused Rs. 15 for each of the offences and directed them to pay Rs. 5-4-0 as costs to the complainant. An appeal was preferred and Mr. Glasson, the Joint Magistrate of Dindigul Division, reversed the conviction after going through the evidence and material papers, as he was of opinion that the case was not proved.

A preliminary objection has been taken by Mr. Jayarama Aiyar for the respondents that no criminal revision petition lies to set aside an order of acquittal and that the only remedy in such cases is an appeal by the Government as provided for by section 417 of the Criminal Procedure Code. It has been argued that a private person has no *locus standi* in such cases and reference has been made to *Thandavan v. Perianna* (1) and *Sinnu Gounden, In re* (2). The right of a private party to prefer a revision petition against an order of acquittal and the circumstances under which the High Court would interfere, if at all, have been considered in numerous cases. In *Thandavan v. Perianna* (1), it was held that an appeal against an order of acquittal by way of revision was not contemplated by the Criminal Procedure Code and their Lordships refused to hear the petitioner's Counsel. The observations of Miller, J., in the case of *Sinnu Gounden, In re* (2), to the effect that to entertain proceedings by way of revision where an appeal would lie from an acquittal under section 417 of the Code of Criminal Procedure is contrary to the spirit, if not to the letter of sub-section 5 of section 439 of the Code of Criminal Procedure, also support the view taken in *Thandavan v. Perianna* (1). There re, however, numerous cases where the High Court has held that it has power to interfere in revision, although the powers were exercised within very narrow limits. I need only refer to *Sukho v. Durga Prasad* (3), *Queen-Empress v. Ala Bakhsh* (4), *In re Sheikh Aminuddin* (5), *Emperor v. Madar Bakhsh* (6), *Heerabai v. Framji Bhikaji* (7), *Municipal Committee of*

Dacca v. Hingoo Raj (8), *Deputy Legal Remembrancer v. Karuna Baistobi* (9), *Rupa Mandal v. Keshab Mandal* (10), *Bellew v. Mrs. Parker* (11), *Rakhial Das Roy v. Kailash Banu* (12), *Kangali Sardar v. Rama Charan Bhattacharjee* (13), *Ramjiwan Rai v. Abilakh Barai* (14), *Shaikh Bazu v. Raika Singh* (15).

The view taken by the Allahabad High Court in the cases reported as *Sakho v. Durga Prasad* (3) and *Queen-Empress v. Ala Bakhsh* (4) was that the Court would not interfere on facts but only on questions of law apparent from the record. In *Heerabai v. Framji Bhikaji* (7), their Lordships observed that though the High Court has power to review an order of acquittal under section 439 of the Code of Criminal Procedure, yet it would not *ordinarily* interfere with such an order in the exercise of its revisional jurisdiction because an appeal can always be made by the Local Government against such an order under section 417 of the Code and that it is open to the complainant to move the Government, if so advised, to appeal against the order. Though in some of the cases above referred to, the Calcutta High Court went further than the other Courts as to the extent of the scope of interference in such cases, the decision of the Chief Justice and Justice Fletcher in *Faujdar Thakur v. Kasi Chowdhuri* (16) is to the effect that the power should be exercised only sparingly and when urgently demanded in the interests of public justice. I entirely agree with the remarks of Jenkins, C. J., in the above case, and while I am not prepared to hold that there is no power for the High Court to interfere in revision, I am of opinion that applications by private parties ought to be discouraged and that the Court should only interfere when it considers that interference is urgently de-

(8) 8 C. 895.

(9) 22 C. 64.

(10) 5 C. L. J. 452; 5 Cr. L. J. 349.

(11) 7 C. W. N. 521.

(12) 5 Ind. Cas. 721; 11 C. L. J. 113; 11 Cr. L. J. 213.

(13) 12 Ind. Cas. 985; 38 C. 786; 12 Cr. L. J. 609.

(14) 22 Ind. Cas. 739; 18 C. W. N. 584; 15 Cr. L. J. 63.

(15) 26 Ind. Cas. 170; 18 C. W. N. 1244; 15 Cr. L. J. 722.

(16) 27 Ind. Cas. 186; 19 C. W. N. 184; 21 C. L. J. 53; 16 Cr. L. J. 122; 42 C. 612.

(1) 14 M. 363; 2 Weir 571.

(2) 23 Ind. Cas. 188; 26 M. L. J. 190; (1914) M. W. N. 273; 15 Cr. L. J. 136.

(3) 2 A. 44.

(4) 6 A. 424.

(5) 24 A. 346.

(6) 25 A. 12; A. W. N. (1902) 200.

(7) 15 B. 349.

In re SANTA CRUZ MORAIS.

manded in the interest of public justice. It seems to me that the Court should not interfere with an order of acquittal where the question is as to the appreciation of evidence or where there is no patent error or defect in the order of acquittal passed by the lower Court which has resulted in grave injustice. The mere fact that the High Court if it was sitting as a Court of Appeal would have come to a different conclusion on facts, is no ground for exercising revisional jurisdiction in petitions against orders of acquittal. 10

Turning to the merits, the chief ground urged before me is that notice did not go to the District Magistrate as required by the Criminal Procedure Code and Rules of Criminal Practice and that consequently the reversal of the judgment of the second class Magistrate by the Joint Magistrate was erroneous. A report was called for as to the alleged want of notice to the District Magistrate and it appears that although notice was ordered by the Joint Magistrate when he admitted the appeal no notice was, as a matter of fact, served on the District Magistrate. The case has been argued on both sides on the footing that notice did not go. Section 422 of the Code of Criminal Procedure enacts that if the Appellate Court does not dismiss the appeal summarily, it shall cause notice to be given to the appellant or his Pleader, and to such officer as the Local Government may appoint in this behalf and section 423 of the Code of Criminal Procedure directs that the appeal shall be disposed of after hearing the appellant or his Pleader, if he appears, and the Public Prosecutor if he appears. The practice in all these cases is for the notice of appeal to be served on the District Magistrate and for the District Magistrate to instruct the Public Prosecutor to appear, if in his opinion the case is a fit one for the Public Prosecutor to appear and argue in support of the conviction. It very often happens that the District Magistrate does not think it worth while to instruct the Public Prosecutor to appear. There can be no doubt that the action of the Joint Magistrate in hearing the appeal when notice was, as a matter of fact, served on the District Magistrate, is irregular, having regard to the provisions of sections 422 and 423 of the Code of Criminal Procedure. I do not think that the mere omission to serve notice of

appeal on the District Magistrate is anything more than an irregularity and do not agree with the arguments of the petitioner's Counsel that the proceedings are *ab initio* void.

Mr. P. R. Grant, who appeared for the Public Prosecutor, states that he has no instructions to urge for a reversal on the ground that the District Magistrate had no notice and I must take it that so far as this case is concerned, the District Magistrate does not consider that the interests of justice have suffered owing to his not having received notice of the appeal.

I have gone through the records and do not think that any grounds exist for the exercise of the revisional jurisdiction of the High Court.

The petition fails and is dismissed.

Petition dismissed.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 829 of 1914.

CRIMINAL REVISION PETITION No. 683 of 1914.

April 20, 1915.

Present:—Mr. Justice Kumaraswami Sastri.

In re SANTA CRUZ MORAIS alias

SIVASANGU AND ANOTHER—ACCUSED—

PETITIONERS.

Penal Code (Act XLV of 1860), ss. 82, 225B—Criminal Procedure Code (Act V of 1898), s. 54—Arrest by Police of a boy less than 7 years of age for theft, legality of—Obstruction to such arrest, whether offence.

As section 82 of the Penal Code exempts a child under 7 years of age from any criminal liabilities it is illegal for a Police Officer to arrest a boy less than 7 years of age for the offence of theft, and an obstruction offered to such arrest is not an offence under section 225B of the Penal Code. [p. 155, col. 1.]

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Divisional Magistrate of Tuticorin, in Criminal Appeal No. 38 of 1914, preferred against the judgment of the Court of the second Class Magistrate of Tuticorin, in Calendar Case No. 156 of 1914.

Messrs. M. D. Deradoss and T. Nallasivq Pillai, for the Accused.

KIRPA RAM v. EMPEROR.

Mr. P. R. Grant, for the Government.

ORDER.—I am of opinion that the conviction of the 1st accused under section 225B cannot stand. He was accused of having offered obstruction to the lawful apprehension of a person apprehended by the Police for theft. It is found that the person apprehended was a boy under seven years of age and the case was argued both by the Public Prosecutor and Counsel for the petitioners on that footing.

Section 82 of the Penal Code enacts that nothing is an offence which is done by a child under seven years of age. Section 4 clause (o) of the Criminal Procedure Code defines offence to mean any act or omission made punishable by any law for the time being in force. The powers given by section 54 of the Criminal Procedure Code to the Police Officer to arrest without a warrant are only in respect of cognisable offences. If the person arrested is a child under seven years of age, who under section 82 of the Indian Penal Code cannot commit an offence, it is difficult to see how such an arrest can be a lawful apprehension within the meaning of section 225B.

So far as the 2nd accused is concerned, the person rescued was over seven and under twelve years of age and section 83 of the Penal Code applies. The arrest was *a prima facie* lawful one and the 2nd accused was guilty under section 225B. The sentence is not severe and I see no reason to interfere.

I reverse the conviction and sentence passed on the 1st accused and dismiss the petition of the 2nd accused.

Conviction partly set aside.

PUNJAB CHIEF COURT.
CRIMINAL REVISION PETITION No. 1660 OF 1914.
December 12, 1914.

Present:—Mr. Justice Chevis and

Mr. Justice LeRossignol.

KIRPA RAM AND OTHERS—CONVICTS—
PETITIONERS

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 423

(b)—*Alteration of sentence of 3 months' rigorous imprisonment into one month's imprisonment and a fine—Payment of fine—Alteration, whether amounts to enhancement.*

Where a District Magistrate on appeal altered the sentence of three months' rigorous imprisonment to one month's rigorous imprisonment and a fine of Rs. 100 or in default one month's further rigorous imprisonment and the fine was paid and the appellant did not wish to have the original sentence restored:

Held, that in the circumstances of the case the alteration did not amount to an enhancement.

Emperor v. Sagwa, 23 A. 497; A. W. N. (1901) 176, referred to.

Petition for revision from an order of the District Magistrate, Multan, dated the 20th August 1914.

Mr. Beechey, for the Petitioners.

JUDGMENT.—Notice in this case issued only as regards the legality of the alteration of the sentence passed on Kirpa Ram, who was sentenced by the Magistrate to undergo three months' rigorous imprisonment. The learned District Magistrate on appeal altered the sentence to one month's rigorous imprisonment and fine of Rs. 100 or, in default, one month's further rigorous imprisonment. The only question is, whether this alteration amounts to an enhancement of sentence.

No doubt in some cases an alteration of this kind might be equivalent to an enhancement. The convict might be a poor man to whom the order of fine would be a heavier punishment than the imprisonment, and, as is pointed out in *Emperor v. Sagwa* (1), the fine can, under section 70, Indian Penal Code, be levied even after the imprisonment awarded in default has been undergone, such imprisonment not being a discharge of the fine.

But in the present case the fine has been paid, and the appellant, when asked by us whether he would like to have the fine refunded and the original sentence passed by the Magistrate restored, gave a decided answer in the negative.

We hold, therefore, that there has been no enhancement of sentence in this case.

The application for revision is dismissed.

Petition dismissed.

(1) 23 A. 497; A. W. N. (1901) 176.

EMPEROR v. KADIR BUX.

SIND JUDICIAL COMMISSIONER'S
COURT.
CRIMINAL APPEAL AGAINST ACQUITTAL No. 115/2
OF 1914.

January 12, 1915.

Present:—Mr. Pratt, J. C., and Mr. Crouch,
A. J. C.

EMPEROR—APPELLANT

versus

KADIR BUX *wald* MITHO—ACCUSED.

RESPONDENT.

*Criminal Procedure Code (Act V of 1898), s. 417—
Appeal against acquittal—Erroneous view of evidence by
lower Court—Appellate Court, duty of.*

The Criminal Procedure Code makes no distinction between an appeal from a conviction and an appeal from an acquittal. Consequently if in an appeal from an acquittal, the Appellate Court thinks that the lower Court has taken an erroneous view of the evidence it has no jurisdiction to refuse to convict. [p. 156, col. 2.]

Queen-Empress v. Bibhuti Bhusan Bit, 17 C. 485; *Queen-Empress v. Karigowda*, 19 B. 51; *Queen-Empress v. Prag Dat*, 20 A. 459; A. W. N. (1898) 117, referred to.

Appeal against the acquittal order passed by the Additional Sessions Judge, Larkana.

Mr. E. Raymond (Public Prosecutor for Sind), for the Crown.

Mr. Kalumal Pahlumal, for the Accused.

JUDGMENT.

PRATT, J. C.—This is an appeal under section 417, Criminal Procedure Code, against the order of the Additional Sessions Judge of Larkana acquitting the accused, Kadirbux, who had been charged with an offence under section 304, Part I, Indian Penal Code.

The deceased Bachal had land in the village of Rahuja and was the son of Lano, the headman of the Rahuja of that village. Information that he had been beaten by the accused in a quarrel over a right of water was brought to the Larkana Police Station at 4 A. M. on the 8th July by one Jan Mahomed. The Sub-Inspector reached the village before sunrise and within a few hours completed his investigation, arrested the accused and sent the corpse to the dispensary at Larkana where it arrived the same morning. The doctor found a contusion 3 inches long by $\frac{1}{2}$ inch broad on the outer side of the right thigh an extravasation of blood below the skin on the right temple. A clot of blood had formed on the brain below the temple and this was the cause of death. The Sessions Judge, without expressing any very definite opinion, seemed inclined to the view

that the blow on the head was the result of a fall. No doubt the injury might possibly have been caused by a fall, but as the contusion on the thigh was clearly a stick blow there can be no reasonable doubt but that the damage to the head was also caused by a stick.

The next question is whether it was the accused who hit Bachal on the head with a stick.

On the whole I feel no doubt that the case is a true one. Bachal must have named his assailant; the quarrel as to water receives corroboration from the shortage of water which necessitated the witness going to settle rotation of water supply and by the dam in the Karia; the first information at Larkana was given before the offence took a serious turn and it names the accused and there could have been no motive for fabrication then, and the very brevity of the information shows that there had then been no thinking over or manipulation of the case. Neither the father nor the witnesses bear any grudge against the accused nor have any motive for falsely charging him.

Mr. Kalumal refers to the cases of *Empress of India v. Gayadin* (1) and *Queen-Empress v. Robinson* (2) and contends that even if we disagree with the view of the Sessions Judge, we should not interfere because he tried the case carefully and his conclusions are not unreasonable or perverse. The cases cited do go the length of saying that the High Court should not interfere under section 417 unless there has been an egregious failure of justice. But they have been practically overruled by the same High Court in the case of *Queen-Empress v. Prag Dat* (3). I think the view taken by the Calcutta and Bombay High Courts in *Queen-Empress v. Bibhuti Bhusan Bit* (4) and *Queen-Empress v. Karigowda* (5) is the correct one. The Code makes no distinction between an appeal from a conviction and an appeal from an acquittal. In the appeal from an acquittal if this Court thinks the lower Court has taken an erroneous view of the evidence, it has no jurisdiction to

(1) 4 A. 148.

(2) 16 A. 212; A. W. N. (1894) 49.

(3) 20 A. 459; A. W. N. (1898) 117.

(4) 17 C. 485.

(5) 19 B. 51.

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refuse to convict. The power of appeal under section 417 is one that should be exercised sparingly by Government. But the discretion to exercise that right of appeal appertains to Government and is not subject to the control of the Court.

I have, therefore, no hesitation in giving effect to my conclusion that the accused is guilty. I do not, however, think that he knew that he was likely to cause death. I would, therefore, convict him of an offence under section 325, Indian Penal Code, and sentence him to rigorous imprisonment for one year.

CROUCH, A. J. C.—I concur.

Acquittal reversed.

PUNJAB CHIEF COURT.
CRIMINAL APPEAL NO. 193 OF 1915.
March 25, 1915.

Present:—Mr. Justice Chevis and
Mr. Justice LeRossignol.

EMPEROR—APPELLANT
versus

MOHAN LAL—RESPONDENT.

Punjab Municipal Act (III of 1911), s. 219—Autrefois acquit—Constructing building without permission—Conviction for prospective disobedience—Jurisdiction of Magistrate to order demolition.

A Magistrate is competent to convict and sentence an accused for constructing a building overhanging a Municipal street under section 219 (2) of the Punjab Municipal Act but he is not authorised to pass an order for demolition of the building, nor can he pass a sentence of daily fine until such time as the building should be demolished. [p. 157, col. 2.]

Where the Chief Court set aside the order directing the demolition of a building and fine for prospective disobedience:

Held, that the order of the Chief Court was no bar to a fresh prosecution in respect of proved initial disobedience and continuing breach of the Municipal Committee's notice. [p. 157, col. 2.]

Appeal from the order of the Sessions Judge, Amritsar, dated the 21st of October 1914, reversing that of the Honorary Magistrate, first Class, Amritsar, dated the 16th September 1914, and acquitting the Respondent.

Mr. Jai Gopal Sethi, for the Appellant.

Mr. Manohar Lal, for the Respondent.

JUDGMENT.—The respondent in this case at the instance of the Municipal Committee, Amritsar, was sentenced to a fine of Rs. 50 for constructing a balcony overhanging the Municipal street without the permission of the Municipal authorities, and was further directed to demolish the offending balcony and to pay a further fine of Re. 1 per *diem* until such time as the balcony should be demolished.

This sentence was revised by a Judge of this Court on 11th April 1913, and it was then held that conviction and fine of Rs. 50 were valid, but that the Magistrate had no power to order the demolition of the balcony or to inflict a fine for prospective disobedience.

Armed with this order the respondent persisted in disobeying the Municipality's injunction to demolish his balcony, whereupon the Committee again moved the Magistrate, with the result that the respondent was fined Rs. 50 for disobedience *plus* Rs. 143-14—being the penalty calculated at Rs. 2 per *diem* for the continuing breach up to the date of judgment.

The respondent appealed from this sentence and conviction to the Sessions Judge, who acquitted respondent on the ground that this Court's order of 11th April 1913 was a bar to a fresh prosecution on the same facts. From that order of acquittal the local Government has preferred an appeal to this Court.

We are quite unable to accept the lower Appellate Court's view. This Court's order of 11th April 1913 modified the sentence of the first Court on two grounds, *first*, that a sentence of fine for prospective disobedience was illegal; *secondly*, that the Magistrate in ordering demolition was acting *ultra vires*.

But this finding in no way detracted from the power of the Municipality to insist on the demolition of the offending *chajja* or balcony and to secure a conviction for proved disobedience and an established, as opposed to a potential, continuing breach.

We understand that the balcony has recently been demolished—and we take into consideration the fact that respondent has already been punished for his encroachment on Municipal property, and he does not appear to be a person of large means,

HAR DAYAL v. EMPEROR.

We accept the appeal, restore the conviction of the first Court, but reduce the sentence to Rs. 50 for the initial disobedience of the Committee's notice and Rs. 50 in respect of the continuing breach, in short Rs. 100 in all.

Appeal accepted.

ALLAHABAD HIGH COURT.
CRIMINAL APPEAL No. 316 OF 1915.

May 21, 1915.

Present:—Mr. Justice Chamier.
HAR DAYAL AND ANOTHER—APPELLANTS
versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 408 (b)—Different sentences by Assistant Sessions Judge—Appeal.

Where an Assistant Sessions Judge sentences one of the several accused in a case to rigorous imprisonment for more than four years and others to a term of four years each, an appeal lies to the High Court, although the accused sentenced to the higher term of imprisonment does not appeal.

Criminal appeal from an order of the Assistant Sessions Judge of Cawnpore.

Mr. Lalit Mohan Banerji, for the Crown.

JUDGMENT.—The appellants have been convicted by an Assistant Sessions Judge of an offence under section 457 of the Indian Penal Code and have been sentenced to four years' rigorous imprisonment each. At the same trial Chhote alias Bhawani was convicted of the same offence and sentenced to six years' rigorous imprisonment. Chhote has not appealed. The two appellants in the first instance presented their appeals to the Court of the Sessions Judge of Cawnpore. The officer forwarded the appeals to this Court on the ground that under section 408, proviso (b), of the Code of Criminal Procedure none of the convicts could appeal to the Court of Session. The question has been raised in more than one case of this kind, whether an appeal against a sentence of imprisonment not exceeding four years lies to the High Court by reason of the fact that another person convicted at the same trial was sentenced to imprisonment for a

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term exceeding four years. Both Mr. Justice Tudball and Mr. Justice Piggott have held that in such a case as this all the appeals lie to the High Court. I am of the same opinion. This case is one which comes within the terms of proviso (b) to section 408 of the Code of Criminal Procedure. The fact that the person upon whom a sentence of imprisonment exceeding four years has been inflicted has not chosen to appeal does not affect the question. On the merits I have no doubt that the appellants, Har Dayal and Muhammad Husain, were rightly convicted. I have examined the evidence and I entirely agree with the Assistant Sessions Judge and the assessors that the two appellants were among the men who broke into the complainant's house on the night in question. Their appeals are dismissed.

Appeal dismissed.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 121 OF 1915.

CRIMINAL REVISION PETITION No. 99

OF 1915.

July 30, 1915.

Present:—Mr. Justice Seshagiri Aiyar.

In re MARUTHA PILLAI—ACCUSED—
PETITIONER.

Madras Abkari Act (I of 1886)—Arrack—Possession of arrack below normal strength—Offence.

Where the seals put on a cask containing arrack are not tampered with, and the weakness in the strength of the liquor is such as could be due to exposure owing to natural causes or constant sales, a conviction of possession of arrack below the normal strength is unsustainable. [p. 159, col. 1.]

Petition, under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of the Sub-Divisional Magistrate of Chidambaram, in Criminal Appeal No. 75 of 1914, preferred against the judgment of the Court of the 3rd Class Magistrate of Pittagudi, in Calendar Case No. 128 of 1914.

Mr. C. Padmanabhu Iyengar, for the Petitioner.

UJIR SHEIKH v. SYID ALI SHEIKH.

Mr. P. R. Grant, for the Government.

ORDER.—I am unable to uphold the conviction in this case. It is common ground that a depot-keeper like the accused is allowed to have *arrack* of U. P. 32 degrees. When the cask was examined on the 16th January 1914, the *arrack* in it was of the strength of U. P. 32'5. The question for decision is whether this weakening in the strength of the *arrack* to the extent of five pints is due to dilution. Exhibit A, the license in the case, shows that it is possible that *arrack* may lose strength to the extent of one degree from natural causes. Further, when the Assistant Commissioner sealed the cask on the 28th April 1914, he found the *arrack* to be U. P. 31'4. When the cask was produced in Court and examined on the 23rd July it was found to be 31'8. There is no suggestion that the seals were tampered with between these two dates. It has also to be remembered that there had been heavy sales before the date of the offence. It is more likely that the difference of five pints was due to constant exposure on account of the frequent sales. I think the accused is at least entitled to the benefit of the doubt arising in this case; The conviction against him is reversed. The fine, if already paid, will be refunded. The cask will be returned to the accused; if it has been sold, its price should be paid to him.

Conviction set aside.

In re MARAKKAR.

Under section 423 (d) of the Code of Criminal Procedure an Appellate Court has power to set aside an order under section 522, Criminal Procedure Code, as the section authorises the Appellate Court in an appeal to make any incidental order.

Mr. Gregory, Counsel, Babus Atulya Charan Bose (for Babu Dasarathi Sanyal) and Umesh Chandra Ghose, for the Petitioner.

Babu Manmatha Nath Mukerjee, for the Opposite Party.

JUDGMENT.—This was a Rule calling upon the District Magistrate and the opposite party to show cause why the order setting aside the order under section 522, Criminal Procedure Code, should not itself be set aside. It has been argued that the Appellate Court had no jurisdiction under the Code to set aside that order and, further, that on the merits the order ought not to have been set aside. So far as the question of jurisdiction is concerned, we think that the Appellate Court had power to set it aside under section 423 (d), Criminal Procedure Code, which authorises the Appellate Court in an appeal to make any incidental order. So far as the merits are concerned, it appears that, on the findings of the Appellate Court, the order under section 522, Criminal Procedure Code, ought not to have been allowed to stand, and that the Appellate Court was, therefore, right in setting it aside. This Rule must be discharged.

Rule discharged.

CALCUTTA HIGH COURT.
CRIMINAL REVISION No. 419 OF 1915.
May 10, 1915.

Present:—Mr. Justice Chitty and Mr. Justice Beachcroft.

In the matter of UJIR SHEIKH—
PETITIONER

versus

SYED ALI SHEIKH AND OTHERS—ACCUSED
—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 423 (d), 522—Appellate Court, powers of, to make any order.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 860 OF 1914.
CRIMINAL REVISION PETITION No. 77 OF 1914.
April 23, 1915.

Present:—Mr. Justice Spencer and
Mr. Justice Coutts-Trotter.

In re P. MARAKKAR AND OTHERS—ACCUSED
—PETITIONERS.

Madras Revenue Recovery Act (II of 1864), s. 8—Defaulter absent at time of distraining—Demand in writing not necessary—Resistance, whether an offence.

The Madras Revenue Recovery Act does not contain any provision requiring in cases where the defaulter is absent at the time of distraining, that the demand in writing described in section 8 should be delivered to the defaulter before the distress. A person distraining in these circumstances is not doing anything illegal and resistance to him is punishable as an offence under the Act. [p. 160, cols. 1 & 2.]

In re MARAKKAK.

Petition, under sections 435 and 439 of the Code of Criminal Procedure, 1895, praying the High Court to revise the judgment of the Court of the Sub-Divisional Magistrate of Malappuram, in Criminal Appeal No. 59 of 1914, preferred against the judgment of the Court of the second class Magistrate of Tirur, in Calendar Case No. 97 of 1914.

Dr. K. Pandalai, for the Petitioners.

Mr. P. R. Grant, for the Public Prosecutor.

ORDER.—The question is whether the act of the distrainer in this case was legal, so as to make resistance to his act an offence. Dr. Pandalai's main contention is that the only person who can be classed as the 'defaulter' within the meaning of section 8 of the Madras Act II of 1864 is the person registered as *pattadar*, and that the service on the *pattadar*, whether present or absent, of a demand in writing is a condition precedent to making distraint under that Act. Taking for granted the first part of this contention to be correct, the difficulty as to the second is that the Act does not contain any provision requiring, in cases where the defaulter is absent at the time of distraining, that the demand in writing described in section 8 should be delivered to the defaulter before the distress. But it is argued that such a procedure must be assumed to have been intended from the fact that the person liable to pay the arrear is the *pattadar* and that a production of the demand in his absence would be a meaningless act. In construing the Act, we are not inclined to read anything into it which is not expressly stated therein. No provision is made in the Act as to what the distrainer is to do with the written demand in the case of the defaulter not being present when the distrainer arrives on the land, except in the third part of the section which reads thus: "When a defaulter may be absent, a copy of the writing with the endorsement shall be fixed or left at his usual place of residence, or on the premises where this property may have been distrained, before the expiration of the third day, calculating from the day of the distress." This clearly refers to what is to be done after the distress and is not a condition precedent to making it. The section itself and the Board's Standing Order No.

44, paragraph 7, which deals with the procedure in distraint, declare that the demand in writing is to be the distrainer's authority for making the distress. In the form of the demand, as given in the appendix to the Board's Standing Orders, there is a direction which practically reproduces the words of the section that "the distrainer should produce this order, and if the sum due be not at once paid, he may make distress, and on the day on which the property is distrained he should deliver to the defaulter a copy of the order endorsing thereon a list of the property distrained and the name of this place where it is kept." It is obvious that if the defaulter is not present at the spot, it cannot be shown to him then and there. But the arming of the distrainer with a written demand signed by a duly empowered Revenue Officer is an act which serves to distinguish him from a thief or trespasser in the eyes of the tenant or mortgagee in occupation of the land. Section 11 of the same Act provides for a tenant whose crop, are attached for an arrear of revenue paying the arrear and deducting the amount from any rent due by him to the *pattadar*. It thus appears that the production of the written demand is not such a meaningless act as it might be thought, and that the provision for the delivery on the same day of a copy to the defaulter is only intended to apply when the defaulter is present. The petitioners cannot rely on any omission to furnish the defaulter with a copy of the demand after the distraint was made as an excuse for resisting the distraint. We consider that P. W. No. 1, when making the distraint in the absence of the *pattadar* who lived twenty miles away, did all that was required of him by law. The point of law now raised was not decided in *Queen-Empress v. Ramasami* (1), which Dr. Pandalai has cited in favour of his contention.

The sentences imposed for the offences committed by the petitioners in defying the authority of the Revenue Officers are not, in our opinion, excessive.

The criminal revision petition is dismissed.

Petition rejected.

(1) 16 M. 364; 1 Weir 422; 3 M. L. J. 178.

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CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE NO. 369 OF 1912.

April 26, 1915.

Present:—Justice Sir Asutosh Mookerjee, Kt.,
and Mr. Justice Chapman.SHYAMA CHARAN BAISYA—PETITIONER
—APPELLANT

versus

PRAFULLA SUNDARI GUPTA—

RESPONDENT.

Probate, revocation of, application for—Probate proceedings—Reversionary heir, whether entitled to intervene—Statement as to relations of deceased to be correct—Probate and Administration Act (V of 1881), ss. 50, 69—Special citation, conditions of—Grant of Probate, defect in—Person bound by proceedings to which he is no party, when—Full knowledge—Burden of proof—Waiver, effect of.

A reversioner under the Hindu Law has no present alienable interest in the property left by the deceased but he is substantially interested in the protection or devolution of the estate, and as such is entitled to appear and be heard in a Probate proceeding relating to the deceased's property. [p. 162, col. 2.]

Brindaban Chunder v. Sureshwar, 3 Ind. Cas. 178; 10 C. L. J. 263, referred to.

Where an applicant for Probate chooses to make a statement as to the relations of the deceased, the information he gives to the Court must be correct and not misleading. [p. 162, col. 2.]

In a case where a Will is propounded which alters the devolution of property the District Judge should, in the exercise of the discretion vested in him by section 69 of the Probate and Administration Act as to the mode of issuing citations, direct special citations to persons whose rights are immediately affected by the Will. [p. 162, col. 2.]

Nistaring v. Brahmomoyi, 18 C. 45 at p. 47, referred to.

Where a Court misled by the untrue statement of an applicant for Probate did not direct the issue of special citation on a relation of the deceased, as it would undoubtedly have done if apprised of his existence:

Held, that the proceeding to obtain the grant was defective in substance, within the meaning of the first clause of the explanation to section 50 of the Probate and Administration Act. [p. 163, col. 1.]

If a person knowing what was passing was content to stand by and see his battle fought by somebody else in the same interest, he should be bound by the result and not be allowed to re-open the case. [p. 163, col. 2.]

Where a person has full knowledge of the proceedings and has capacity to make himself a party he is bound by proceedings to which he is no party and of which he has received no notice from Court. [p. 163, col. 2.]

Where in answer to an application for revocation by a person on whom citation should have been issued, it is pleaded that he did not intervene though aware of the proceedings, the burden of proof that he had

full knowledge is on the person who alleges it, it is not necessary for the party who applies for revocation to prove not only that no special citation was served on him but also that he had no knowledge of the proceedings. [p. 164, col. 1.]

Prem Chand Das v. Surendra Nath Saha, 9 C. W. N. 190, referred to.

There can be no acquiescence without full knowledge both of the right infringed and of the acts which constitute the infringement. [p. 164, col. 1.]

Marker v. Marker, (1851) 9 Haro 1; 20 L. J. Ch. 246; 15 Jur. 663; 68 E. R. 389; 17 L. T. (o. s.) 177; 89 R. R. 305, referred to.

A person cannot be barred of his remedy on the ground of waiver unless at the time of the alleged waiver he is shown to have been fully cognizant of his right and of the facts of the case. [p. 164, col. 2.]

A waiver must be an intentional act with knowledge. [p. 164, col. 2.]

Duke of Leeds v. Amherst, (1846) 2 Phillips 117; 78 R. R. 47; 41 E. R. 886; 10 Jur. 956; *Daruley v. L. C. & D. Railway Company*, (1869) 2 H. L. 43 at p. 60; 36 L. J. Ch. 404; 16 L. T. 217; 15 W. R. 817, referred to.

Appeal against the decision of the Subordinate Judge of Mymensingh, dated the 1st July 1912.

Babu Sasankajiban Ray, for the Appellant.

Babus Tarakishore Chowdhuri and Birendra Kumar De, for the Respondent.

JUDGMENT.—This appeal is directed against an order of dismissal of an application for revocation of Probate of an alleged Will of one Raj Chandra Baisya. The testator died on the 25th April 1899, and is said to have made a testamentary disposition of his properties on the 18th April 1899. He left a widow, Anandamayi, and his nearest male relation alive at the time of his death was the appellant, Shyama Charan Baisya, who would consequently be entitled to succeed as reversionary heir on her death. The Will authorised the widow to take a son in adoption and constituted her absolute owner of the estate, if she did not exercise her power of adoption. There were also two legacies, one in favour of Giris Chandra Bhattacharyya, the spiritual guide of the testator, the other in favour of Karunamayi, the daughter of the appellant and the wife of the brother of Anandamayi. No application for Probate was made till the 4th August 1902, more than three years after the death of the testator. In this application Anandamayi stated that, besides herself, the deceased had left no other near relation, kindred or heir surviving him. A general citation was

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issued under section 69 of the Probate and Administration Act, 1881, on the 7th August 1902, and is said to have been put up on the north wall of the house of the deceased on the 14th August and on the gate of the Court house on the 18th August. Special citation was also issued on the 13th August 1902 on the two legatees. The spiritual preceptor, it is said, declined to give a receipt for the notice, and it was accordingly affixed on the wall of his house on the 25th August 1902. The other legatee was not found in the house of her husband, who declined to receive the notice, which was accordingly affixed on the wall of his house on the 19th August 1902. The return of service states that the lady had gone to the house of her father; there is, in fact, some evidence to show that she was not on good terms with her husband and had been discarded by him; the statement in the return that she had gone to the house of her father may, accordingly, be accepted as a true version. On the 5th September 1902, one Biswanath Baisya filed a caveat, but he does not appear to have persisted in his opposition. The result was that the Will was formally proved and Probate granted on the 22nd September 1902. The Probate was not, however, actually issued till the 28th May 1903. The widow continued in occupation of the estate till her death, which took place on the 2nd December 1910. She appears to have alienated portions of the estate for alleged necessity on the 14th October 1903, 4th December 1905, and 9th October 1907. According to the petitioner, he attempted to take possession of the estate after the death of the widow, but was opposed by the transferees who set up title by purchase from her as executrix. On the 18th May 1911, he consequently applied for revocation of Probate on the ground that the Will was a forgery and that the Probate had been obtained without notice to him. The application was opposed by the representatives of the spiritual preceptor and by the transferees from the widow; the other legatee died in 1906. The Subordinate Judge has dismissed the application on the ground that the petitioner was barred by the doctrine of acquiescence. The substantial question in controversy in the present appeal is, whether this view is well-founded.

It has not been disputed that the petitioner was the nearest male relation of the testator at the time of his death and was entitled to succeed as reversionary heir on the demise of the widow. The testator and the petitioner were the sons of two sisters, and were, from the point of view of Hindu Law, near relations. The petitioner was thus clearly a person entitled to intervene in the Probate proceedings. It was ruled by this Court in the cases of *Kamona Soondury Dasse v. Harro Lall Shaha* (1); *Khetramoni v. Shyama Churn* (2); *Bepin Behari v. Manoda* (3) and *Brindaban Chunder v. Sureshwar* (4), that although a reversioner under the Hindu Law has no present alienable interest in the property left by the deceased, he is substantially interested in the protection or devolution of the estate, and as such is entitled to appear and be heard in a Probate proceeding. This position has not been seriously controverted on behalf of the respondent; but it has been argued that as section 62, unlike section 64, does not specifically require that the names and residences of the family or other relatives of the deceased should be stated in the application, omission to furnish such information does not affect the validity of the proceedings. This need not be disputed; but two points are perfectly plain, namely, *first*, that if the applicant for Probate chooses to make a statement as to the relations of the deceased the information he gives to the Court must be correct and not misleading and *secondly*, that as observed in the case of *Nistarany v. Brahmomoyi* (5), when a Will is propounded which alters the devolution of property, the District Judge should, in the exercise of the discretion vested in him by section 69 of the Probate Act as to the mode of issuing citations, direct special citations to persons whose rights are immediately affected by the Will. In the case before us, the petition contained the untrue statement that, besides the widow, the deceased had left no other near relation, kindred or heir surviving him. With what motive this statement was made, it is needless to

(1) 8 C. 570; 10 C. L. R. 409.

(2) 21 C. 539.

(3) 6 C. W. N. 912.

(4) 3 Ind. Cas. 178; 10 C. L. J. 263.

(5) 18 C. 45 at p. 47.

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speculate; it is immaterial whether the untrue statement was intentional and fraudulent or was the result of an accidental mistake. The fact remains that the statement was made, and that misled thereby the Court did not direct the issue of special citation on the petitioner, as it would undoubtedly have done if apprised of his existence. Consequently, the proceeding to obtain the grant was defective in substance, within the meaning of the first clause of the explanation to section 50 of the Probate and Administration Act; reference may, in this connection, be made to illustration (b) appended to that section: *In the goods of Gunga Bissen Mundra* (6). The respondents were, consequently, driven to invoke the aid of the doctrine that mere omission to serve a special citation is not by itself a sufficient ground for revocation, if it is shown that the person on whom the citation should have been served is otherwise aware of the proceedings. Before this principle is applied to the circumstances of this case, it is necessary to examine its scope and precise import.

The leading decision on the subject is the judgment of Sir John Nicholl in *Newell v. Weeks* (7) where he observed as follows: "The process of citing parties is a convenient one for all suitors, because when that is done, you need not prove actual privity—the law presumes actual privity after the legal process—the *lis pendens* is sufficient notice that persons should appear and protect their own interests—but if you can prove actual privity, the legal process, in point of solid justice and sound reason, is superfluous; though *ex abundanti cautela*, it may still be convenient to resort to it and have it upon record." To the same effect is a long series of decisions, amongst which may be mentioned, *Hoffman v. Norris* (8); *Richardson v. Claney* (9); *Bell v. Armstrong* (10); *Braham v. Burchell* (11); *Blake v. Knight* (12); *Merryweather v. Turner* (13); *Ratcliffe v. Barnes* (14);

Duffy v. Brady (15); *Wytycherley v. Andrews* (16); *Goddard v. Smith* (17); *In re Topping* (18); *Young v. Holloway* (19); *Mohan v. Broughton* (20); *Williams v. Evans* (21). The reason for the rule has been thus summarised by Sir John Nicholl in the case first mentioned: "Spectators to the whole and privy to the whole, if they had been dissatisfied, they might have intervened at any moment of the proceedings. This right of intervention, coupled with their privity to the proceedings, is decisive to shew that they can have sustained no prejudice by not having been before cited, and not having before given a formal appearance." To the same effect is the observation of Sir Cresswell in *Ratcliffe v. Barnes* (14): "Where a party has had full notice, and has had the opportunity of availing himself of the contest, he will be bound by the decision." Similarly, Lord Penzance said in *Wytycherley v. Andrews* (16): "If a person knowing what was passing, was content to stand by and see his battle fought by somebody else in the same interest, he should be bound by the result, and not be allowed to re-open the case." The rule that a person is bound by proceedings to which he is no party and of which he has received no notice from Court, thus depends on his full knowledge of the proceedings and his capacity to make himself a party. Consequently cases may be found in the reports which show that a next-of-kin or an executor who has acquiesced in a grant of Probate without full knowledge of the proceedings may obtain a revocation of the grant: *Williams v. Evans* (21); *Young v. Holloway* (19); *Peters v. Tilly* (22); *Witchie v. Malcolm* (23). These principles have been adopted and applied in Indian Courts in a long line of authorities, amongst which may be mentioned, *Komolochun Dutt v.*

(6) 2 C. W. N. 607.
 (7) (1814) 2 Phillim. 224.
 (8) (1805) 2 Phillim. 230 note.
 (9) (1802) 2 Phillim. 228.
 (10) (1882) 1 Add. 365.
 (11) (1826) 3 Addam 243.
 (12) (1843) 3 Curt. 547.
 (13) (1844) 3 Curt. 802.
 (14) (1862) 2 Sw. & Tr. 486; 31 L. J. P. 61; 8 Jur. (N. S.) 313; 6 L. T. 658.

(15) (1841) Milward (Irish) 582.
 (16) (1871) 2 P. & D. 327; 40 L. J. P. 57; 25 L. T. 134; 19 W. R. 1015.
 (17) (1873) 3 P. & D. 7; 42 L. J. P. 14; 28 L. T. 141; 21 W. R. 247.
 (18) (1853) 2 Rob. 620.
 (19) (1895) P. D. 87; 64 L. J. P. 55; 11 R. 596; 72 L. T. 118; 43 W. R. 429.
 (20) (1899) P. D. 211; 68 L. J. P. 91; 51 L. T. 211.
 (21) (1911) P. D. 175; 80 L. J. P. 115; 105 L. T. 79; 27 T. L. R. 506.
 (22) (1886) 11 P. D. 145; 55 L. J. P. 75; 35 W. R. 183.
 (23) (1902) 2 Ir. R. 403; 36 I. L. T. R. 56; 6 Irish Law Reports 783.

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Nibruttn (24); *Nistariny v. Brahmomoyi* (5); *Brinda v. Radhica* (25); *In re Pitambar Gir-dhar* (26); *In the goods of Bhuggobutty Dasi* (27); *Rebells v. Rebells* (28); *Blokeshi v. Hari Prosad* (29); *Kunja Lal v. Kailash Chandra* (30); *Nalini Sundari Gupta v. Bejoy Kumar Roy* (31); *Dwijendra Nath v. Golok Nath* (32). It is further well-settled that where in answer to an application for revocation by a person on whom citation should have been issued, it is pleaded that he did not intervene though aware of the proceedings, the burden of proof that he had full knowledge is on the person who alleges it; it is not necessary for the party who applies for revocation to prove not only that no special citation was served on him, but also that he had no knowledge of the proceedings. *Prem Chand Das v. Surendra Nath Saha* (33). It is thus clear, from what has already been said, that if a person is to be deprived of his right to have the Will proved in his presence, on the ground of acquiescence or waiver, he must be proved to have possessed full knowledge of the fact; for it is elementary that there can be no acquiescence without full knowledge both of the right infringed and of the acts which constitute the infringement; in the words of Turner, V. C., in *Marker v. Marker* (34), parties cannot be said to acquiesce in the claims of others unless they are fully cognizant of their right to dispute them. See also *Beauchamp v. Winn* (35); *De Bussche v. Alt* (36); *Willmott v. Barber* (37). There is further, as Lord Cottenham pointed out in *Duke of Leeds v. Amherst* (38), a distinction between a case where the acquiescence alleged occurs while the act acquiesced in is in

progress and another where the acquiescence takes place after the act has been completed. In the former case, the acquiescence is quiescence under such circumstances as that assent may be reasonably inferred from it. In the latter case, when the act is completed without any knowledge or without any assent on the part of the person whose right is infringed, the matter must be determined obviously on very different legal considerations. A right of action has then vested in him, and mere delay to take legal proceedings to redress the injury cannot, by itself, constitute a bar to such proceedings, unless the delay on his part, after he has acquired full knowledge, has affected or altered the position of his opponent. Similarly, a person cannot be barred of his remedy on the ground of waiver, unless at the time of the alleged waiver he is shown to have been fully cognizant of his right and of the facts of the case; for, as Lord Cranworth said in *Darnley v. L. C. & D. Railway Company* (39), a waiver must be an intentional act with knowledge. We shall now proceed to test the case before us in the light of these principles.

The testator died on the 25th April 1899; the widow remained in occupation of the estate of her husband ostensibly in her character as widow; there is no evidence to show that the Will was produced or set up at any time during the three years and a half which elapsed before the application for Probate was made on the 4th August 1902. There was consequently nothing to put the reversioner on his guard or to rouse his suspicion. When, again, the application for Probate was made, the general citation as also the special citation on the daughter of the appellant were served in a manner not calculated to bring the proceedings to the actual notice of the parties. A caveat was no doubt filed by a distant agnate of the deceased, but for some unexplained reason he did not persist in his opposition. The consequence was that the order was made as in a non-contentious proceeding on the 22nd September 1902. There is no evidence to show that during the few weeks that the application remained pending, the appellant

(24) 4 C. 360; 4 C. L. R. 175; 2 Shome L. R. 126.

(25) 11 C. 492.

(26) 5 B. 638.

(27) 27 C. 927; 4 C. W. N. 757.

(28) 2 C. W. N. 100.

(29) 30 C. 528; 7 C. W. N. 450.

(30) 7 Ind. Cas. 740; 14 C. W. N. 1068.

(31) 30 Ind. Cas. 12; 21 C. L. J. 555.

(32) 25 Ind. Cas. 574; 21 C. L. J. 297; 19 C. W. N. 747.

(33) 9 C. W. N. 190.

(34) (1851) 9 Hare 1; 20 L. J. Ch. 246; 15 Jur. 663; 68 E. R. 389; 17 L. T. (o. s.) 177; 89 R. R. 377.

(35) (1873) 6 H. L. 223; 22 W. R. 153.

(36) (1878) 8 Ch. D. 296; 47 L. J. Ch. 331; 23 L. T. 370.

(37) (1880) 15 Ch. D. 96; 43 L. T. 95; 28 W. R. 911.

(38) (1846) 2 Phillips 117; 75 R. R. 47; 41 E. R. 886; 10 Jur. 956.

(39) (1869) 2 H. L. 43 at p. 63; 33 L. J. Ch. 404; 16 L. T. 217; 15 W. R. 817.

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was in any way apprised thereof. The burden of proof, as we have said, is upon the respondents to establish that he had full and definite knowledge of the proceedings taken in Court; this burden they have not discharged. The evidence is directed to show that the proceedings were known to men in the village or to other members of the community. This is clearly insufficient, for we cannot hold that the appellant is barred by acquiescence or waiver, unless it is proved that he had full knowledge of the facts, such as would enable him to appear and intervene. It is significant that it was not even put in cross-examination to the appellant that he had become aware of the proceedings before they terminated. There is also nothing to show that he was apprised of the order after it had been made; on the other hand, he pledges his oath that he came to know of the Will and Probate for the first time when after the death of the widow he attempted to take possession of the estate. The inference follows that the respondents have failed to show that though no special citation was issued to the appellant, he is not entitled to have the Will proved in his presence, as he had such knowledge of the proceedings as would have enabled him to intervene therein or to have the Probate revoked earlier. The case thus falls within the general rule and not within the exception.

The result is that this appeal is allowed, the decree of the Subordinate Judge set aside and the Probate revoked. The appellant is entitled to costs both here and in the Court below. We assess the hearing fee in this Court at five gold *mohurs*. We direct that the record be returned to the Court of the District Judge, so that the Probate case may be restored and the objectors allowed an opportunity to prove the Will in the presence of the appellant; as the executrix and the legatees are dead, the conduct of the proceedings in support of the Will may now be given to such of the representatives of the legatees and the purchasers from the executrix as may desire to carry them on.

Appeal allowed.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEALS NOS. 790 AND 2024
OF 1912.

June 25, 1914.

Present:—Mr. Justice Holmwood and
Mr. Justice Chapman.ABDUL HAKIM CHOWDHURY—
DEFENDANT—APPELLANT

versus

HEM CHANDRA DAS—PLAINTIFF—

RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XLI, r. 1, O. XLVII, r. 4—Review, application for, when not granted—Notice, necessity of—Appeal filed without copy of decree, if duly preferred.

An application for review cannot be granted without previous notice to the other party and a non-compliance with rule 4 of Order XLVII renders the granting of an application for review, which is prejudicial to the other party, a nullity. [p. 166, col. 2.]

Under Order XLI, rule 1, an appeal cannot be said to have been preferred until the decree appealed against is filed. [p. 166, col. 2.]

Appeals against the decree of the Subordinate Judge of Chittagong, dated December 20th, 1911, reversing that of the Munsif of Chittagong, dated September 26th, 1910.

Babu Probodh Kumar Das, for the Applicant.

Babu Ram Doyal Dey, for the Respondent.

JUDGMENT.

HOLMWOOD, J.—These two appeals, Nos. 790 and 2024 of 1912, relate to a litigation for rent which has been going on since 1906. The proceedings by which they have now come before us illustrate in the most extraordinary way the ease with which questions of limitation and fatal irregularities may escape the notice of several Benches in succession unless facts are properly brought to the notice of the Judges at the time applications are made.

The history of this case is as follows: A suit was brought for rent in 1906 which was decided *ex parte*. Towards the close of three years execution was taken out and the defendants applied for re-hearing. The Munsif restored the suit. In the meantime another rent suit against the same defendants had been filed in the year 1910. The suits were consolidated and the Munsif decreed the suits with modifications. On appeal the lower Appellate Court reversed the decision of the Munsif and decreed the plaintiff's suit in full on the 20th December 1911. The decree was signed on the 22nd December 1911.

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The appeals were filed in this Court in the two cases on the 10th April 1912. Appeal No. 790 appears to have been filed on the last day with a copy of the judgment, which covered both the cases, and of the decree in Appeal No. 790 which differed from the decree in the other suit. Appeal No. 2024 was filed without any copy of decree or judgment, and it is alleged that inasmuch as the copies might have taken less time in that case that it was not filed within the period of limitation. But this, of course, we cannot now go into, as we cannot assume that it would have taken any different time to get copies in this case to what it did in the other. On the 17th June 1912, the memorandum of appeal in No. 2024 was returned to the appellant with a note under Order XLI, rule 1, that there was no copy of the decree appealed from. A copy had been obtained on the 1st May 1912 and it was filed by the appellant on the 5th July 1912. Appeal No. 790 came up before a Bench of this Court under Order XLI, rule 11, on the 24th June 1912 and was summarily dismissed.

The copy of the decree, which was filed on the 5th July 1912, was accepted. There was no prayer for extension of time, although it was mentioned in a note that the copy was out of time. But to avoid the law of limitation, section 5 of the Limitation Act would have to be applied, and we find that no order stating that the Court was satisfied, as is required by that section, was recorded. Curiously enough Appeal No. 2024, which was an analogous appeal filed at the same time as No. 790 did not come on for hearing under Order XLI, rule 11, until the 2nd January 1913 before another Bench. The Bench admitted it without being told that it was barred by limitation and without any adjudication upon that point. Thereupon a review of the order of dismissal in Appeal No. 790 was filed before another Bench, that is the fourth Bench, before which these cases had come and was granted on the 1st February 1913 without notice to the other side.

Now whether, as speaking for myself, I am able to hold that Order XLVII, rule 7, enables the respondent to take objection before us now in this appeal from the final decree or order passed or made in the suit, or whether he is entitled to invoke the inherent power of this Court, as both of us

are prepared to hold and as was held in the case of *Ajant Singh v. Sundar Mull* (1), it is clear that the non-compliance with rule 4 of Order XLVII renders the granting of this application for review, which was prejudicial to the respondent, a nullity and that such an application could not be granted without previous notice. We have already shown that under Order XLI, rule 1, filing of the decree of the Appellate Court is imperative, and that the appeal cannot be said to have been preferred until that decree is filed. Appeal No. 2024 is, therefore, clearly barred by limitation.

That being so, the preliminary objection must prevail and both the appeals must be dismissed. The question of whether any second appeal lay on the matters found by the Subordinate Judge is one which we need not go into. The amounts are very small and in dismissing these appeals with costs, we think that a single hearing fee of one gold mohur is sufficient for both these appeals.

CHAPMAN, J.—I concur.

Appeals dismissed.

(1) 16 Ind. Cas. 567; 17 C. W. N. 862.

MADRAS HIGH COURT.

SECOND CIVIL APPEALS NOS. 279 AND 280
OF 1913.

April 29, 1915.

Present:—Mr. Justice Sadasiva Aiyar and
Mr. Justice Tyabji.

IN APPEAL NO 279 OF 1913

RAMASWAMI AIYAR—PLAINTIFF—
APPELLANT

IN APPEAL NO. 280 OF 1913

SESHAPPIER—PLAINTIFF—APPELLANT
versus

S. SUNDARAM AIYAR, RECEIVER AND
MANAGER, PALACE ESTATE, TANJORE—
DEFENDANT—RESPONDENT IN BOTH.

Madras Estates Land Act (I of 1908), ss. 143, 144
—Cess when obligatorily leviable—Amount exacted
from ryots—Suit for recovery, when maintainable.

A cess cannot be held to be obligatorily leviable
against the ryot unless the zemindar can show that,
after the object, for which it was originally intended
failed, there was a fresh contract founded on fresh
consideration to continue to make the payment. [p.
169, col. 1; p. 170, col. 2.]

Before a ryot can sue to recover back cesses unduly

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levied from him, he must prove that they were "exacted" from him within the meaning of section 144 of the Madras Estates Land Act. [p. 167, col. 2; p. 172, col. 2; p. 173, col. 1.]

Meaning of the term "exact" discussed. [p. 167, col. 2; p. 172, col. 1.]

Where, therefore, it appeared that payments were made without the issue of any coercive process or a demand:

Held, that there was no exaction within the meaning of the section and a suit for recovery of the cesses so collected did not lie. [p. 168, col. 1; p. 173, col. 1.]

Second appeals against the decree of the District Court of Tanjore in Appeal Suits Nos. 130 and 131 of 1912, preferred against those of the Revenue Divisional Officer of Pat-tukkottai in Summary Suits Nos. 278 and 279 of 1911.

Messrs. P. R. Srinivasa Aiyangar, G. S. Ramachandra Aiyar and K. G. Panchapakesa Aiyar, for the Appellants.

Mr. L. A. Govindaraghava Aiyar, for the Respondent.

These second appeals connected with Second Appeals Nos. 79 to 82, 278 and 281 to 293 of 1913 coming on for hearing on the 20th and 21st July 1914, and having stood over for consideration till the 18th August 1914, the Court delivered the following

JUDGMENT.

SADASIVA AIYAR, J.—These twenty connected second appeals arose out of suits brought by 20 sets of tenants against the Receiver and Manager of the Tanjore Palace Estate for recovery of the excess amount alleged to have been "exacted" as *swatantrams* (beyond the legitimate rents) by the defendant in *Fasli* 1320, these *swatantrams* being alleged to be not part of the legitimate *melvaram* due for the landlord's share.

Section 143 of the Estates Land Act says "that landlords shall not exact from the *ryots* under any name or under any pretence anything in addition to the rent lawfully payable. All stipulations and reservations for such additional payment shall be void". Then section 144 provides "that every *ryot* from whom any sum of money or any portion of the produce of the land has been exacted by the landlord in excess of the rent lawfully payable, shall be entitled to recover by a suit before the Collector, in addition to the amount or value

of what has been so exacted, such sum by way of penalty which the Collector deems fit," not exceeding double the amount or value so exacted and not exceeding also one hundred rupees. The Deputy Collector in whose Court these suits were instituted held that the amounts paid by these twenty sets of plaintiffs under four of the five heads of *swatantram* did not constitute part of the legitimate rent, and that they were exacted from the plaintiffs for *Fasli* 1320 by the defendant and he, therefore, decreed the return of these illegal fees along with $\frac{1}{4}$ th of the respective amount (so illegally collected) by way of penalty.

The learned District Judge on the appeals by the defendant held (a) that those four items formed part of the legitimate rent because, "whatever names be used for the fees in question, they were originally part of the demand made upon the tenant for the occupation of the land;" (b) and even if they were not originally part of the rent, they were made such by the contracts between the parties, such contracts being embodied in the registered documents, Exhibit II series, which are the *muchilikas* executed for the seven *Faslis* 1318 to 1324 by the tenants to the defendant. The District Judge, therefore, dismissed all the suits with costs. Hence these second appeals by the plaintiffs.

As regards 10 of these second appeals, I think they can be disposed of on the short ground that the plaintiffs (appellants) have not proved that the excess payments had been exacted from them. Both sections 143 and 144 of the Estates Land Act use the word 'exact' and not the word 'receive.' Now what is an exaction? Mere authoritative demand is also sometimes called exaction (See Webster's Dictionary), but that is clearly not the sense in which the word is used here. 'Exact' means to compel payment or delivery of, to enforce the yielding of, to extort (as, to exact tribute, fees, obedience and the like), to practise extortion, to demand and compel to pay or yield under colour of authority; or to levy by force. In the present case, the finding of the Deputy Collector is that the plaintiffs in these 18 cases paid their dues as per their respective leases and *muchilikas* before the

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Issue of any demand or attachment notice by the defendant, and yet he held that because the plaintiff in one of the 20 suits, namely, Summary Suit No. 279 of 1911 (out of which Second Appeal No. 280 of 1913 has arisen) was served with a demand and attachment notice for not paying his dues, the other plaintiffs who afterwards paid their dues must be deemed not to have paid such dues voluntarily but through coercion. The reason given by the learned Deputy Collector is that "if the other plaintiffs had not paid their dues they would have certainly received similar notices of demand and attachment." The learned District Judge in his judgment on appeal makes the following remarks on this point: "In his edition of the Bengal Act, Mr. Justice Rampini understands the word 'exacted' to mean nothing more than collected after demand and he quotes a ruling to the effect that money collected under a proceeding prescribed by law, though in excess of the demand amount, is not exacted. From this it would appear that the important words of the section are 'in excess of the rent lawfully payable' and that the application of the section would have been the same if the word 'collected' had been used in place of the less intelligible one actually employed." I am unable to agree with the lower Courts on this point. It may be that if the money is paid after an authoritative demand (even though no coercive process was taken before the payment and even though the authoritative demand was not accompanied by an express threat of coercive proceedings), the money might be considered as exacted but on the finding that not even a demand had been made on any of the 18 sets of plaintiffs before the excess amount was paid along with the amount really due (both amounts being payable according to the registered *muchillikas* executed by the plaintiffs), I cannot hold that the money was exacted from the plaintiffs and that they were not voluntary payments. Even Mr. Justice Rampini does not say that money paid *without demand* can be called money "exacted." The plaintiffs in 18 suits had, therefore, no cause of action under sections 143 and 144 of the Estates Land Act and the dismissal of their suits by the District Judge was right

and can be supported on this ground. The 18 second appeals, therefore, substantially fail. I would, however, modify the order of the District Judge on the question of costs and direct the parties to bear their respective costs throughout.

In the remaining Second Appeals, Nos. 279 and 280 of 1913, the *swatantram* fees in question were collected after demand and attachment notice and hence if they were illegal, they were clearly *exacted*. The question, therefore, is whether those four items of fees do form part of the legitimate *melvaram* or whether they are unlawful additions to the rent lawfully payable. The documentary evidence clearly shows that the legitimate *melvaram* is only 48 per cent. of the net cutturn, that an additional $2\frac{1}{8}$ per cent. has been demanded for a long time by the Palace authorities (and paid by the tenants) under three heads: (1) Grama Pichai, being 6 *marakals* per 100 *kalam*s of the tenant's *kudivaram* of 52 per cent. of the gross produce, (2) Kaval, 1 *kalam* and 8 *marakals* and (3) Mahamai, $3\frac{1}{8}$ *marakals*; that besides these three collections in grain, two other collections namely, (4) Nazar Bheti, for 1,000 *kalam*s of the tenant's *udavaram*, 2 *kalam*s and $5\frac{1}{8}$ *marakals* i. e., 4 annas 4 pies and (5) Kajana Thackarar, for one hundred rupees of *melvaram* paddy, 8 annas. Out of these five fees, the second, namely, for *kaval* was found to be part of the rent by the Deputy Collector and there was no appeal filed against that decision and that is not the subject of the second appeal before us. The other four as their very names indicate are not part of the rent. Grama Pichai means donations to the village beggars. Mahamai mean offerings to the village deity. Nazar Bheti means presents for allowing the visitor to see the face of the visited. Kajana Thackarar means insurance money on account of the risk of a few bad coins being mixed up in the money paid towards rent. The following observations occur in *Devanui v. Raghunatha Row* (1):—"It is a well-known fact that the *zamindars* frequently added to their income by collecting cesses of various kinds. * * *

* The practice of making demands which were not legally maintainable was evidently

(1) 18 Ind. Cas. 298; (1913) M. W. N. 886; 13 M. L. T. 351.

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not confined to this Presidency. In Bengal *abwabs* or legal cesses had to be put a stop to by the Legislature. * * * * We must not forget the fact that *ryots* were formerly less influential and less educated than they might be now. It must also be remembered that *mamool* is departed from with more difficulty in this country than elsewhere

* * *. We cannot say that mere payment for a long time would in all cases justify the presumption of a legally enforceable contract to pay for ever. Very often, positive evidence is not available to prove the circumstances under which the payment commenced. *Substantial light is often thrown by the name of the cess*, although the payment may have ceased to be applied for the purpose indicated by the name." There would be no justification for holding that the cess must be held to be obligatorily leviable against the *ryot* unless the *zamindar* can show that after the object for which it was originally intended failed, there was a fresh contract founded on fresh consideration to continue to make the payment. I think that these fees, as their very names indicate, clearly did not form part of the *melvaram* rent when they were first levied and it is, therefore, on the landlord to show that after the objects for which such payments were originally intended failed (as they have admittedly failed in this case), there was a fresh contract founded on a fresh consideration to continue to make the payments. The learned District Judge says casually at the very end of his judgment (as a part of one sentence) that "the evidence shows that the items objected to are part of the consideration for the easy terms granted by the landlord in respect of commutation," that is, the rate fixed to ascertain the value of the grain rent when commuted into money rent during the seven years' lease period. It must be established by evidence that Re. 1-3-0 (the commutation rate agreed upon between the parties), which superseded the Re. 1-1-8 rate which prevailed for 14 years before the date of Exhibit II, was admitted by the plaintiff as unduly favourable to the plaintiff and that the plaintiff, therefore, agreed to the inclusion of these unauthorized cesses as part of the rent in consideration of the defendants not insisting on fixing a higher rate of commutation than Re. 1-3-0. The speculative opinion of a witness examined on the defendant's side that the defendant would not have consented

to the Re. 1-3-0 rate if he had known that the plaintiff would afterwards object to the payment of these cesses (it is contended), is not legal evidence of a contract, (that is) an agreement supported by consideration on the part of the plaintiff to pay these cesses, and the learned District Judge will consider the question again when dealing with this matter on remand. As, however, there might be other evidence on the record not brought to our notice it is desirable to have a fresh finding on the 6th issue in Second Appeals Nos. 279 and 280 of 1913 on the evidence on record.

The findings should be submitted within six weeks from the receipt of records and 10 days will be allowed for filing objections.

TYABJI, J.—The suits out of which this batch of appeals arises were instituted by tenants under section 144 of the Estates Land Act for recovery of alleged illegal cesses exacted by the landlord. The contentions of the parties are shortly but sufficiently and clearly set out by the learned District Judge in the first two paragraphs of his judgment.

The points argued before us were that the payments in question formed part of the rent under a contract implied from long payments or expressed in *pattas* and *muchilikas* and that even if they did not so form part, they had not been "exacted" within the meaning of section 143 of the Estates Land Act, and that unless they had been so exacted they could not be recovered back.

The payments fall under the following five heads.—

Kalam. Marakal.

1. Gramapichai (paddy given to the poor out of <i>udaivaram</i> paddy under the Amani system) per 100 <i>kalams</i> ...	0	6
2. Kaval (paddy given to the village watchman) ...	1	8
3. Mahamai (paddy given to the temple) ...	0	3½
4. Nazar Bheti (present given to the Maharajah of Tanjore on Dasara) for 1000 <i>kalams</i> of <i>udaivaram</i> , 2 <i>kalams</i> and 5½ <i>marakals</i>	Rs. 4 4 4	

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5. Kajana Thackarar for coins received which were not current or for compensation to the Shroff for shortage in remittance sent to the Treasury

Re. 0 8 0
For one hundred rupees
worth of *melvaram paddy*

The present appeal does not refer to the second of these items (*kaval*). This was held by the Deputy Collector to be part of the rent, and his decision was not appealed against. The question that remains is whether the 1st, 3rd, 4th and 5th items above were "something in addition to the rent lawfully payable," and if so, whether they can be recovered back under section 144 of the Madras Estates Land Act.

What is "rent lawfully payable" is laid down in section 3 (11) of the Madras Estates Land Act. The terms of section 3 (11) with a slight change in the collection of words may be set out as follows:—

"Rent means—

Whatever is lawfully payable in money or kind, or both,

(1) to a land-holder,

(2) for the use or occupation of land in his estate,

(3) for the purpose of agriculture,—
and includes,

where the charge for the use and enjoyment of water supplied or taken for the cultivation of land has not been consolidated with the rent payable for the land,

(i) whatever is payable on account of the use and enjoyment of such water;

Rent also includes for the purposes of sections 59 to 72, 77 to 131, 143 to 148, 165, 210 and 211, and the schedule,

(ii) any local tax, cess, fee or sum payable

(a) by the *ryot* as such,

(b) in addition to the rent due in respect of land,

(c) according to law, or usage having the force of law,

and also

(iv) money recoverable under any enactment for the time being in force, as if it were rent,

(v) sums payable by a *ryot* as such on account of pasturage fees and fishery rents.

The scheme of clause 11 of section 3 is, therefore, as follows:—In the first place it is

stated what rent "means." This portion of the clause has reference to the three matters that are numbered (1), (2) and (3) above. Then the clause proceeds to provide what rent "includes," the four classes of payments particulars of which are numbered by me (i), (ii), (iii) and (iv) are so included.

If the four heads under which payments have been made, and which are in question in these appeals, are for the use and occupation of land for the purpose of agriculture, then they fall within the "meaning" of rent. The learned District Judge in the last sentence of the paragraph of his judgment, which is numbered 3 (2), holds that these payments are fees, and "were originally part of the demand made upon the tenant for occupation of the land." According to this finding, the fees would be within the "meaning" of rent. The preceding portion of the paragraph, however, shows that the learned Judge has apparently based this finding on the mere fact that the sums in question are shown in the *jamabandi* accounts of 1858 (Exhibit III) as having been recovered from the tenants, and are mentioned in the *patta* for *Fasli* 1305 (Exhibit A8). These circumstances do not furnish any evidence for the finding. But there are some other circumstances in the case to which I must advert in this connection, though they are not alluded to by the learned Judge in the paragraph which I am now considering.

I can conceive of circumstances in which sums that were in their origin illegal, and were collected for unauthorised objects, come to be legalised by being incorporated at a subsequent period into the rent and thus becoming a part of the rent. This may take place in some such way as is alleged here by respondent. For his case is that in fixing the commutation rate for computing the sum payable by way of rent, it was agreed between the parties that the commutation rate should be lower in consideration of the inclusion of these fees as part of that which was to be payable as rent. The respondent thus relies upon an express contract. Similarly it may be that an implied contract may be inferred from a course of conduct followed for many years. I must point out, however, that the incidents of rent collected from tenants with occupancy rights, are very different from

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those of rent payable under a contract of tenancy. In the former case the rights in their inception do not spring from contract, and it is much more difficult to infer an implied contract from the mere fact that payments have been made in the past. That, however, is a question of sufficiency of evidence. All that is necessary at present is to allude to the possibility of the tenants having agreed expressly or impliedly to pay a definite sum of money or portion of the produce to the landlord; it being a matter of indifference to them under what name they have to pay their due to the landlord, so long as all the payments together in fact represent the consideration, and nothing more than the consideration, which is "lawfully payable to the land-holder for the use or occupation of land in his estate for the purpose of agriculture." The present case must, therefore, be examined from this point of view.

The learned Judge in the second paragraph of his judgment, to which I have referred, does not allude to the express contract set up by the respondent which I have just mentioned. Neither does that paragraph deal with an implied contract. But it proceeds on the basis that the mention of the payments in the accounts and *patta* above referred to proves that the payments were for rent; and that the names under which they were made did not affect their legality. I am unable to follow this process of reasoning. The names of the cesses, as pointed out in *Devanai v. Raghunatha Row* (1), throw substantial light on the object for which they were levied, though it may be that the payments have ceased to be applied to the purpose indicated by the name. There may be cases in which sufficient explanation is offered why the rent is collected under a different name, or how and when a sum originally levied for a different purpose came (by an implied contract) to be transmuted into rent. But the learned Judge does not refer to any explanation for the change.

I am, therefore, of opinion that the finding contained in the said paragraph of the learned District Judge's judgment was not meant to be a finding that by an implied

agreement these payments became lawfully payable as rent. If he meant to find to that effect, there was no evidence on which he could do so and the finding cannot be accepted.

The express agreement relied upon by the respondent is referred to in the last words of the 3rd paragraph of the District Judge's judgment. He, however, does not examine the evidence and seems to refer to the matter merely incidentally. The view he casually expresses is opposed to that of the Deputy Collector. It seems to me that he must give a definite finding on the sixth issue with reasons for his finding.

In addition to the argument that there was an express or implied agreement to pay rent [which would bring it within the "meaning" of rent in section 3 (11) of the Madras Estates Land Act], the learned Pleader for the respondent contended that the payment fell under one of the heads which the clause "includes" within rents. The portions of section 3 (11) that have reference to this part of the argument are numbered (i), (ii), (iii) and (iv) by me.

None of the payments in question are (i) on account of the use and enjoyment of water or of (iv) pasturage fees or fishery rents; nor do any of them fall within the description of (iii) money recoverable as rent under any enactment. It remains to consider whether they are "included" within (ii) above as "a sum payable

- (a) by the *ryot* as such
- (b) in addition to the rent in respect of land
- (c) according to law or usage having the force of law."

The sum so payable must, I apprehend from the frame of the clause, be something *ejusdem generis* with "local tax," "cess" or "fee"; something paid by the *ryot* as such, i. e., paid by a person who holds, for the purpose of agriculture, *ryoti* land in an estate, and paid by him as such holder. The obligation to pay it must have arisen by law or usage having the force of law. I find great difficulty in the application of these provisions and in defining what they connote with any precision. I see

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much less difficulty, however, in saying that the particular payments with which we have to deal do not, in my opinion, satisfy all the conditions that are required by the clause. I do not think that they can be classed with local taxes, cesses and fees, or that they can be said to be payable by the *ryot* as such, or payable according to law or usage having the force of law.

It is argued, however, for the respondent that even if the payments in question cannot be shown to be payable as rent by an express or implied contract or otherwise form part of rent under section 3 (11), still the appellants are precluded by sections 143 and 144 of the Madras Estates Land Act from recovering back the sums paid, unless it is shown that they were "exacted." It is also contended that there is no evidence on which it can be held that these payments were exacted.

The word "exact" (which occurs in section 143 and 144) has not, so far as I am aware, any special meaning as a term of law distinct from, or more precise than, its ordinary meaning. It is not free from that indefiniteness from which terms of law, recognised as such and made precise by long usage in law and by repeated analysis and definition, are free. That by the use of the term "exact" it was meant to express something different from mere collection or receipt, seems to me to be clear from the fact that the Legislature has avoided the use of those more usual words. It seems also clear that it could not have been intended by the Legislature, that the mere receipt of money which was not legally due should bring upon the receiver the penalties referred to in section 144.

Section 143 consists of two sentences. By the *first* it is provided that no unauthorised payment in addition to the rent shall be exacted—without the free consent of the tenant. By the *second*, that, even if the tenant consents to make such additional payments, the stipulation or reservation for making the payments shall be void—payments made under a void agreement will not be "exactions" if made without any coercion. The object of section 144 of the Madras Estates Land Act does not affect the right (if any exists) to recover

back the additional payments under the law as it stood at the time when section 143 was passed, *e. g.*, under section 65 of the Indian Contract Act, to have "the advantage restored." What section 144 provides is that in cases where the landlord has "exacted additional payments" independently of any right that there might be to have the advantage restored, the *ryot* shall have the newly created right to recover a penalty, and that both these rights shall be adjudicated upon by the Collector. The question, therefore, whether or not the payments have been exacted becomes relevant in three ways: (1) the question, which is not free from doubt whether payments made under an agreement which is void by reason of section 143 of the Estates Act fall within the terms of section 65 of the Indian Contract Act does not arise if they are exactions; (2) suits under section 144 must be instituted before the Collector; his jurisdiction must be determined by reference to section 144 and the 15th item of part A to the schedule, which refer to "illegal exactions," and it may be doubtful whether assuming that the payments can be recovered under section 65, they can be recovered in a suit before the Collector unless they are proved to have been exactions; (3) for deciding whether any penalty shall be enforced. The third aspect of the case seems to me to afford an adequate explanation for the use by the Legislature of an indefinite term like "exact." It leaves a discretion in the Collector to order or not to order the payment of a penalty; and to fix the amount of the penalty with reference to the gravity of the offence.

The plaintiffs have not brought the suit on the basis of section 65 of the Indian Contract Act. That section or the principle involved in it was not referred to in the plaints or in arguments before us. The applicability of that section is, as I have already said, not free from doubt both as to whether any rights arise under it in such circumstances as we have to deal with, and if any rights do arise, whether the Collector has jurisdiction to enforce them under section 144. It seems to me, therefore, to be supererogatory to deal with the question from that aspect.

Hence the plaintiffs cannot succeed in these suits without proving that the

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sums which are sought to be recovered back were exacted from them. Two of the plaintiffs were served with a demand and attachment notice for not paying the sums in question. In these cases it seems to me that there was exaction. The plaintiffs in the other 18 cases made the payments without any demand. It is argued on their behalf that they paid under the apprehension (and implied threat) of similar treatment, and consequently that payments by them were no less exactions. The expression "exaction" should not, in my opinion, be construed with stringency except for the purpose of enforcing the penalty. Had, therefore, the Court which has to decide questions of fact, come to the conclusion that the payments were exacted, I am not prepared to say that I should have considered the circumstance relied upon by the 18 tenants to furnish no evidence of the payments having been exacted. There is, however, no finding of the District Judge on the point and in arriving at one myself, I cannot shut out from my mind that the circumstances relied upon by the appellants are not all the facts on which the decision must be based. It is not clear to my mind that these payments were not made under an agreement. I have already given my reasons for desiring to have a finding on that point. It seems to me that balancing the two sets of circumstances and taking them in connection with the other facts which were placed before us at the hearing (to which I need not refer in detail), the proper decision to arrive at is that the payments were not exacted from the 18 tenants.

If the payments were not exacted, then in regard to the 18 tenants in question the suits will fail irrespective of the question on which I desire to have a finding. The decision of the remaining appeals (Second Appeals Nos. 279 and 280 of 1913) must depend on whether the payments had become part of the rent by agreement between the parties. For these reasons I agree in the order proposed by my learned brother.

In compliance with the order contained in the above judgments the District Judge of Tanjore submitted the following.

FINDING. * * * *—I find, therefore, on the 6th issue, that while, no doubt, the "Sillaraikududal" were part of the consideration for the new *muchilikas*, as they had always been part of the consideration for earlier ones, the altered or enhanced rate was not imposed in consideration of plaintiffs' paying these charges.

These second appeals coming on for final hearing after the return of the finding from the lower Appellate Court upon the issue referred to it for trial, the Court delivered the following

JUDGMENT.

SECOND APPEAL NO. 279 OF 1913.

We accept the finding and restore the decision of the Deputy Collector in the suit out of which this second appeal has arisen. The defendant will pay the plaintiff's costs in this and in the lower Appellate Court.

This judgment governs Second Appeal No. 280 of 1913.

Appeals allowed.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 1206 OF 1914.

June 17, 1915.

Present:—Mr. Justice Tudball.

BACHCHA SINGH—PLAINTIFF—

APPELLANT

versus

JAFAR BEG—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1909), s. 80—Act done by Police Officer under power conferred on him by Criminal Procedure Code, 1898—Suit for damages in respect of such act—Two months' notice, necessity of.—Police Act (V of 1861), s. 42.

Where a suit is brought against a Police Officer for acts done by him in the exercise of the powers granted to him by the Criminal Procedure Code, section 42 of the Police Act does not apply. The plaintiff must give to such officer two months' notice as provided in section 80 of the Civil Procedure Code. [p 174, col. 2.]

Second appeal from a decree of the District Judge of Allahabad.

Mr. Peurey Lal Banerji, for the Appellant.

Messrs. Rama Kant Mulaviya and Narsing Dass, for the Respondent.

JUDGMENT.—This is a plaintiff's appeal. The plaintiff brought a suit against the defendant, Jafar Beg, and

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others with whom we are not concerned in this appeal, to recover damages for malicious prosecution. His case was that a riot occurred and a report was made by certain complainants in the course of which they named one Bachcha Ahir. At the instigation of certain persons the defendant, who was the Sub-Inspector, put the name of Bachcha Singh in place of Bachcha Ahir, proceeded to make an inquiry against him, arrested him, and sent him for trial in Court where he was finally acquitted. The present suit was decreed as against one of the other defendants. As against Jafar Beg it was dismissed by the Court of first instance, on the ground that under section 42 of the Police Act the suit had not been instituted within three months of the unlawful act alleged. The plaintiff appealed. The lower Appellate Court upheld the decree of the Court of first instance but for a different reason. Notice was given by the plaintiff to the defendant on the 7th of June 1912, the suit was instituted on the 18th of July 1912. Applying section 80 of the Civil Procedure Code, the lower Court held that the suit must fail as it was brought before the expiry of two months next after notice had been delivered to the defendant as set forth in the section.

The plaintiff has come here in second appeal. This urged that under section 42 of the Police Act, it was necessary for the plaintiff to give only one month's notice and not two months' notice as laid down in section 80 of the Civil Procedure Code. It seems to me that the fallacy in the argument lies in this, that section 42 of the Police Act refers to "all actions and prosecutions against any person which may be lawfully brought for anything done or intended to be done under the provisions of the Police Act itself or under the general Police powers thereby given." The present suit for damages is brought against the Sub-Inspector for acts done by him in the exercise of the powers granted to him by the Criminal Procedure Code. What he did was nothing done under the provisions of the Police Act or the general Police powers given under the Act. I have been referred to sections 23 and 24 of the Police Act. Section 23 merely lays down that it is the duty of every Police Officer, among

other things "to apprehend, all persons whom he is legally authorized to apprehend, and for whose apprehension sufficient grounds exist." This, no doubt, lays down what the Sub-Inspector's duty was but this does not give him any power to arrest. That power he receives under section 24 of the Police Act. Section 24 simply says that "it shall be lawful for any Police Officer to lay any information before a Magistrate and to apply for a summons, warrant, search warrant, or such other legal process as may by law issue against any person committing an offence." In the present case, the acts of which complaint is made were acts of arrest and prosecution in the Court of the Magistrate. Neither of these is an act which is contemplated by section 24 of the Police Act. The special period of limitation which was given in section 42 of the Police Act has been repealed by the subsequent Limitation Act, Act IX of 1871, Schedule I. That Act merely repealed so much as related to limitation of suits, but it did not alter the scope of section 42 of the Act which clearly related to acts done under the provisions of that Act itself or the general Police powers given by that Act. It cannot and does not relate to suits or actions brought in regard to acts done in the exercise of the powers granted by other Acts to Police Officers. In my opinion the decision of the lower Court is correct. Section 80 of the Civil Procedure Code applies and the suit was instituted before the expiry of two months mentioned therein. The appeal, therefore, fails and is dismissed with costs.

Appeal dismissed.

CALCUTTA HIGH COURT. PRIZE COURT.

ORIGINAL CIVIL SUIT No. 8 of 1914.

December 8, 1914.

Present:—Sir Lawrence Jenkins, Kt.,
Chief Justice.

In re CARGO ex S. S. RAPPENFELS.

Prize Court—Enemy ship, capture of Goods consigned before war to enemy merchants, confiscation of—Test—Property in goods at time of capture—Risk—Confiscation, liability of.

In re CARGO, et S. S. RAPPENFELS.

The *Rappenfels*, a German merchantship, sailed from Calcutta on the 2nd of August 1914 with goods consigned by British subjects to British as well as German merchants. War was declared between Great Britain and Germany on the 4th of August 1914. The ship was captured and was in due course condemned as good and lawful prize by the Prize Court in Ceylon, but was sent to Calcutta in order that the liability to condemnation of the Cargo might be considered and determined by the High Court at Calcutta. The bills of lading of the goods were made out to the order of the consignors and were endorsed by them in blank and at the time of the capture of the ship the price was not paid and the bills of lading were still held by the consignors. The Crown maintained that they were liable to confiscation as the risk, not the property, was the test of liability to confiscation:

Held, (1) that in determining the question of liability to confiscation regard must be had to the property in goods and not the risk; [p. 176, col. 2.]

(2) that the sellers had not the idea of passing the property to the buyers at the time of appropriating the goods to the contract and that the property in the goods consigned, therefore, remained in the sellers; [p. 177, col. 1.]

(3) that under the circumstances the goods were not liable to confiscation. [p. 177, col. 2.]

Mr. G. H. B. Kenrick, K. C., Advocate-General, for the Crown.

Mr. Pugh, for the Claimants.

JUDGMENT.—The *Rappenfels*, a German merchant ship, was captured after the outbreak of hostilities by one of His Majesty's ships of war, and was in due course condemned as good and lawful prize by the Prize Court in Ceylon. The cargo, however, was released, not absolutely, but merely in order that its liability to condemnation might be considered and determined by this Court. This curious arrangement was the result of an understanding between claimants of the cargo and the authorities. With its wisdom I have no concern, nor do I propose to discuss its propriety, for the cargo is now within the limits of this Court's jurisdiction and no one has questioned the Court's competence to deal with it. On the contrary, an adjudication by the Court has been invited by all concerned. The *Rappenfels* sailed from Calcutta on the 2nd of August last, having on board the goods which are now the subject of adjudication. War had not then been declared, and it is conceded on behalf of the Crown that the ship sailed and the material contracts relating to these goods were made without any contemplation of war; and that nothing has been left

undone that should have been done by the claimants. The ship's destination was Hamburg. The goods it carried belong to a number of persons, and the position of the several claimants is not in all cases identical. Certain typical claims have accordingly been selected as probably governing all or most of the rest. It is with these that I now propose to deal.

(i) *The claims of Messrs. Hari Singh Nihal Chand.*

These claimants carry on business in Calcutta, and have been treated for the purpose of this case as British subjects. Five lots of jute were shipped by them for Hamburg in performance of five contracts for sale. The terms of these contracts are set out in five separate notes each of which records that Messrs. Campbell & Co. of St. Mary Axe bought of the present claimants the jute described in the note upon the terms and conditions of the London Jute Association Contract C. I. F.

The contract is for jute "to arrive," and one of the terms is that the contract is to be considered cancelled for any portion not arriving owing to loss of vessel or other unavoidable causes, but to be valid for any portion that may be shipped or transhipped on sellers' account and arrive by any other vessel [clause 6 (d)].

The bill of lading was made out to the order of the consignors, the present claimants, and was endorsed by them in blank. With regard to three consignments the claimants drew bills of exchange. These, in accordance with the usual course of business in Calcutta, they discounted with the Mercantile Bank transferring to the Bank at the same time the bills of lading as security for payment of the bills of exchange. The bills were forwarded to London. There they were not accepted but were returned, with the result that the claimants have re-paid the Bank. The bills of exchange with the bills of lading in respect of the remaining two consignments were passed through the Mercantile Bank for collection, but were not accepted. The result then is that the goods have not arrived and their price has not been paid, and the bills of lading are held by the claimants. Policies of insurance were taken out by the claimants but nothing turns on their terms or conditions.

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In these circumstances, the Advocate-General contends that the goods were shipped at the consignee's risk, and on this assumption maintains, in accordance with instructions emanating from the Secretary of State, that they are liable to confiscation even though the British vendor is unpaid. His proposition is that risk, not property, is the test of liability to confiscation.

Even if this test be accepted, it is difficult to see how it can justify condemnation in this case, for the dealings with the goods only disclose sellers and buyers, both of whom are British; and though under a C. I. F. contract, risk is ordinarily on the buyer, this is qualified in this case by the provision which makes arrival of the goods an essential term. The risk during the voyage was thus on the sellers to the extent indicated by this qualification and, in the events which have happened, has actually fallen on them. This conclusion would entitle the claimants to urge that even on the Advocate-General's own showing no case for condemnation has been made.

But as some of the other claims may require a decision as to whether property or risk is to be regarded for the purpose in hand, it will be better to deal with that problem at this point.

Whatever may have been the view in former times, International Law now (apart from exceptional cases) regards property as the test of liability to confiscation in the case of neutrals, and this finds direct expression in the 3rd Article of the Declaration of Paris where it is said, "*La marchandise neutre, a l'exception de la contrebande de guerre, n'est pas saisissable sous pavillon ennemi.*"

At the same time the Declaration of London (Article 58) declares, "*Le caractere neutre ou ennemi des marchandises trouvees a bord d'un navire ennemi est determine par le caractere neutre ou ennemi de leur proprietaire.*"

Why then should the goods of a British subject shipped before war was even contemplated, be in a worse plight? No reason has been disclosed in the course of the argument.

It is true that these International Declarations deal only with enemy and neutral goods, and the treatment by a State of its subjects' property is a concern not of International but of Municipal Law. But the position of a subject's goods has been considered and determined in a British Prize Court. Thus in

The Packet de Bilbao (1), claim was successfully made by a British merchant for goods shipped on an enemy ship before the outbreak of hostilities with Spain.

Sir W. Scott, as he then was, said, "the question is, in whom is the legal title? Because if I should find that the interest was in the Spanish consignee I must then condemn, and leave the British party to apply to the Crown for that grace and favour which it is always ready to show." Later he said, "under these circumstances, in whom does the property reside?" It, no doubt, is the case that reference is made to the incidence of risk, but as being a test of property and not as being in itself the occasion of confiscation or exemption.

That this is so, is, I think, apparent from the concluding portion of the judgment where it is said, "I must consider the property to reside still in the English merchant; it is a case altogether different from other cases which have happened on this subject *flagrante bello*. I am of opinion that, on all just considerations of ownership, the legal property is in the British merchant, that the loss must have fallen on the shipper, and the delivery was not to have been made till the last stage of the business, till they had actually arrived in Spain, and had been put into the hands of the consignee; and, therefore, I shall decree restitution of the goods to the shipper."

There may be cases in which the goods of a subject are in greater peril than those of a neutral, but that is where the Municipal Law sanctions the confiscation of the property of a subject for his illegal acts, as where he contravenes the law which forbids to a subject commercial intercourse with the enemy. But no such ground of confiscation is suggested here.

The conclusion then to which I come is that in determining the question of liability, to confiscation even in the case of a subject I must have regard to the property in the goods and not the risk except so far as it may assist me in determining where the property is. To whom then did the goods belong at the time of capture?

They were no doubt sold under a C. I. F. contract, but it was a contract "to arrive"

(1) (1799) 2 C. Rob. 133; 1 Eng. Pr. Cas. 209.

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and it was an express term that it should be "considered cancelled for any portion not arriving owing to loss of vessel or other unavoidable causes."

So, even if risk be regarded as a valuable clue to property, in this case the risk during the voyage was on the seller to the extent indicated by this qualification.

But what appears to me to be decisive of this case, in view of the well-known mercantile usage that prevails in Calcutta, is the mode in which the sellers dealt with the bills of lading. They were taken to their own order and after the dealings I have already described, still are in the seller's possession.

The fair presumption in the circumstances of this case is that the sellers intended to retain and in fact did retain the property in the goods. This was a necessary reservation for the purpose of securing that method of commercial finance commonly employed by Calcutta shippers.

It will not be inappropriate to quote in support of this view certain remarks of Mr. Benjamin to be found in Chapter VI, Book II, of his *Treatise on Sale of Goods* (4th Edition, page 345):

"If A in New York orders goods from B in Liverpool, without sending the money for them, there are two modes usually resorted to among merchants, by which B may execute the order without assuming the risk of A's inability or refusal to pay for the goods on arrival. B may take the bill of lading, making the goods deliverable to his own order, or that of his agent in New York, and send it to his agent, with instructions not to transfer it to A except on payment for the goods. Or B may not choose to advance the money in Liverpool, and may draw a bill of exchange for the price of goods on A, and sell the bill to a Liverpool banker transferring to the banker, the bill of lading for the goods to be delivered to A on due payment of the bill of exchange. Now in both these modes of doing the business, it is impossible to infer that B had the least idea of passing the property to A, at the time of appropriating the goods to the contract. So that although he may write to A and specify the packages and marks by which the goods may be identified, and although he may accompany this with an invoice, stating plainly that these specific goods are shipped for A's account, and in

accordance with A's order, making his election final and determinate, the property in the goods will nevertheless remain in B, or in the banker, as the case may be, till the bill of lading has been endorsed and delivered up to A."

So here, I think, it is impossible to infer that the sellers had the least idea of passing the property to the buyers at the time of appropriating the goods to the contract, and, were I sitting in the High Court's ordinary jurisdiction, I should hold without doubt that the property remained in the sellers.

Is there then any reason why I should not come to the same conclusion sitting in Prize? For I recognize that this question of property may be viewed differently in Prize from what it would be in a Court sitting in its ordinary jurisdiction and that any disposition or reservation of property made *flagrante bello* which would defeat the ordinary rules of Prize Law, is disregarded: *The Abo* (2).

But here all arrangements were made in time of peace and without any contemplation of war, and there is no suggestion of any fraud on the Prize Law. There is ample authority to support this distinction in favour of transactions concluded in time of peace. Thus in *The Sally* (3), the Commissioners of Appeal said: "It has always been the rule of the Prize Courts that property going to be delivered in the enemy's country and under a contract to become the property of the enemy immediately on arrival, if taken *in transitu*, is to be considered as enemies' property. When the contract is made in time of peace or without any contemplation of war no such rule exists."

The cases of *The Vrow Margaretha* (4), *The Packet de Bilbao* (1) and *The Vrow Anna Catharina* (5) may also be cited to the same effect.

I, therefore, hold, in the circumstances of this case, that the property in the goods is in the sellers, and it follows, in the absence of any illegality, that they are not liable to be confiscated.

(2) (1854) Spink's Prize Cas. 42; 2 Eng. Pr. Cas. 285.

(3) (1795) 3 C. Rob. 300, n. 1 Eng. Pr. Cas. 28.

(4) (1799) 1 C. Rob. 336; 1 Eng. Pr. Cas. 149.

(5) (1805) 5 C. Rob. 15; 1 Eng. Pr. Cas. 412.

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I accordingly decline to condemn the goods and direct them to be restored for the use of the owners thereof.

(ii) *Messrs. Grossman & Co.*

This claimant is a British India Company and its claim is in respect of goods shipped under four bills of lading.

The purchaser in each case was J. C. Gustav Schmidt, and the destination of the goods was Hamburg.

The bills of lading were in each case made out to the order of and retained by the Company in accordance with the commercial usage of Calcutta, to which I have already alluded. For the reasons I have explained in dealing with the first claim, I hold that the property remained in the seller, and as all the material transactions were prior to the contemplation of war, I decline to condemn the goods and direct restoration.

(iii) *Messrs. Gladstone Wyllie & Co.*

This claim is in respect of jute shipped on the *Rappenfels* in pursuance of three orders. The first of these orders was from Luther & Seyfert of Bremen for the shipment of goods from Calcutta in through-freight to Messrs. Luther & Seyfert Ltd., Accra; the 2nd was from Carl Tressman of Hamburg for the shipment of goods from Calcutta in through-freight to Lagos; and the 3rd was from Carl Tressman for the shipment of goods from Calcutta to Hamburg.

In each case the bill of lading was made out to the order of Messrs. Gladstone Wyllie & Co. It is proved in this case that the bills of lading were retained by these claimants and are still in their possession as the Banks refused to discount bills.

For the reasons I have stated at length in dealing with Messrs. Hari Singh Nihal Chand's claim, I hold the property in the goods is in Messrs. Gladstone Wyllie & Co. and as in this case too all the transactions relating to the goods were prior to the contemplation of war, I decline to condemn the goods and direct their restoration.

The order of restoration will in each case be subject to the payment of proper charges, if any.

Order accordingly.

MADRAS HIGH COURT.

SECOND CIVIL APPEALS NOS. 689 TO 693
OF 1912.

April 8, 1915.

Present:—Mr. Justice Oldfield and
Mr. Justice Tyabji.

Sri Raja BOMMADEVARA SATYA-
NARAYANA VARAPRASADA RAO
NAIDU BAHADUR ZAMINDAR, MINOR,
BY GUARDIAN, COLLECTOR OF KISTNA, AS
AGENT TO THE COURT OF WARDS—
DEFENDANT No. 3—APPELLANT

versus

DASIKA SRIRAMULU AND OTHERS—

PLAINTIFFS—RESPONDENTS.

Water-cess—Pre-Settlement inam—Collection of water rate by zemindar on behalf of Government—Wrongful exclusion of plaintiff's land from mamool wet—Res judicata, principle of—Contract Act (IX of 1872), s. 70.

Where the plaintiffs sued for a declaration in respect of a pre-Settlement *Inam* that they were not liable to pay any water cess on the lands in their occupation and for recovering back the water cess levied from them at a penal rate on account of incorrect information given to the Government by the *zemindar* who made the collection of the water rate on behalf of the Government:

Held, (1) that there was no cause of action against the *zemindar* on the ground that he was bound to include the plaintiff's land in the area allowed to him water free and that the plaintiffs could not make him liable for any excess rate they had to pay; [p. 182, col. 1.]

(2) that in order to get the benefit of section 70 of the Contract Act, the plaintiffs should prove the extent of the benefit derived by the *zemindar*. [p. 186, col. 2.]

Per Tyabji, J.—The doctrine of *res judicata* is based on the principle that neither the Courts nor the parties should be permitted to be harassed by the same question being repeatedly brought up for adjudication. [p. 182, col. 1.]

Bommidi Bayyan Naidu v. Bommidi Suryanarayana, 17 Ind. Cas. 445; 23 M. L. J. 543; 12 M. L. T. 500; (1913) M. W. N. 1; 37 M. 70, referred to.

Second appeals against the decrees of the Court of the Subordinate Judge of Kistna at Ellore, in Appeal Suits Nos. 34, 36, 35, 37 and 38 of 1911 respectively, preferred against those of the District Munsif of Ellore in Original Suits Nos. 218 of 1905, 454 of 1908, 537 of 1906, 541 of 1907 and 728 of 1909 respectively.

Dr. S. Swaminadhan, for the Appellant.

Mr. V. Ramesam, for the Respondents.

These second appeals and the memorandum of objections coming on for hearing on the 1st and 2nd December 1913 and having stood over for consideration till the 23rd

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December 1913, the Court delivered the following

JUDGMENT.

OLDFIELD, J.—Plaintiffs-respondents are *ryots* holding under 3rd defendant-appellant—a *zemindar*, who represents 2nd defendant, now deceased. First defendant is the Secretary of State. Plaintiffs' case is that their holding is *mamool wet inam* and has always been held as such without payment of rent or water rate. So long as the *zemindar* made the collection of water rate on behalf of Government, there was as between him and Government no necessity to ascertain the identity of the *mamool wet lands*, since he could simply deduct the amount corresponding with their total extent from the total sum otherwise payable by him. When, however, before *Fasli* 1312 he abandoned the collection, an ascertainment of the *mamool wet* became necessary; and owing to the incorrect information, which 2nd defendant's servants gave, Government, represented by 1st defendant, collected water rate from plaintiffs, which they were not liable to pay, since their land was *mamool wet*. They sue to recover the payments made under protest for *Fasli* 1314. Their payments included not only the ordinary water rate, but also the penal water rate imposed in consequence of their having taken water without application.

The foregoing represents plaintiffs' case as stated in their plaint, its foundation as regards both the ordinary and penal water rate being given as against 2nd defendant as his tortious act in giving incorrect information to 1st defendant. The Court of first instance, however, in its judgment (after remand), dated 21st September 1910, treated the claim against both defendants as *res judicata* in circumstances to be referred to; and the lower Appellate Court, holding that there was no *res judicata*, treated it as based on section 70, Indian Contract Act, observing that the "*zemindar* had the benefit of the water for the rest of his lands to the exclusion of plaintiffs' *inam*" and presumably meaning that he had the benefit of plaintiffs' payment in consequence of the exemption of some part of the rest of his lands. It exonerated the 1st defendant, who is not a party to this appeal,

This, so far as the ordinary water rate is concerned, was a possible basis for the decision and may be regarded as covered by the very general issues framed. Moreover the grounds of appeal relating to the discrepancy between it and the pleadings have not been pressed as regards this part of the case. But, section 70 being in question, 3rd defendant's objection that the finding of fact above referred to is not supported by, or has not been reached after consideration of, the evidence must be allowed. The Court of first instance, no doubt, after dealing with the case as one of *res judicata*, admitted all the evidence adduced, but it simply recorded its findings without discussion of it or reference to section 70; and the lower Appellate Court found, as stated above, also without applying its mind to the evidence in detail and without attempting to decide whether it did or did not support its assumption that the *zemindar* had in fact been exempted from liability to an extent corresponding with the payment made by plaintiffs.

It is conceded that section 70 cannot justify plaintiffs' claim in respect of the penal portion of their payment and that it must be supported as one for compensation for the result of 2nd defendant's improper conduct. Neither of the lower Courts has dealt separately with this part of the case. As regards it also there must be a remand for a finding on fresh issues.

The question is next, whether the dispute between the parties or any part of it is *res judicata*. The facts are that plaintiffs sued 1st and 2nd defendants in Original Suit No. 434 of 1903, on allegations similar to those now before us for (1) a declaration that their holding was *mamool wet inam*, (2) refund of water rate paid under protest for *Fasli* 1312. Reference to the decree in the printed papers in this Court shows (what Exhibit A, the judgment, leaves obscure) that both reliefs were granted against 1st defendant, but only the first against 2nd defendant, the suit against him for the second being dismissed without costs. This result was not affected by the appellate judgments, Exhibits B and CC, plaintiffs' memorandum of objection against 2nd defendant having been filed after Exhibit A had become final. In these circumstances Exhibit A is *prima facie* an adjudication

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in 2nd defendant's favour, if not as to the nature of the holding, at least as to his obligations in respect of it. Plaintiffs' argument is then that incidentally to this disposal of their claim the matter in dispute was not heard or determined. They have not relied on the reasons adopted by the lower Appellate Court.

Firstly, as regards the nature of the holding, I have pointed out that the declaration claimed by plaintiffs was given against both defendants; and, though plaintiffs have not so far pleaded *res judicata*, the fact will be important, when the issues remanded are dealt with by the lower Appellate Court. At present the material facts are that, though Exhibit A, paragraph 17, contains the finding in plaintiffs' favour, it was expressed in paragraph 12 only as follows:—"Although I am prepared to find it proved that plaintiffs' holding is a wet *inam*, I think that it would be enough to find that the land is immemorial wet..... in other words, plaintiffs have an easement right by grant or prescription to irrigate these fields.....when, therefore, the Government agreed with the *zemindar*, etc., ...it should be taken to contract with him as representing all concerned, that the new source shall be subject to all their customary rights." This I understand to mean (1) that, though the land was *inam*, that fact and the possible responsibility of the *zemindar* for its irrigation were not material, because (2) it was *mamool wet* and entitled to receive water from Government on that ground. The Court adopted the second of these grounds and (perhaps because a decree against Government was considered by it a sufficient relief) refused to adopt the first as the basis of its decision.

The remainder of the judgment agrees with this,—since there is nothing in the ascertainment of the duties of the parties, which follows, inconsistent with the disposal of the case on the footing that land is ordinary *mamool wet*, not wet *inam* in connection with which the *zemindar* might be under special liabilities. Though, as stated, there is a finding in paragraph 17 that it is wet *inam*, the other finding, that the collection of water rate was wrong, relates only to the act of Government. In the circumstances the decision must be that the Court declined to adjudicate on 2nd defendant's conduct and that there

has been no determination of the claim relating to it.

The result is that there must be a remand on the basis that the character of the land as *mamool wet inam* is *res judicata* against 3rd defendant in consequence of Exhibit A, against which 2nd defendant did not appeal. The following issues must be tried:—

1. Whether in consequence of plaintiffs' payment 2nd defendant was exempted from any liability for water rate and was benefited and (if so) to what extent?

2. Whether penal water rate was levied from plaintiffs in consequence of any wrongful or negligent representation to 1st defendant by 2nd defendant or his servants, and (if so) whether 3rd defendant is bound to compensate plaintiffs and to what extent?

3. To what reliefs are plaintiffs entitled?

Fresh evidence may be adduced. The finding should be submitted in six weeks from the re-opening of the Court. Seven days are allowed for objections.

TYABJI, J.—The plaintiffs are holders of land in the 2nd defendant's *zemindari* which, is a portion of the Nuzvid Estate. Their suit is against the Secretary of State and the *zemindar* (the 1st defendant and the 2nd defendant's representative respectively) for a declaration that the plaintiffs are not liable to pay any water cess on the lands in their occupation, and for recovering back from the defendants the water cess levied from the plaintiffs at a penal rate.

It is not contended before us that the plaintiffs have any cause of action against the Secretary of State. For it is admitted the Government were entitled to recover from the plaintiffs the water cess, even though as between the plaintiffs and the *zemindar* no water cess may be due from the particular plots of land in the occupation of the plaintiffs. The lower Appellate Court has, however, decided against the *zemindar* and held that he is liable to refund the payment made by the plaintiffs.

It is argued for the *zemindar* in this appeal that the decree against him is erroneous, on the ground that there was no cause of action disclosed as against him, and that in any case the matter is *res judicata* between him and the plaintiffs. With reference to the later contention it is admitted that there were suits between the same parties in which

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the liability of the *zemindar* on the same basis as in the present case, was directly in issue. The lower Appellate Court held that the decrees in those suits did not operate so as to make the question involved in the present suits *res judicata*: "First, because the said judgments relate to different *Faslis* i. e., the plaintiffs' claim for *Faslis* 1311 and 1312, which was prior to *Faslis* 1314 to 1318; and secondly, because the cause of action for the present suits is also different." The learned Pleader who appeared for the respondent did not rely upon these reasons for contending that the matter was not *res judicata*, owing to the decision reported in *Bommidi Bayyan Naidu v. Bommidi Suryanarayana* (1).

The argument before us, however, was that in the previous suits, as a matter of fact, there was either no adjudication on the point at all, or, if there was, then it was in favour of the plaintiffs.

On referring to the records of the previous suits and appeals arising therefrom, it is found that the District Munsif in the Court of first instance decided the suits in favour of the plaintiffs: in doing so he purported "formally to record findings on the issues in favour of the plaintiffs." He seems to have considered the liability of 2nd defendant in the preceding paragraph of his judgment where he says, "on behalf of the 2nd defendant a curious argument was advanced. The argument is advanced only for the purpose of this suit and is not *bona fide*;" his decree embodied a declaration that the lands were *mamool wet inam*, which was a relief against the 2nd defendant also; and he made the 2nd defendant bear his own costs, though the decree was otherwise only against the 1st defendant. Holding that the cess was not due on the lands, he held as a consequence that the plaintiffs were entitled to recover back the payments made by them. As the plaintiffs were not entitled to get the money twice over, and also perhaps because there was no question that if the Government were bound to re-pay the money they would re-pay it, his decree for re-payment of the cess was only against the Government who had actually received the payment.

From the Munsif's decree, that the lands in question were *mamool wet*, that the 1st defendant should refund the payments made by the plaintiffs, and that the 2nd defendant should bear his own costs, there were appeals and cross-objections. The Subordinate Judge in appeal said: "That being the case it is clear that as against the 2nd defendant plaintiffs are entitled to get water for their land free of charge. If the *zemindar*, who was bound to include the extent of the plaintiffs' holding within the 120 and odd acres allowed in his favour by Government for irrigation free of charge, failed to do so, the fault was his and it seems to me that plaintiffs must look to him for the redress of their grievances so far as the Government are concerned. I fail to see how they are to blame for charging water rate from plaintiffs, because it is not plaintiffs' case that they have entered into any engagement with the Government by which they are entitled to irrigation free of charge. Under these circumstances the first Court was not right in directing the Government to refund to plaintiffs the water rate collected from them. I decide on the first point that since 1839 the plaintiff land has been enjoyed as *mamool wet inam* exempt from water tax, but that the 1st defendant is not liable for plaintiffs' claim. I need not record any finding on the 2nd point, as the first Court had not made the 2nd defendant liable and the plaintiffs' memorandum of the objections in Appeal Suit No. 198 of 1901 asking for the 2nd defendant also being made liable was presented out of time. The plaintiffs were served with notice of Appeal Suit No. 198 of 1905 on the 9th December 1905, and their objection memorandum was filed in Court only on the 25th November 1906."

The decision of the Subordinate Judge was, therefore, that the plaintiffs were barred by limitation from asserting their rights against the 2nd defendant in the Appellate Court. There was a second appeal (Second Appeal No. 1735 of 1908) from the appellate decree and the second appeal was dismissed.

Apparently, therefore, the only questions that can be considered to have been decided by the Courts in the litigation culminating in Second Appeal No. 1735 of 1908 were (1) whether the 1st defendant was liable to refund the cess and (2) whether a decree for payment could be given against the 2nd

(1) 17 Ind. Cas. 445; 23 M. L. J. 543; 12 M. L. T. 500; (1913) M. W. N. 1; 37 M. 70.

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defendant or whether the plaintiffs' cross-objections were out of time. The 2nd defendant's liability with reference to the previous *Faslis* was not really adjudicated upon: by the Munsif because in his view it was unnecessary, by the Appellate Court because the plaintiffs had not taken cross-objections in time. Giving its full force to the decision of the Appellate Court, we have no adjudication upon the points now arising.

Under these circumstances, to hold that the question of the liability of the 2nd defendant to refund the water cess in respect of the *Faslis* 1314—1318 is *res judicata*, would be a denial of justice based on a fiction which is directly at variance with the facts, and which is not based on the principle underlying the doctrine of *res judicata*: that principle for the present purposes may be stated to be that neither the Courts nor the parties should be permitted to be harassed by the same question being repeatedly brought up for adjudication. It has been held that with regard to the previous *Faslis* the plaintiffs had forfeited the right to have their rights determined by the Courts. That is no reason why they should be placed under a similar disability in regard to the latter *Faslis*, though the reason for the forfeiture is absent. This is in accordance with the decisions of *Chunder Coomar Mitter v. Sib Sundari Dassee* (2), *Nilvaru v. Nilvaru* (3), *Gungubishen Bhagat v. Raghuo Nath Ojha* (4), *Balkishan v. Kishan Lal* (5).

The next question is whether the plaint discloses any cause of action against the 2nd defendant. The cause of action relied upon by the plaintiffs is as follows:—that the water cess which was levied from the plaintiffs was in fact due from other lands not in the occupation of the plaintiffs; that the 2nd defendant wrongfully represented to the 1st defendant that the lands from which water cess could be levied included the plaintiffs' lands: that by reason of such representation the plaintiffs were made to pay the water cess though the lands in their occupation were not subject to the water cess: and that the said other lands were exempted from payment of the tax, which would not have been exempted had the 2nd defendant represented

the true facts. If all these facts are established by the plaintiffs then, it would seem that the plaintiffs have made payments which the 2nd defendant was bound to make, under such circumstances that the plaintiffs would be entitled to be compensated by the 2nd defendant under section 70 of the Indian Contract Act. In the alternative the plaintiffs' case may be stated to be that they have been compelled to make payments for the 2nd defendant (not intending to do so gratuitously), the benefit of which has been that other lands in which the 2nd defendant is interested have been exempted from payment of the water tax: this benefit has been enjoyed by the 2nd defendant; and in respect of it the 2nd defendant is bound to make compensation to the plaintiffs.

See *Wilson v. Glossop* (6) and *Mohendra Ghoshal v. Bhuban Mardana* (7).

The plaintiffs, however, claim to recover back from the *zemindar* the whole of the water cess paid by them to the Government, and that was levied at a penal rate.

The question, therefore, will also have to be considered whether the plaintiffs had any cause of action in respect of the sum which they had to pay as a penalty. That question would depend upon whether such extra sum can be considered to be damages arising out of the facts above referred to.

On none of these questions have the lower Courts given any express findings.

There are no findings on which we can proceed with reference to the questions—

(1) whether the 2nd defendant represented to the 1st defendant that the land referred to in the plaint did not form part of the lands exempted from payment of water cess; and if the answer to this question is in the affirmative,

(2) whether the 2nd defendant obtained an exemption from payment of the water cess which would have been due on other lands had he not made the said misrepresentation.

(3) Whether the penal rate of water cess was levied from the plaintiffs by reason of any act or omission on the part of the plaintiffs themselves which they ought to have done or abstained from doing.

(2) 8 C. 631; 11 C. L. R. 22.

(3) 6 B. 110.

(4) 7 C. 381; 9 C. L. R. 34.

(5) 11 A. 148; A. W. N. (1889) 42; 13 Ind. Jur. 309.

(6) (1888) 20 Q. B. D. 354; 57 L. J. Q. B. 161; 58 L. T. 707; 36 W. R. 296; 52 J. P. 246.

(7) 6 Ind. Cas. 810; 14 C. W. N. 945; 12 C. L. J. 566; 38 C. L.

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(4) Whether even if the misrepresentation above referred to had not been made by the 2nd defendant still the plaintiffs would have become liable to pay water cess at a penal rate; and

(5) Whether if the 2nd defendant had not made the misrepresentation referred to in the first issue, then the penal rate of water cess would, in the events that have taken place, have become due from lands other than those referred to in the plaint, and would have been payable by the 2nd defendant.

It seems necessary, therefore, to send the case back for findings on the issues, which are mentioned in my learned brother's judgment.

In compliance with the above order of this Court, the Subordinate Judge of Kistna at Ellore submitted the following

FINDING.—I am directed to submit my findings on the following issues:—

(I) Whether in consequence of plaintiffs' payment the 2nd defendant was exempted from any liability for water rate and was benefited and (if so) to what extent?

(II) Whether penal rate was levied from plaintiffs in consequence of any wrongful or negligent representation to the 1st defendant by the 2nd defendant or his servants and (if so) whether the 3rd defendant is bound to compensate the plaintiffs and to what extent?

(III) To what relief are the plaintiffs entitled?

2. The plaintiffs Nos. 2 to 6 are the sons of 1st plaintiff. It appears from the evidence of 1st plaintiff as P. W. No. 1 that no water tax was levied from him in respect of the suit *inam* prior to *Fasli* 1312. It is alleged on behalf of plaintiffs, and not denied by the 3rd defendant, that prior to *Fasli* 1312 the *zemindar* (2nd defendant) used to pay to Government (1st defendant) water cess on all the lands in the village of Rajupeta, after deducting 120 acres of *mamool* wet area. That the suit land of 11 acres 30 cents was also included in the said extent of *mamool* wet area is clear from Exhibit F, dated 16th November 1895. Exhibit F1 is an account prepared by the 2nd defendant's *karnam* for *Fasli* 1305 and bears the signature of the then Tahsildar. With reference to Exhibit F, the present Tahsildar as D. W. No. 1 deposed that the suit *inam* (land) is

shown as *mamool* wet in Exhibit F1 and that no application for water is necessary in the case of *mamool* wet lands recognised as such by the Collector and the Board. Till *Fasli* 1312, it is conceded by the *zemindar* himself that no water cess was levied from plaintiff in respect of the suit land as it was treated as a part of the *mamool* wet allowed to the *zemindar*. In other words, the extent of the *mamool* wet area of 120 acres included the suit land which, however, was shown in the accounts of the *zemindar* as a *darimila inam* without *patta* (*vide* Exhibit DD and also Exhibit IV).

3. It is next seen from the accounts (Exhibits D, E, F, F1) that prior to *Fasli* 1312 the *zemindar* (2nd defendant) used to apply for water for the whole village of Rajupeta and was paying water tax to Government (1st defendant) on irrigated area in excess of the *mamool* wet of 120 acres including the suit *inam*. In other words, prior to *Fasli* 1312 the *zemindar* (2nd defendant) acted as agent of the Government (1st defendant) to supply water for the whole village and that in consideration thereof received a commission of 10 per cent. (*vide* paragraph 3 of the 1st defendant's written statement). But in *Fasli* 1312 the 2nd defendant having met with obstacles in the collection of water cess from the tenants put an end to his commission contract and relinquished water for the whole village. The 1st defendant accepted the relinquishment (*vide* paragraph 3 of 1st defendant's written statement).

4. Exhibits G and H as also Exhibit J show that in the suits (Original Suit No. 126 of 1895 and 1372 of 1896) brought by the *zemindar* against plaintiffs for the recovery of *gattuthumulu* and other dues for *Fasli* 1295 to 1305, the *zemindar*'s claim was disallowed and the suits were dismissed on the ground that the land was granted as a rent-free *inam* and that the *inamdar* was not liable to pay *gattuthumulu* and other cesses. According to the evidence of D. W. No. 2, *gattuthumulu* of old is the same thing as water cess of the present day. Relying upon the Court's decisions evidenced by Exhibits G, H and J, the 2nd defendant in paragraph 4 of his written statement contended that if the suit land is an old *sarcadumbala inam* he has no concern whatever with it. In paragraph 6 of his written statement the 2nd defendant further

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contended that the suit land not being treated by Government as *mamool* wet, it was not open to plaintiff to get separately localized his *darimila inam* as part of the *mamool* wet allotted to the *zemindar*.

5. The plaintiff's case is that so long as the *zemindar* made the collection of water cess on behalf of Government, there was as between him and Government no necessity to ascertain the identity of the *mamool* wet lands, but that before *Fasli* 1312 when 2nd defendant abandoned the collection, it became necessary for plaintiff to apply to the Settlement Deputy Collector to localize the *mamool* wet and that accordingly he put in a petition before the Settlement Officer on the 17th November 1901. This petition has been filed on defendant's behalf as Exhibit XIV (a) which shows that because the *zemindar's* officials wanted to exclude the suit *inam* from the extent of *mamool* wet allowed for the village, the plaintiff applied to the Deputy Collector to include his land in the extent of *mamool* wet allotted to the *zemindar*. Exhibit GG, dated 13th January 1902, is a certified copy of 1st plaintiff's statement in the matter of the *mamool* wet enquiry held by the Deputy Collector, Mr. P. Nageswara Rao (D. W. No. 2). Exhibit GG read along with Exhibit XIV (a) shows that the *zemindar* was claiming the suit land as being included in the *mamool* wet under the head "*seri*" and that, therefore, 1st plaintiff requested the Deputy Collector to separately localize the *darimila inam* as *mamool* wet. Exhibit HH, dated 14th January 1902, contains the *zemindar's* protest to the effect that the suit land cannot be converted into *mamool pallam* (wet), because it was a *darimila inam* and registered as such in the accounts of the estate. The Deputy Collector's order is evidenced by Exhibit FF, dated 5th February 1902, and it is to the effect that as the *zemindar* protests against the separate localization, the petitioner's (1st plaintiff's) request cannot be complied with. In other words, the 1st plaintiff's request for separate localization was refused by the Deputy Collector (D. W. No. 2) in consequences of the 2nd defendant's protest contained in Exhibit HH, dated 14th January 1902. The question then arises whether 2nd defendant was justified in protesting against the separate localization of the plaintiff's land? The Deputy Collector (D. W. No. 2) states in his deposition before

this Court that if at the time of the settlement the *zemindar* instead of protesting had asked him (D. W. No. 2) to include the suit land as *mamool* wet, he would have done so only if it was a *darimila inam*. But the *zemindar's* contention that the suit land is a *darimila inam* and that plaintiffs were liable to pay water-cess in respect of the suit land, was found to be not true in Original Suit No. 126 of 1895 and 1372 of 1896 and this finding was confirmed in Appeal Suits Nos. 238 and 240 of 1899 (*vide* Exhibits G and H). Exhibit G shows that 1st plaintiff, who was defendant in the said suit, pleaded *inter alia* that the suit land was not a part of the *zemindar's* *seri* land but is a *sarvadumbala inam* granted to plaintiff's ancestors by defendant's ancestors prior to *Fasli* 1200. This plea of plaintiffs was upheld both in the Court of first instance and also in the Appellate Court (*vide* Exhibits G and H referred to above). The question as to the character of the suit land being *mamool* wet and that it is a pre-settlement *inam* as alleged by plaintiffs and not a post-settlement *inam* as contended by defendants Nos. 2 and 3 has, therefore, become *res judicata* between plaintiffs and defendants Nos. 2 and 3. Such being the case, it was not open to 2nd defendant in the face of the above-mentioned finding to contend that the suit land was a *darimila inam* before the Deputy Collector, at the time of the *mamool* wet settlement enquiry by him in 1902. No doubt the 2nd defendant's contention was wrong with reference to the decisions evidenced by Exhibits G and H referred to above. But the real point is whether 1st plaintiff was right in asking the Deputy Collector to localize the suit land as part of the *mamool* wet allotted to the *zemindar* under the head *seri*. This was in effect the prayer of the plaintiffs in Exhibit XIV (a). The answer to this is furnished in paragraph 5 of 2nd defendant's written statement. The 2nd defendant's answer is that inasmuch as the suit land was decided to be an old *sarvadumbala inam* in the litigation set forth in paragraphs 6 and 10 of the plaint, the plaintiffs have no right to include the suit land in the extent of the *mamool* wet allotted to the *zemindar*. In other words, the suit land having been declared to be a pre-settlement *inam* by the Civil Courts, it was not open to plaintiffs to treat the same as *darimila* or post-settlement *inam* and include it in the

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mamool wet area allotted to the *zamin*dar. The proper course open to plaintiffs was to ask the Collector to *determine* the suit land as *mamool* wet and to obtain a title-deed immediately after the result of the litigation evidenced by Exhibits G and H.

6. With reference to the observations made in the foregoing paragraphs, I proceed to record my findings on the issues 1 and 2 upon the evidence now adduced after remand and also upon the evidence on record before remand. The payments made by plaintiffs are evidenced by Exhibit AA series which relate to *Faslis* 1312 and 1313. In the present case, the *zamin*dar (2nd defendant or 3rd defendant) had no interest in the suit land at the time of plaintiffs' payment. This is clear from Exhibits G, H and J (*vide* also Exhibit CC). The liability under section I of the Irrigation Cess Act (VII of 1865) is on the suit land. The suit land belongs admittedly to plaintiff. The plaintiff's case has been all along that the suit land is a pre-settlement *inam*, while 2nd defendant's contention was that it was a *darimila inam* or post-settlement *inam*. As between plaintiff and 2nd defendant it has been held that the suit land is a pre-settlement *mamool* wet *inam*, and not a *darimila inam* (*vide* Exhibits G and H). No doubt the suit land, although decided by the Court to be a pre-settlement *inam*, the title-deed in respect of it was issued to plaintiff only in 1911. The delay in the issue of the title-deed was wholly attributable to plaintiff's negligence. The 1st plaintiff's explanation in Exhibit XIV (a), dated 17th November 1901, was that because he was a minor and because nobody represented him at the time of the *inam* commission enquiry in 1864, it was not possible for him to get the title-deed. In Exhibit GG, dated 13th January 1902, the 1st plaintiff's explanation was that although he had attained majority he did not make any attempt to get the title-deed. And in Exhibit C, dated 7th February 1905, the 1st plaintiff stated that his co-sharers obtained title-deeds but he did not, because he considered it unnecessary. The conduct of 1st plaintiff, as evidenced by Exhibits XIV (a), GG and C, clearly shows that he was not anxious to obtain a title-deed although the suit land was declared to be

a pre-settlement *inam*. The fact that on the strength of the description of the suit land as *darimila inam* in Exhibits XIV (a) and GG the 1st plaintiff wanted to get it localized as wet and included in the *mamool* area of 140 acres allotted to the *zamin*dar, lends support to the respondent's Counsel's argument that the 1st plaintiff remained quiet without obtaining a title-deed because he wanted to avoid payment of the quit-rent. For after the suit land was declared to be not a *darimila inam*, there was no obligation on the part of the *zamin*dar to apply for water on behalf of the *inam*dar of the *ryots* in the village (*vide* the evidence of D. W. No. 2). In other words, it was no concern of the *zamin*dar to see to the supply of water for the suit land which was declared to be a *mamool* wet pre-settlement *inam*. The plaintiff's case, as disclosed from the evidence of P. W. No. 1, is that the water tax for *Faslis* 1312 and 1313 was really payable by the *zamin*dar (2nd defendant), *first*, because the suit land was wrongly excluded by him from the list submitted by him to Government and *secondly*, because the *zamin*dar was benefited by reason of some other land of his being substituted for the suit land. As regards the first reason, neither the original list submitted to Government nor a copy of it has been produced. No doubt Exhibit VIII, as deposed to by D. Ws. Nos. 1 and 2, was in substance a relinquishment application for supply of water in respect of the suit land and certain other lands mentioned in Exhibit VIII. This application was put in long after the decision evidenced by Exhibits G and H as admitted by plaintiff, and it is argued for the respondent that 2nd defendant acted rightly because he had no concern with the suit land after the Courts found it to belong to plaintiff as a pre-settlement *inam*. In other words by Exhibit VIII, the 2nd defendant put an end to his commission contract to supply water and put in a relinquishment application. The Government (1st defendant), having accepted the relinquishment, called for water applications from 1st plaintiff (and other *ryots*), because there was no engagement between plaintiffs and Government in respect of the suit land which ceased to

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belong to the *zemindar* as his *darimila inam*, according to the decisions evidenced by Exhibits G and H referred to above. Next as to the second reason, that the *zemindar* has been benefited by virtue of some other land being substituted for the suit land, the 1st plaintiff's answer in his cross-examination is that he cannot say what that land is. According to the evidence of D. W. No. 3 the subsequent enfranchisement of the suit land in favour of plaintiffs as a *mamool wet inam* would not affect the 2nd defendant's *mamool wet*, because the suit land has changed its character. It cannot, therefore, be said that either section 69 or 70 of the Contract Act has any application to the facts of this case. Section 69 cannot apply, as the *zemindar* was not legally bound to pay the water cess. And section 70 cannot apply as the plaintiff, who paid the water-cess, did so on his own account and not on behalf of the *zemindar*. It cannot, therefore, be said that in consequence of the plaintiff's payments the 2nd defendant was exempted from any liability for water and was benefited. In other words, I find the 1st issue in the negative and against plaintiff.

7. With regard to the 2nd issue, penal water rate was levied from 1st plaintiff because he persistently refused to apply for water in *Paslis* 1312 and 1313. The 1st plaintiff had to pay the penal water tax because he failed to get the suit land determined as *mamool wet*, as required by Rule VI at page 4 of the Board's Standing Orders, Vol. II (Appendices). There was no wrongful or negligent representation to the 1st defendant by the 2nd defendant or his officers in putting in the relinquishment application as per Exhibit VIII. Under Exhibit VIII the *zemindar* ceased to be the agent to supply water to the *inamdar* and *ryots* in the village and they were called upon to make their own arrangements. There was nothing to prevent plaintiffs to make their own arrangements. The plaintiffs had three years' time between the date of Exhibit VIII and the date of the first payment, as per Exhibit AA. It follows, therefore, that plaintiffs' paying the penal assessment cannot be said to be the result of the *zemindar's* relinquishment as per Exhibit VIII. Even supposing it were so,

I hold upon the evidence that the act of 2nd defendant, as evidenced by Exhibit VIII, was not a wrongful or negligent representation to the 1st defendant by the 2nd defendant and that, therefore, 3rd defendant is not bound to compensate the plaintiff. I find the 2nd issue also in the negative.

8. It follows from my findings on the 1st and 2nd issues that plaintiffs have no cause of action as against 2nd or 3rd defendant and that, therefore, are not entitled to the relief sought with reference to the 3rd issue, which I find likewise in the negative.

These second appeals and the memorandum of objections coming on for final hearing after the return of the findings of the lower Appellate Court upon the issue referred by this Court for trial, the Court delivered the following

JUDGMENT.—It is now found that the plaintiffs' land is a pre-settlement *inam*. The finding cuts at the foundation of the plaintiffs' case. The appeals must be allowed and the plaintiffs' suits dismissed with costs throughout. The memoranda of objections are also dismissed with costs.

Appeals allowed; Suits dismissed.

ALLAHABAD HIGH COURT.

FIRST APPEAL FROM ORDER No 13 OF 1915.

June 21, 1915.

Present:—Mr. Justice Chamier and
Mr. Justice Piggott.

MUNNA LAL—JUDGMENT-DEBTOR—
APPELLANT

versus

RADHA KISHAN—DECREE-HOLDER—
RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXI, r. 89
—Application to deposit money made in time—Money
tendered to Treasury Officer shortly before 3 P. M., not
accepted, effect of—Money deposited next day beyond 30
days, effect of.

A judgment-debtor applied to set aside a sale on the last day of limitation and tendered the money to the Treasury Officer shortly before 3 P. M., the hour at which the Treasury is closed to the public. The Treasury Officer refused to take the money as it was too late to count it. He, however, observed that the money could be paid at any time within three days of the tender. The judgment-

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debtor, consequently paid the money next day after 30 days had expired:

Held, that the judgment-debtor having done all that was possible for him to do to pay the money into the Treasury within time, must be taken to have paid the money in accordance with law. [p. 188, col. 1.]

First appeal from an order of the Subordinate Judge of Muttra.

Mr. Jawahar Lal Nehru (for Mr. Motilal Nehru), for the Appellant.

Mr. Lalit Mohan Banerji (with him Mr. Sham Krishna Dar), for the Respondent.

JUDGMENT.—This is an appeal by a judgment-debtor against an order of the Subordinate Judge of Muttra, refusing to set aside a sale held in execution of a decree. The sale took place on August 7th, 1914. As September 6th was a Sunday the judgment-debtor was entitled to make an application under Order XXI, rule 89, and pay the sum specified in that rule on September 7th. The evidence shows that the judgment-debtor was not able to raise the money required for the purpose until about 2 o'clock on the afternoon of September 7th. According to the evidence on September 7th he made an application to the Court with tender in the prescribed form No. 43 duly filled in, and obtained thereon an order of the Court that the money should be deposited in the Treasury. He took the money to the Treasury shortly before 3 p.m., the hour at which the Treasury is closed so far as the public are concerned. The Treasury Officer looked at his watch and said that it was too late to count the money (Rs. 12,735-9) on that date and he observed that the money could be paid at any time within three days of the tender. He was probably referring to the words on the duplicate tender, "receive and credit the above sum if tendered to you within three days." But these words cannot be used for the purpose of extending the period of limitation allowed by law. They are intended to facilitate the checking of the accounts kept by the Court. The judgment-debtor says that he accepted the statement of the Treasury Officer as correct, and as the Treasury Officer declined to take the money, he took it away and paid it into the Treasury on the following day. The Subordinate Judge has held that it is not proved that the money was tendered before 3 p.m. on September 7th and has

accordingly declined to set aside the sale. The evidence that the money was tendered to the Treasury Officer before 3 p.m. is, however, uncontradicted and should, we think, be accepted. The question, however, is whether under the circumstances, the payment required by Order XXI, rule 89, of the Code of Civil Procedure should be taken to have been made within the time allowed by law. The learned Counsel for the judgment-debtor relies upon the decision of the Calcutta High Court in *Mahomed Akbar Jaman Khan v. Sukhdeo Pandey* (1), in which it was held, in accordance with the principle *actus curiæ neminem gravabit*, that the payment must be taken to have been made in time where the judgment-debtor had applied to the Court under rule 89, Order XXI, on the 30th day from the sale and was ready to deposit the required sum in Court and the *challan* to the Treasury had been duly filled up and placed in the hands of the proper officer, but the signature of the presiding officer of the Court could not be procured on that day as he had left the Court. The result was that the *challan* was signed on the following day and on the authority of it the money was received by the Treasury Officer. The Calcutta High Court held that the application of the judgment-debtor to have the sale set aside should under the circumstances have been allowed. The present case is not on all fours with the Calcutta case. In the latter it was quite clear that the Court by its own action had prevented the judgment-debtor from paying the money into Court within time. In the present case the question is what the Treasury Officer ought to have done when the money was tendered to him shortly before 3 p.m. on September 7th. We are not satisfied that the Treasury Officer could not have arranged for the safe custody of the money until it could be counted in the presence of the judgment-debtor, and we think that it is probable that he would have made some such arrangement if he had not been under the impression that the judgment-debtor was entitled to three days from the date of the tender within which to pay the money into the Treasury. Under the circumstances we think that it should be held that the judg-

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ment-debtor in this case did all that it was possible for him to do to pay the money into the Treasury on September 7th, *i. e.*, within time, and that he was prevented from paying the money by the action of the Treasury Officer, who for this purpose must be regarded as an Officer of the Court. We, therefore, allow this appeal, set aside the order of the Subordinate Judge, and direct that the application be disposed of according to law. We make no order as to the costs of this appeal.

Appeal allowed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL NO. 2594 OF 1913.

April 9, 1915.

Present:—Mr. Justice Oldfield and
Mr. Justice Napier.

VENUGOPALACHARIAR—DEFENDANT
No. 2—APPELLANT

versus

PADMANABHA ROW—PLAINTIFF—
RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXXIV, rr. 4 (1), 5, 6, Appendix D, Forms 4, 11—Mortgage-decree—Costs—Declaration of personal liability, whether can be made against any person other than the mortgagor—“Defendant” in rule 6, meaning of.

The word “defendant” in rule 6 of Order XXXIV, Civil Procedure Code, means only the mortgagor. Therefore a declaration of personal liability for the costs of the decree-holder in case the sale-proceeds were not sufficient to pay them as well as the mortgage-money, cannot be made against the purchaser of the mortgaged property after the mortgage, though it can be made against the mortgagor. [p. 188, col. 2; p. 189, col. 1.]

Second appeal from the decree of the Court of the Sub-Judge of Tinnevely, in Appeal No. 424 of 1912, preferred against that of the Additional District Munsif of Tinnevely, in Original Suit No. 64 of 1912.

Mr. K. Jagannatha Iyer, for the Appellant.

Mr. S. Ramaswami Iyer, for the Respondent.

JUDGMENT.—The suit was on a mortgage and ended in a decree for recovery by sale of the property. The decree also contained a declaration of the personal liability of 2nd defendant for plaintiff's costs in case the sale-proceeds were not sufficient to pay them as well as the mortgage-money. Defendant No. 2, who appeals against this part of the decree, purchased the property after the suit mortgage.

His first objection, that such a declaration can in no case be included in a preliminary decree for sale, is answered by reference to *Kamalamma v. Komandur Narasimha Charlu* (1).

Next he argues that whilst such a declaration can be given, as in that case, against the mortgagor, none can be given against any other party, because it is only against the mortgagor that a personal decree under Order XXXIV, rule 6, (section 90, Transfer of Property Act) can eventually be passed. Costs, it is said, may be legally recoverable from 2nd defendant under the decree against him. But the mortgage-money will not be legally recoverable from him; and, as the assumption that the portion of the decree amount unsatisfied by the sale-proceeds represents costs, not the mortgage-money, will be inadmissible, the passing of a personal decree against him for it will not be justified by law.

We have been referred to English cases, in which this relief was given, *Sharple v. Adams* (2), *Liverpool Marine Credit Co. v. Wilson* (3) and *Griffith v. Pound* (4). But in the first the defendant was in the position of the mortgagor, since he made the mortgage as his trustee and with his sanction; and in any case in the absence of statutory restrictions on the contents of the decree, English practice is conclusive. Such statutory restrictions are imposed in India by Order XXXIV, rules 4 (1) and 5, and the forms of decree, Nos. 4 and 11, Appendix D, of the Civil Procedure Code, the heading of the last-mentioned form, “Decree against mortgagor personally,” implying what (it will be seen) authority supports, that “defendant” in rule 6 means only the mortgagor. We have not been shown authority for disregarding these restrictions and do not feel entitled to do so.

The decisions in *Ram Lal v. Sil Chand* (5) and *Matu Amber v. Sri Dhar* (6) are that “defendant” in section 90, Transfer of Property Act, means only the mortgagor and that no subsequent decree can be made against any other defendant, when the pre-

(1) 30 M. 464; 17 N. L. J. 317; 2 M. L. J. 359.

(2) (1863) 32 Beav. 213; 55 E. R. 84; 8 L. J. 139; 11 W. R. 450; 139 R. R. 705.

(3) (1872) 7 Ch. App. 50; 41 L. J. Ch. 798; 26 L. T. 717; 20 W. R. 665.

(4) (1890) 45 Ch. D. 553; 59 L. J. Ch. 522.

(5) 23 A. 439; A. W. N. (1901) 131.

(6) 23 A. 51; A. W. N. (1901) 71; 1 A. L. J. 250.

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liminary decree has provided for recovery of costs only by sale of the property. The judgments, no doubt, support plaintiff by the suggestions contained in them, that personal decree for costs could have been made against such other defendants if they had been applied for when the preliminary decrees were passed. For, if such decrees could have been given with immediate effect, it is hard to understand why they should not be given, like that before us, as declarations subject to the result of the sale. But these suggestions were only *obiter*, and the distinction between liability for costs and mortgage-money, on which plaintiff relies here, was not referred to. That distinction was drawn, though as between mortgagee and mortgagor, in *Damodar Das v. Budh Kuar* (7) and *Rutnessur Sein v. Jusoda* (8). But the decree in those cases were for foreclosure; and the Court disregarded the distinction in two cases, in which the decrees were (as here) for sale: *Raj Kumar Singh v. Sheo Narayan Sahu* (9) and *Panday Jagannath v. Junian* (10). In the latter case the distinction was material between the parties to the mortgage with reference to limitation; and Chamier, J., whose conclusions we respectfully adopt, refused to draw it, holding that no such disintegration of the amount declared due under Order XXXIV, rule 4, was contemplated by the Legislature, and that no presumption in favour of the appropriation of sale-proceeds in any particular way was recognised by authority. It has not been shown how those principles, valid between mortgagor and mortgagee, are invalid between the former and other defendants.

Taking this view, we must decide for 2nd defendant, though the result of doing so will be to exempt him from liability for the expense which his deceitful and reckless pleading has imposed on plaintiff. The second appeal is allowed and the declaration regarding 2nd defendant's liability is expunged from the decree under appeal. In view of his conduct he will pay his own costs before the District Munsif. Plaintiff must pay his costs in first and second appeals.

Appeal allowed.

(7) 10 A. 179; A. W. N. (1885) 68.

(8) 14 C. 185.

(9) 35 C. 431; 12 C. W. N. 304; 8 C. L. J. 152.

(10) 24 Ind. Cas. 63; 12 A. L. J. 645.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 921 OF 1914.

June 14, 1915.

Present:—Mr. Justice Piggott.

DALJIT SINGH—DEFENDANT—APPELLANT

versus

SHAMBHU SINGH—PLAINTIFF—

RESPONDENT.

U. P. Land Revenue Act (III of 1901), s. 233 (k)—Partition—Mistake in distribution of plot, correction of—Suit in Civil Court, whether maintainable—Jurisdiction.

Where there has been a partition of a certain *mahal* by a Revenue Court, resulting in a certain distribution of the lands of that *mahal*, if any error has been made in connection with this distribution to the prejudice of a particular co-sharer, the remedy of the latter is by way of application to the Revenue Court to correct its own mistake and not a suit in the Civil Court. [p. 189, col. 2; p. 190, col. 1.] *Lachman Das v. Hanuman Prasad*, 8 Ind. Cas. 807; 7 A. L. J. 1156; 33 A. 169, followed.

Muhammad Sadiq v. Laute Ram, 23 A. 291 (F. B.); A. W. N. (1901) 86; *Kishen Prasad v. Kather Mal*, A. W. N. (1900) 11; *Jagan Nath v. Tirbeni Sahai*, 1 Ind. Cas. 696; 31 A. 41; A. W. N. (1908) 274, referred to.

Second appeal from a decree of the Additional District Judge of Farrukhabad.

Mr. *Gulzari Lal*, for the Appellant.

The Hon'ble Dr. *Tej Bahadur Sapru*, for the Respondent.

JUDGMENT.—The question for determination in this appeal is whether this suit was barred by the provisions of section 233 (k) of the United Provinces Land Revenue Act, Local Act No. III of 1901. According to that section the Civil Court is debarred from taking cognizance of any suit with regard to the partition or union of *mahals*. The section itself is drawn up in broad terms and it has been applied broadly by this Court ever since the Full Bench decision in *Muhammad Sadiq v. Laute Ram* (1). That decision was under the former Land Revenue Act, No. XIX of 1873, the wording of which differed somewhat. The provisions of section 233 (k), as they now stand, were considered by two Judges of this Court in *Lachman Das v. Hanuman Prasad* (2). I understand that ruling as laying down the broad principle that where there has been a partition of a certain *mahal* by a Revenue Court, resulting in a certain distribution of the lands of that *mahal* being effected, if any error has been made in connection with this

(1) 23 A. 291 (F. B.); A. W. N. (1901) 86.

(2) 8 Ind. Cas. 807; 7 A. L. J. 1156; 33 A. 169.

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distribution to the prejudice of a particular co-sharer, the remedy of the latter is by way of application to the Revenue Court itself to correct its own mistake. Any exercise of jurisdiction on the part of a Civil Court which would disturb, or in any way affect, the distribution of land made on a partition, is barred by section 233 (k) of Act III of 1901. The facts of the present case are given at length in the very careful judgment of the learned Munsif. It appears that the *mahal* with which we are concerned had been divided by perfect partition in the year 1875. A number of *pattis* had been formed, one of which *patti*, No. 9, was known as *patti shamilat* and consisted of those lands which had not been divided amongst the co-sharers, that is to say, the joint lands in which all the co-sharers of the various *pattis* retained their rights according to their proportionate shares. In the year 1904 Daljit Singh, who is the defendant in the present case, presented an application for the separation, by perfect partition, of his share in *pattis* Nos. 4 and 5 and also of his share in *shamilat patti* No. 9. Notice of this application was issued to all the co-sharers of all the various *pattis* in the *mahal*. The Assistant Collector, however, came to the conclusion that there were objections to a perfect partition, and intimated as much to Daljit Singh. The latter thereupon presented a fresh application on the 25th of March 1905 asking the Court to separate his share by imperfect partition only, thus forming it into a new *patti*. The learned District Judge seems to have felt some doubt as to whether on this application any actual partition of the lands appertaining to the *shamilat patti* No. 9 could have followed, or actually did follow. Obviously, when Daljit Singh's application was limited to one for imperfect partition, no actual partition of the lands appertaining to the *patti shamilat* would follow. A new *patti* would be created by separating Daljit Singh's share in lands appertaining to *pattis* Nos. 4 and 5 from those of the other co-sharers in the same *pattis*. In the course of carrying out this imperfect partition the Assistant Collector laid hold of a plot 69, 69 of an acre in area, shown as No. 1956 in the village map. He treated this as appertaining to *patti* No. 4 and divided it amongst co-sharers of that *patti*, assigning to the defendant-appellant, 49, 49 acre as his share in the same. The plaintiff

in this case, Shambhu Singh, has acquired since the partition the proprietary rights which belonged in the years 1904 and 1905 to a co-sharer named Dular Singh. He contends that plot No. 1956 above referred to never appertained to *patti* No. 4 at all, but formed part of the land appertaining to *patti* No. 2 in which Dular Singh was a co-sharer. He suggests that the proceedings of the Assistant Collector dealing with this plot in the course of the partition of 1905 were a pure mistake. The Courts below have gone into the question of fact. Apparently it was not a question which could be settled off-hand on a mere inspection of the village records. It turned upon a comparison of the existing village records with the older papers and the ascertainment and location of the older numbers which went to make up plot No. 1956 in the present village map. The Courts below have, however, found that plot No. 1956 did appertain to *patti* No. 2 and was wrongly included by the Assistant Collector in *patti* No. 4 and partitioned amongst the co-sharers of that *patti*. Assuming that this finding is correct, the plaintiff has suffered an injury, but the question remains whether his remedy is by way of suit in a Civil Court or, as was said in the ruling to which I have already referred, by way of application to the Revenue Court to correct its own mistake. Both the learned Munsif and the learned District Judge have taken the view that the case stood on an entirely different footing from the moment that Daljit Singh applied to the Revenue Court to separate his share from the rest of the *mahal* by imperfect instead of by perfect partition. It certainly cannot be denied that, if the proceedings had continued on the application for perfect partition as originally brought, and the Assistant Collector had, however erroneously, taken this plot of land and divided it amongst the co-sharers in *patti* No. 4, a suit would not have been maintainable in the Civil Court to disturb that apportionment. I understand the District Judge to mean that the sharers in the remaining *pattis*, other than *pattis* Nos. 4 and 5, ceased to have any interest in the partition, or to be under any obligation to watch the proceedings in the Assistant Collector's Court, from the moment that Daljit Singh's application was limited to an application for imperfect partition. The only reported case I can find which lends some

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support to the decision of the Courts below is that of *Kishen Prashad v. Kadher Mal* (3), which was a single Judge case. So far as I can discover from the reported cases of this Court it has only once been considered by a Bench of this Court, and that was in *Jagan Nath v. Tirbeni Sahai* (4). It was then distinguished against, though not expressly dissented from. It seems to me that the plaintiff is not entitled, in the present case, to ask the Court to treat the Assistant Collector's proceedings as a nullity. On Daljit Singh's application for partition the Assistant Collector had to ascertain what lands belonged to *pattis* Nos. 4 and 5 and to apportion them between the recorded co-sharers of the said *pattis*. He would have to do this equally on an application for imperfect partition as on an application for perfect partition. It may be that the Assistant Collector came to an erroneous decision when he included this plot No. 1956 in the area which he proceeded to apportion amongst the co-sharers of *patti* No. 4. Nevertheless he did so, and it seems to be impossible to say that he had no jurisdiction to do so. This case is really distinguishable from that of *Kishen Prashad v. Kadher Mal* (3), because in the present case all the co-sharers in the *shamilat patti*, including the proprietors of *patti* No. 2, had notice of the partition proceedings. I am not sure that I should myself have been disposed to regard this as in itself decisive, but it seems to me that I am bound to follow the general principle laid down in *Lachman Das v. Hanuman Prasad* (2), unless something can be shown to take the case before me outside the operation of that principle. In my opinion this appeal must succeed. The suit was not cognizable by reason of the provisions of section 233 (k) of the Land Revenue Act and should have been dismissed accordingly. I accept this appeal, and setting aside the decrees of both the Courts below dismiss the plaintiff's suit with costs throughout.

Appeal decreed.

(3) A. W. N. (1900) 11.

(4) 1 Ind. Cas. 696; 31 A. 41; A. W. N. (1909) 274.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1575 OF 1912.

December 14, 1914.

Present:—Mr. Justice Sadasiva Aiyar and
Mr. Justice Seshagiri Aiyar.

MURUGAPPA MODALY AND OTHERS—

DEFENDANTS NOS. 1 TO 13—APPELLANTS

versus

PANAGANTI JAGANNATHA RAYANIM
GARU AND ANOTHER—PLAINTIFFS—

RESPONDENTS.

Ejectment, suit for—Defendants' possession within 12 years—Lands lying waste—Title—Presumption.

Where in a suit for ejectment it appeared that the defendants' possession arose within 12 years before suit, but that during the remaining period of the 12 years the land in suit had been lying waste and uncultivated:

Held, that the lands were presumably in possession of the plaintiff who had title to them. [p. 192, col. 1.]

Second appeal against the decree of the District Court of North Arcot, in Appeal Suit No. 205 of 1911, preferred against that of the District Munsif of Tirupati in Original Suit No. 348 of 1909.

Mr. Rangachariar, for the Appellants.

Messrs. S. Sreenivasa Iyengar and K. Raja Iyer, for the Respondents.

This second appeal coming on for hearing on the 11th March 1914, the Court delivered the following

JUDGMENT.—So far as the plaintiffs' (respondents') title is concerned, we are not satisfied that the lower Appellate Court misconstrued any documents in arriving at its conclusion that the road A in the plaintiffs' plan is the extreme southern limit of the defendants' hamlet and that the plaintiffs have established that their title-deed covers the plaint land.

But as regards the question of limitation, though the learned District Judge correctly sets out the point which falls to be decided by him, namely, that the plaintiffs ought to prove possession within 12 years before suit: see *Mohima Chunder Mozumdar v. Mohesh Chunder Neoghi* (1), he discusses only those facts on which he finds that the defendants' possession arose within 12 years before suit, but fails to find whether at sometime during the remaining portion (which might be called the first portion) of the 12 years, the plaintiffs had proved possession in themselves either directly or

(1) 16 C. 473; 16 I. A. 23; 5 Sar. P. C. J. 321.

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by the actual cultivators having attorned to them or by the lands having lain waste during the whole or any portion of that period and possession being, therefore, presumably with the person having title. However, we are able to accept the District Munsif's view as to the facts (which view, we take it, was intended to be adopted by the District Judge) that the plots B9 to B18 and the sandy waste B were not in possession of any person (other than the plaintiffs) continuously during the 12 years before suit.

We, however, cannot accept the District Judge's finding (as it stands) on the question of limitation as regards the plots B1 to B8 and we request the District Judge to submit a revised finding on this question with reference to the above observations, after the necessary discussion of the evidence and distinguishing (when necessary) the different plots according as they have been lying waste or had begun to be cultivated more than 12 years before suit.

The findings should be submitted within two weeks from the re-opening of the District Court after the midsummer vacation and ten days will be allowed for filing objections.

In compliance with the above order of this Court, the District Judge of North Arcot submitted the following

FINDING.— * * * * *

* * * I must, therefore, find that plots B1 to 5 and 7 were waste prior to *Fasli* 1310 and plots 6 and 8 were waste prior to *Fasli* 1313, and being waste they were presumably in the possession of the plaintiff who had title to them.

This second appeal and the memorandum of objections coming on for final hearing after the return of the finding of the lower Appellate Court upon the issue referred by this Court for trial, the Court delivered the following

JUDGMENT.—We accept the finding and dismiss the second appeal with costs.
Appeal dismissed.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 1010 OF 1914.

June 11, 1915.

*Present:—*Mr. Justice Tndball.LACHMAN DAS—PLAINTIFF—APPELLANT
*versus*MUHAMMAD YUSUF KHAN AND OTHERS—
DEFENDANTS—RESPONDENTS.*Transfer—Ex-proprietary holding exchanged for house—Illegal transaction—Suit for recovery of possession of house, if maintainable.*

An exchange of a house for the ex-proprietary right of a holding is an illegal transaction and the owner of the house is not entitled to maintain a suit for recovery of possession of the house. [p. 193, col. 1.]

Second appeal from a decree of the Additional Judge of Farrukhabad.

Dr. Surendro Nath Sen, for the Appellant.

Dr. S. M. Sulaiman, for the Respondents.

JUDGMENT.—The facts of the case out of which this appeal has arisen appear to be as follows. One Ram Ratan Lal obtained a decree against the defendants and in execution of that decree, he attached and sold the house which is in dispute in the present suit. It was purchased in the name of Lachman Dass, who is connected in some way with Ram Ratan Lal. It appears that after the sale, Ram Ratan Lal and the auction-purchaser had a considerable amount of difficulty in getting possession of the house from the judgment-debtors; finally on the 22nd of September 1905, a document was executed by both sides under which Ram Ratan Lal and Lachman Das transferred the ownership of this house to the defendants, while the defendants in return transferred to them their ex-proprietary rights in a certain holding. This holding included a large number of plots of land. As far as one can see the parties acted up to their words, possession of the house was given to the defendants and possession of the holding was given to Ram Ratan Lal and Lachman Das. Subsequently to this there was a difference about a grove. The defendants owned a grove and in execution of a decree the whole of the grove was attached, sold and purchased by Lachman Das. Under the decree, however, it was only a portion of the grove that ought to have been sold. The defendants thereupon brought a suit to recover possession of the excess amount

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which ought not to have been sold. In the course of that suit Lachman Das pleaded the exchange of the 22nd of September 1905, this grove apparently standing on one of the plots in which the defendants had held ex-proprietary rights. In that case the Court held that the transfer was an illegal transfer and was not binding on the defendants and the defendants got a decree for possession of that portion of the grove. The plaintiff, Lachman Das has now brought the present suit for possession of the house. In his plaint he said nothing about the deed of exchange or anything else. He has come forward as an auction-purchaser and says that though formal possession was delivered to him, he has failed to obtain actual possession of the property sold and on the basis of his title as auction-purchaser he claims possession of the house. Both the Courts below have held that the plaintiff has no right to re-gain possession of the house. On behalf of the plaintiff it is urged before me that he is quite willing to be put upon terms, that if he can get the house back, he would be quite willing to re-transfer the ex-proprietary holding. This was not what he stated in his plaint. The question is whether he is entitled to get back the house. It is quite clear that if he had purchased the ex-proprietary right, he would not have been entitled to recover the money by suit. The deed of the 22nd of September 1905 was practically a sale-deed, though instead of cash, property was given in exchange for property. The fact that the transaction was an exchange and not a sale makes little difference in the application of the principle on which the cases in this Court have been decided. The transfer of ex-proprietary rights is forbidden by law. The plaintiff has purchased property the sale of which he must have known was forbidden by law. The property has been handed over since by the vendor and he is not entitled to recover back his house, much more so in the present case, because it will be impossible to re-place the opposite party in the same position in which he was before the transaction was carried out. That was ten years ago. For ten years they have been out of possession of this ex-proprietary holding and the landlord of the village would probably object to their returning as

ex-proprietary tenants, they having been out of possession for so many years. The plaintiff has nobody but himself to thank and I cannot see my way to helping him. Under the circumstances I hold that he is legally not entitled to recover possession of the house. The appeal, therefore, fails and is dismissed with costs.

Appeal dismissed.

ODDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 344 OF 1912.

February 9, 1915.

Present:—Mr. Stuart, A. J. C., and
Mr. Kanhaiya Lal, A. J. C.

RAJA AND OTHERS—PLAINTIFFS—APPELLANTS
versus

Mahant SANT RAIN DAS AND ANOTHER—
DEFENDANTS—RESPONDENTS.

Burden of proof—Minority—Oudh Estates Act (I of 1869), s. 6—Redemption—Estoppel—Compromise, binding effect of—Minor, when bound by compromise entered into by his father.

The burden of proving minority lies on the person alleging it. [p. 195, col. 1.]

A mortgage-deed executed in 1835 provided that redemption would take place in the 25th year when the land was clear of both the crops or in any subsequent year afterwards whenever the mortgage-money was paid to the mortgager. On a suit for redemption brought by the heirs of the original mortgagor it was contended that the suit did not lie as the mortgage was irredeemable under the provisions of section 6 of the Oudh Estates Act:

Held, that the suit was not barred inasmuch as there was a distinct term fixed for redemption of the mortgage and as that term had not expired before the 13th day of February 1856 the date of annexation of Oudh. [p. 196, col. 2.]

Rajah Kishen Dutt Ram Pandey v. Narendar Bahadoor Singh, 3 I. A. 85, referred to.

Thakur Kalka Singh v. Thakur Debi Singh, 8 O. C. 233 at p. 238, explained.

A person is bound by the terms of a compromise, entered into by his father during his minority and which he had no power to enter into, if he himself has derived benefit from it, and if he has taken no steps to have it set aside for a long time after attaining majority. [p. 197, col. 1.]

Mahomed Abdul Kadir v. Amtal Karim Banu, 15 I. A. 220; 16 C. 161; 12 Ind. Jur. 416; 5 Sar. P. C. J. 224, referred to.

Appeal from the decree of the Additional District Judge, Lucknow, dated the 13th May 1912, upholding that of the Subordinate Judge, Unao, dated the 18th November 1910.

Pandit Gokaran Nath M. S. and Babu Aditya Prasad, for the Appellants.

Babus Bnsdeo Lal, Bisheshwar Nath and Gopal Sahai, for the Respondents.

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JUDGMENT.—On the 2nd October 1835, corresponding to the beginning of the *Fasli* year 1243, a certain Mithu Lal mortgaged Bhawanipur and Dhinji Khara, together with *nankar* rights worth Rs. 970 a year, to Mahant Gur Narain Das of Lucknow for Rs. 701. There is no evidence to show how the mortgagor came to part with his rights over the villages and with *nankar* rights for such a small sum of money. On the 24th April 1865 Sheo Din and Mendi Lal applied in the Court of the Settlement Officer for redemption of the mortgaged property against Charan Das, guardian of Har Charan Das and the manager of the estate. Har Charan Das, who was then a minor, was the successor-in-interest of Mahant Gur Narain Das. Mahant Gur Narain Das had been recognized as a *Talukdar* and his name was entered after his death in general No. 20, List I, and in No. 4, List II, of the Lists prepared in accordance with section 8, Act I of 1869. The suit for redemption of the property in question could not have succeeded at the time that it was instituted, as at that period the Legislature had failed to provide for the redemption of mortgages in cases in which a *Talukdar* was mortgagee in possession holding under a usufructuary mortgage at the time of annexation. Under the Summary Settlement and the terms of the *Sanad Talukdars* had been considered proprietors of lands so held in their possession; but subsequently by Legislation, which was contained in Act XIII of 1866, Act I of 1869 and Act XXXII of 1871, a power of redemption was given in certain cases. The lower Courts appear to have held that the Court of the Settlement Officer had no jurisdiction to entertain the suit which was brought by Sheo Din and Mendi Lal, because as the law stood such suit could not have been successful. We are of opinion that the Court had jurisdiction to entertain the suit, although as the law then stood the suit would have failed had there been a decision on the merits. It does not follow that a Court has no jurisdiction to decide a suit because the cause of action is bad. To give a simple illustration, a Court has jurisdiction to decide a suit when the cause of action is time-barred. The suit in question was not determined

on the merits. A compromise was entered into between the parties on the 8th May 1865, under which the *Talukdar* agreed to transfer to Sheo Din and Mendi Lal possession over 51 *bighas* of *sir* land rent and revenue free and to pay them Rs. 450 *nankar* a year on the condition that, so long as they retained possession of the 51 *bighas* of land and received the Rs. 450 a year, they would have no right to redeem the mortgaged property. Mithu Lal was dead when this suit was brought. He had four sons, by name Sheo Din, Mendi Lal, Debi and Chandi, and a brother, by name Chet Ram. Mithu Lal was the sole mortgagor as has been already stated and the plaintiffs in the case were Sheo Din and Mendi Lal only. Sheo Din died without issue. Mendi Lal had a son, Puttu Lal, who had a son Raja, who had been born before 1865, and a son, Gauri Shanker, who was born after 1865. Debi had a son called Bhagwan Din, who married a woman called Bhagwana and died without issue. Chandi died without issue. Chet Ram had three sons, Ram Dayal, Kusehar Din and Kishan Dayal. The two latter lines are now extinct. Ram Dayal has left a daughter called Padmani or Tulshia. The suit for redemption was brought on the 22nd November 1909 by Raja, Gauri Shanker and Padmani. Bhagwana was joined as a defendant. This suit was dismissed by the Subordinate Judge of Unao and the appeal brought was dismissed by the Additional District Judge of Lucknow, on the grounds that the mortgage was irredeemable and that, even if it had been redeemable, redemption by the plaintiffs was barred under the terms of the compromise dated 8th May 1865. As the value of the property involved is stated to be more than Rs. 10,000, the second appeal in this case has been referred to this Bench.

The judgments of the Courts below are full and ample and such questions of fact as were before them for decision have been decided fully and completely upon the evidence on the record so as to become conclusive. As a Court of second appeal we cannot interfere with those findings. Certain of those findings may be stated at once. They are to the effect that Raja was born before 1865 and

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that he was from four to nine years old at the time. He thus attained majority at some period within the years 1874 and 1879. Gauri Shanker was not born till after 1865. Bhagwan Din verified the compromise. The Courts have found that he was a major at the time that it was executed. They have found this fact on the ground that he verified the compromise and that it was for the plaintiffs to prove that he was a minor and that they had failed to do so. We accept this conclusion as legally valid. They have further found that at the time that the mortgage was executed Mithu Lal and Chet Ram were separate. This finding is based on the following grounds. It was admitted that Mithu Lal and Chet Ram had separated in 1837. The plaintiffs sought to establish that the separation took place actually in 1837 and had not taken place in 1835. Mithu Lal was the sole mortgagor and the deed of mortgage does not recite that he mortgaged it as head of a joint family. The Courts found, and in our opinion found rightly, that on the evidence of the mortgage-deed, as it stood, there could be no presumption that Mithu Lal and Chet Ram were joint, that it was, therefore, for the plaintiffs to prove that the separation between Mithu Lal and Chet Ram had taken place after the deed of mortgage had been executed, and that they had failed to do so. We, therefore, accept the finding that Mithu Lal had separated from Chet Ram before the execution of the deed of mortgage. They further found that Bhagwan Din had accepted benefits of the compromise personally and that he had himself verified it. In these circumstances the claims of Gauri Shanker, Bhagwana and Padmani to redeem must fail in any case. Gauri Shanker has no right to redeem as he was born after the execution of the compromise. Bhagwana has no right to redeem as her husband accepted the compromise and verified it, being a major at the time, and derived benefits under its terms. Padmani or Tulshia has no right to redeem as her ancestor, Chet Ram, was no party to and had no concern with the mortgage. This leaves the case of Raja alone to be considered.

We have now to decide whether the

mortgage would ordinarily be redeemable. The law governing the point will be found in sections 3 and 6 of Act I of 1869. We understand the provisions of the law upon this subject to be that in the case of a deed of usufructuary mortgage executed within 12 years of the date of annexation, which was the 13th of February 1856, the Legislature allowed a right of redemption, but that in the case of a usufructuary mortgage executed more than 12 years before the date of annexation, the Legislature refused a right of redemption, except in a case in which the mortgagor had been unable under the terms of the deed to redeem before 13th February 1856. The reasons for permitting redemption in certain cases and refusing it in others appear to have been that the Crown did not wish to enter ordinarily into the merits of old mortgages. It was ready to consider on the merits all mortgages which had come into existence within 12 years of the date of annexation but did not ordinarily wish to go into cases of mortgages executed beyond that period. As, however, it would have been palpably unfair to refuse the right of redemption to a mortgagor who could not under the terms of the deed, have obtained redemption before the date of annexation, the Crown made an exception in the favour of such mortgagors by laying down that, if a mortgagor had not been entitled to a right of redemption under the terms of the deed before the 13th February 1856, he should be permitted to redeem whatever was the date of his mortgage. We understand their Lordships of the Privy Council to have interpreted the provisions of the law upon these principles in the case of *Rajah Kishen Dutt Ram Pandey v. Narendar Bahadoor Singh* (1). The point was not raised distinctly for their determination. There it was alleged on one side that redemption had been possible in 1850 in which case the suit for redemption must fail, and on the other side that redemption was not possible till 1860 in which case the suit for redemption would succeed. Their Lordships decided on the evidence that redemption was possible in 1850, but the general terms of their judg-

(1) 3 I. A. 85.

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ment would denote that the principles governing redemption are as we have stated them to be. It has been argued that the decision in *Thakur Kalka Singh v. Thakur Debi Singh* (2) lays down that such a mortgage as this is irredeemable. In that case the question arose as to whether a mortgage could be redeemed in which the mortgagor agreed to redeem in 1852. Ryves, A. J. C., considered that in that case the instrument of mortgage had not fixed a term within which the property might be redeemed. In so far he interpreted the particular deed of mortgage, but he added the remark at page 238: "Act XIII of 1866" (the section of Act XIII of 1866 corresponds closely enough to section 6 of Act I of 1869 for a dictum as to its interpretation to apply to the interpretation of section 6, Act I of 1869) "applies, I think, only to such mortgages as were common before the annexation of Oudh in which a date was agreed upon between the parties as the last possible date on which redemption could take place." It has been argued from this that, inasmuch as no last possible date beyond which redemption can take place has been fixed in the present mortgage, the provisions of section 6, Act I of 1869, have no application and the mortgage remains irredeemable. The point referred to by Mr. Ryves did not arise in the case which he decided and the pronouncement is not of a nature which can bind us in deciding the point. Much of the argument that we have heard upon this point is based upon an assumption that a term cannot be fixed within which the property might be redeemed unless a specific date is fixed for redemption. We are of opinion that the introduction of this addition to the words of the section is unwarranted and would lead to a wrong interpretation of provisions. A term can be fixed for redemption without a specific date being fixed for redemption. A term may be fixed either by fixing a definite date or by placing the conclusion on the occurrence of an event. If a man agrees to give possession on a certain date, he fixes the term within which he will give possession. But if he agrees to give possession on the date of another person's

(2) 8 O. C. 233 at 238.

death he also fixes the term, though in that case the period within which the term will expire will not be ascertained until the event of the death of that person has occurred. Here it would appear that a term was fixed within which the property might be redeemed. The time of redemption was to be the time when both the crops were cleared in 1860 or any year afterwards when Rs. 701 were paid to the mortgagee. Here there was a distinct term which concluded on the payment of the money in such particular month and that term had not expired before the 13th of February 1856. Therefore we are of opinion that under the provisions of section 6, Act I of 1869, a suit lay for the redemption of the mortgage.

It remains to be seen, however, whether Raja, who, as we have already shown, is the only person whose claims to redeem are not excluded on the findings of fact, has title to redeem the property. It is true that as a son born in a Hindu family governed by the *Mitakshara* Law he obtained a vested interest in the ancestral property from the date of his birth, and that, as the property of which redemption is sought is proved to be ancestral property, he would in ordinary circumstances have a right to redeem in spite of the fact that his grandfather had lost his right. Was he, however, bound by the terms of the compromise? We can leave on one side the question whether the compromise was ineffective against Raja because no decree was passed embodying it. Even had a decree been passed embodying it, the decree would have been against Mendi Lal and would not have bound Raja. We have it, however, that Raja attained majority within the years 1874 to 1879 and this suit for redemption was not brought till 1909, that is to say, 30 years after the last possible date when Raja could have attained majority. During the whole of these 30 years the *Talukdar* has been allowing the parties to the compromise the use of 51 *bighas* of land rent-free and revenue-free and Rs 450 a year. It has been argued that there is evidence on the record to show that on the 14th November 1882 Puttu Lal, the father of Raja, transferred all his interests in Rs. 450 a year to the *Talukdar* for Rs. 2,300 and that in the same year he mortgaged and sold his interests in the *sir* land, but the facts that Puttu

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Lal capitalised his right to receive an annuity and that he transferred his rights in the *sir* land to a third party, do not alter the fact that the *Talukdar* has kept his part of the bargain and that the father of Raja and Raja himself for a period of at least three years (for he was admittedly joint with his father) derived benefit from the terms of the compromise. In a case decided by their Lordships of the Privy Council, *Mahomed Abdul Kadir v. Amtal Karim Banu* (3), two ladies were held to be bound by the terms of a *sulehnama*, which had been executed by their mother when they were minors, out of which they had received no benefit, their mother being found to have no power to bind them under the terms of the *sulehnama*, because they had not taken steps to set it aside after the lapse of 20 years from the time of their attaining full age. Their Lordships observed at page 168: "Assuming that Khadija had no power to transfer the plaintiffs' share, or that they might have had the *sulehnama* set aside, their making no objection to it for so many years after they attained majority is sufficient evidence that they ratified and adopted it." In that case the ladies had received no benefit of any kind. The claim of Raja is much weaker than theirs, for not only has his father with whom he was joint received benefit, but he has received benefit himself and he has made no attempt to set up a title conflicting with the terms of the compromise for 30 years at least from the period when he attained majority. Thus we have no hesitation in finding that he adopted and ratified the arrangement and that he is estopped equitably from now asserting a right to redeem.

There is a further point to be considered. The appellants have asserted that redemption is possible because the *Talukdar* has broken the terms of the compromise. If this plea were accepted, Raja Gauri Shanker, Padmani and Bhagwana would all have a right to redeem. The assertion that there has been a breach of the terms of the compromise is based upon the evidence afforded by the proceedings in two instances. In suit No. 172 of 1906 in the

Court of the Munsif of Purwa in the Unao District Sheo Prasad sued Har Charan Das for a portion of the *nankar* payable under the terms of the compromise. It appears that Sheo Prasad was a transferee of the rights of the beneficiary. The suit was brought because he had not received his quota. Har Charan Das applied for time to prepare his defence and, having obtained time, compromised the claim, and the suit was dismissed. There is no breach of the terms of the compromise on these facts. Har Charan Das is not shown to have been in a position to know that Sheo Prasad had any title to claim as a transferee. It appears that when he ascertained that he had such title, he settled his claim. The remaining evidence consists of a notice of ejectment on Fakir Muhammad issued by Har Charan Das calling on him to vacate a portion of the *sir* land. It appears that Fakir Muhammad was a vendee and mortgagee of Puttu Lal. Here again there is nothing to show that Har Charan Das had any knowledge of the fact that Fakir Muhammad had any title derived from the title of Puttu Lal. There is nothing to show that effect was ever given to this notice. It may well have been issued in ignorance of the facts with regard to the title of Fakir Muhammad and the circumstance that it was issued cannot go to prove a breach of the terms of the compromise. There is no other admissible evidence upon the point, and we are satisfied upon the evidence that there has been no breach on the part of the *Talukdar* of the terms of the compromise.

The tenth and eleventh grounds of appeal were withdrawn in argument.

This concludes the decision on all the arguments advanced to us in support of the appeal. We find that no right to redeem can be ascertained on the part of any of the plaintiffs or of *Musammnat Bhagwana*. We, therefore, dismiss this appeal. The appellants will pay their own costs and those of the respondents.

Appeal dismissed.

(3) 16 C. 161; 15 I. A. 220; 12 Ind. Jur. 416; 5 Sar. P. C. J. 224.

CHANDRA KUAR v. RAGHUBAR SINGH.

OUDDH JUDICIAL COMMISSIONER'S
COURT.

FIRST CIVIL APPEAL NO. 62 OF 1913.

March 5, 1915.

Present:—Mr. Lindsay, J. C., and

Mr. Kanhaiya Lal, A. J. C

Musammāt CHANDRA KUAR—PLAINTIFF—
APPELLANT

versus

Kuar RAGHUBAR SINGH AND ANOTHER
—DEFENDANTS—RESPONDENTS.

Mortgage by reversioner—Hindu widow in possession of mortgaged property—Reversionary interests not mortgaged but property itself—Declaration, suit for, by widow, maintainability of—Period fixed by mortgage, expiration of, during widow's life-time, effect of.

Where a reversionary heir to a deceased Hindu mortgages the property in the hands of the widow without stating that the property is for the time being owned by the widow or that he is mortgaging his reversionary interests only, the widow is entitled to claim a declaration that the mortgage is of no effect so far as her interest in the property is concerned, if the period fixed by the mortgage is such as may possibly expire during the life-time of the widow. [p. 199, col. 1.]

Appeal from the decree of the Subordinate Judge, Sitapur, dated the 7th March 1913.

Babu Ram Chandra, for the Appellant.

Pandit Gokaran Nath Misra and Babu Kalka Prasad Trivedi, for Respondent No. 2

JUDGMENT.—This is a plaintiff's appeal. The plaintiff, Musammāt Chandra Kuar, brought a suit in the Court of the Subordinate Judge of Sitapur against Kuar Raghubar Singh and Kuar Balbhaddar Singh asking for a declaration that a certain deed of mortgage executed by the first defendant in favour of the second defendant was, so far as her interest in the property in her possession was concerned, of no effect. The Subordinate Judge dismissed the suit being of opinion that the document complained of was not one from which the plaintiff could reasonably entertain any apprehension of injury to her interest. We have heard Counsel in this case and in our opinion the appeal must be allowed and the decision of the Court below must be set aside. The facts admitted by both parties in this Court are as follows. The village named Mahrana, which was formerly the property of one Fateh Singh, consisted at one time of two hamlets, Mahrana proper and Ichchanagar. In the course of some partition proceedings which are said to have taken place long ago, this village was divided

into three *mahals*, namely, Mahrana Khas, Ichchanagar South and Ichchanagar North. Fateh Singh, when he died, left two sons, Madho Singh and Sheo Bakhsh Singh. Madho Singh is dead and the plaintiff in this case, Musammāt Chandra Kuar, is his widow. Sheo Bakhsh Singh died leaving a son, Jagannath Singh, who had married two wives from each of whom he had children. From one wife Jagannath Singh had two sons, Jadunath Singh and Raghubar Singh, Raghubar Singh being the first defendant in the present case. From the other wife Jagannath Singh had a son named Arjun Singh. When the whole of the family property which had once belonged to Fateh Singh came to be divided, it appears that of the three *mahals* above-mentioned two, namely, *Mahal* Mahrana Khas and *Mahal* Ichchanagar North fell to the lot of Madho Singh who was the plaintiff's husband. It is admitted now that Musammāt Chandra Kuar is in possession of these two *mahals* with the estate of a Hindu widow. The other, *Mahal* Ichchanagar South, was divided between the sons of Jagannath Singh in the following proportions:

4½ annas to Jadunath Singh.

4½ annas to Raghubar Singh.

7 annas to Arjun Singh.

It is admitted further that the 4½ anna share of Raghubar Singh in *Mahal* Ichchanagar South was foreclosed by the second defendant, Balbhaddar Singh, some time ago and previous to the date of the mortgage of which the plaintiff complains. The result, therefore, was that at the time this mortgage of the 5th July 1912 was executed, Raghubar Singh had no immediate interest in any portion of the village of Mahrana. The only interest he had had, as already said, passed by foreclosure to Balbhaddar Singh. To turn now to this mortgage of the 5th of July 1912, it purports to be a mortgage of a 5-anna 4-pie share of the entire village of Mahrana. The mortgage is one by conditional sale and the period of the mortgage is seven years. The amount of the mortgage-money is Rs. 12,000 with interest at Re. ½ per cent. per mensem. It has been frankly admitted by the learned Counsel who appears here for the

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respondent Balbhaddar Singh that this deed of mortgage purports to transfer by way of mortgage property to which the mortgagor, Raghubar Singh, has at the present time no title. It is clear on the pedigree just given that at the present moment Raghubar Singh is one of the reversionary heirs of the plaintiff's deceased husband, Madho Singh; but any right he has at present in the property which belonged to Madho Singh is contingent. It is admitted that in the mortgage-deed no reference is made to the fact that the present owner in possession of two of the *mahals* of *Mauza* Mahrana is the plaintiff, *Musammât Chandra Kuar*, and it is further admitted that it is nowhere stated in the mortgage-deed that the interest which Raghubar Singh purported to transfer by way of mortgage was merely a reversionary interest. These being the facts we find ourselves unable to agree with the opinion of the learned Judge of the Court below to the effect that *Musammât Chandra Kuar* the plaintiff, has no right to obtain the relief she asked for. On the contrary, although her estate is merely that of a Hindu widow, it appears to us that she may rightly complain that some injury may be done to her by this mortgage transaction unless some declaration is obtained by her at the earliest opportunity that it is in no way to affect her rights. It is quite possible that she may survive for a long time after the period of the mortgage has expired and it is, therefore, not an unreasonable apprehension on her part that if the time of foreclosure should arrive she may be dragged into litigation with which she has really no concern. We are not called upon in the present case to discuss the relations which have arisen between the respondents out of the execution of this deed of mortgage, but we are certainly of opinion that *Musammât Chandra Kuar* is entitled to have the protection she asks for in the shape of a declaration that this transaction of mortgage in no way affects her rights as a Hindu widow in possession of the two *mahals*, Mahrana Khas and Ichchanagar North.

We, therefore, allow this appeal and set aside the decree of the Court below. A declaration in the above form will be granted to the plaintiff-appellant and she

will be entitled to have her costs from the defendants-respondents in both Courts.

Appeal allowed.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

REVENUE PETITION NO. 16 OF 1913-14 OF
PARTABGARH DISTRICT.

November 19, 1914.

Present:—Mr. Tweedy, S. M., and
Mr. Holms, J. M.

SUKH MANGAL TEWARI—PLAINTIFF—
APPELLANT

versus

Musammât RAUNAQ BIBI—DEFENDANT—
RESPONDENT.

Practice—Service, insufficient, on appellant—Pleader informed of date of hearing—Appearance by Pleader without instructions, effect of—Dismissal of appeal in default, if legal.

Where an appellant is not properly served although his Pleader is informed of the date of hearing, and the Pleader alone appears on that date but states that he is unable to prosecute the appeal for want of instructions, the appeal should not be dismissed in default. [p. 200, col. 1.]

Appeal against the order of the Commissioner, Fyzabad, dated the 9th September 1913, upholding that of the Assistant Collector, Partabgarh, dated the 31st March 1913.

FACTS.—The plaintiff-appellant filed the appeal in the Commissioner's Court through a Pleader. The Pleader was not informed of the date of hearing fixed by the Court, nor was a notice to that effect properly served on the appellant. The appellant and his Pleader both, being absent on the said date, the Commissioner ordered another date to be fixed and notices to be served on the appellant as well as on the Pleader. Notices were accordingly issued, but although the Pleader was informed of the date the notice was not served personally on the appellant; but simply affixed to his house as he had gone out. On the subsequent date of hearing the Pleader appeared, but said that he was unable to prosecute the appeal as he had got no instructions from his client, the appellant. The Commissioner thereupon dismissed the appeal for want of prosecution. Thereafter the appellant

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applied to have the said order of dismissal set aside, alleging that he had been ill and could not, therefore, appear and instruct his Pleader. The Commissioner rejected this application, holding that the appellant should have taken steps to instruct his Pleader beforehand, and that Order IX, rule 9, Civil Procedure Code, did not govern the case as there had been an appearance on behalf of the appellant by his Pleader although there was no prosecution of the case. An appeal against the order passed on the said application was preferred to the Board of Revenue.

Thakur Lal Behari Singh, for the Respondent.

ORDER.

HOLMS, J. M. (November 12th, 1914.)—The Commissioner ordered the notice to be issued again on the 1st of September 1913 on both the appellant and his Pleader. The notice was affixed to the appellant's house as he had gone off to Sultanpur and there was no proper service. This being so, the appeal should not have been dismissed in default.

I would set aside the order of the Commissioner and direct that he re-hear the appeal.

TWEEDY, S. M.—I concur.

Appeal allowed.

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 32 OF 1913.

March 17, 1915.

Present:—Mr. Lindsay, J. C., and

Mr. Kanhaiya Lal, A. J. C.

RAGHUNATH BAKHSH—PLAINTIFF—

APPELLANT

versus

Haji Sheikh MUHAMMAD BAKHSH AND

OTHERS—DEFENDANTS—RESPONDENTS.

Contract Act (IX of 1872), s. 11—Minor, sale to, validity of—Transfer by sale.

A transfer by sale to a minor is not void by reason of his minority. [p. 202, col. 1.]

Narankoti Narayana Chetty v. Loyalanga Chetty, 4 Ind. Cas. 583; 19 M. L. J. 752; 7 M. L. T. 233; 33 M. 312; *Musammatt Munni v. Madan Gopal*, 27 Ind. Cas. 733; 13 A. L. J. 185 and *Mir Sarwarjan v. Fakhruddin Mahomed Chowdhuri*, 13 Ind. Cas. 331; 16 C. W. N. 74; (1912) M. W. N. 22; 9 A. L. J. 33; 15 C. L. J. 69; 14 Bom. L. R. 5; 21 M. L. J. 1156; 39 C. 232; 39 I. A. 1 (P. C.), dissented from.

Mohori Bibee v. Dharmodas Ghose, 30 C. 539; 5 Bom. L. R. 421; 7 C. W. N. 441; 30 I. A. 114 (P. C.), distinguished.

Appeal from the decree of the Subordinate Judge, Bara Banki, dated the 28th February 1913.

Mr. A. P. Sen, for the Appellant.

Mirza Sami Ullah Beg and Syed Wazir Hasan, for the Respondents.

JUDGMENT.—The appeal arises out of a suit for pre-emption brought by the plaintiff, Raghunath Bakhsh, who is a minor. The suit was dismissed by the lower Court on the ground that the plaintiff had no title to maintain the suit.

The sale sought to be pre-empted was a sale of the superior proprietary rights of a village called Sadruddeenpur. The third defendant, Chaudhri Shafiq-uz-zaman, was the vendor and the defendants Nos. 1 and 2 were the vendees.

In the fourth paragraph of the plaint it was alleged that the plaintiff was an under-proprietor of the village and was also a member of the village community and, therefore, entitled to seek pre-emption. The vendees, in their written statement, denied these allegations, but did not definitely state grounds for their denial. It was only after the evidence had been closed and the arguments had commenced that these defendants challenged the plaintiff's title, on the ground that it was based upon a sale-deed executed in his favour in the year 1907. It was contended that a sale-deed in favour of a minor was void and passed no interest to the purchaser.

After this point had been raised, the parties were allowed to produce further evidence. For the plaintiff it was sought to be proved that the sale had been negotiated and carried through by one Ram Sahai, an uncle of the minor who was joint in family with him, and that the purchase had been made for the benefit of the joint family in the name of the minor. As an alternative case it was pleaded that the sale was good, as the transaction had been concluded by Ram Sahai who was the *de facto* guardian of the minor and who was acting as such for the minor's advantage.

The Subordinate Judge found against the plaintiff on these pleas and relying

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apparently on the judgment of their Lordships of the Privy Council reported as *Mir Sarwarjan v. Fakhruddin Mahomed Chowdhuri* (1) came to the conclusion that there was no valid sale and, therefore, no title in the plaintiff to sue. In the concluding portion of his judgment he stated that although the sale had, without doubt, been negotiated by the plaintiff's uncle, the transaction was nevertheless void by reason of the plaintiff's minority.

In appeal here the contention is that the view of the law that a transfer by a sale to a minor is void is wrong. The only authorities directly in point which have been cited in support of the view taken by the Court below are a judgment of a Bench of the Madras High Court reported as *Navakoti Narayana Chetty v. Loyalinga Chetty* (2) and the decision of a single Judge of the Allahabad High Court to be found in *Musammat Munni v. Madan Gopal* (3). In both of these rulings it is laid down that a sale to a minor is void and this view has been arrived at by deduction from the law as laid down in the well-known case of *Mohori Bibee v. Dharmodas Ghose* (4), in which it was declared by their Lordships of the Privy Council that a mortgage made by a minor is void on the ground that he is a person not competent to contract, and that being so, any transfer of property made by a minor must necessarily be void under section 7 of the Transfer of Property Act, which by implication provides that there can be no valid transfer by a person who is under disability to contract.

The question with which we are concerned here is a different one, namely, the capacity of a person to acquire ownership of property by transfer from another.

The only provision of the Transfer of Property Act which relates directly to disqualification to take by transfer is to be found in section 6, clause (h), of the

Act where it is laid down that no transfer can be made to a person legally disqualified to be a transferee. Who the persons so disqualified are, is not stated in the clause; to ascertain who they are we have to refer to other provisions of the law generally which declare the disqualification. We have, for example, the provision embodied in section 136 of the Act imposing incapacity upon Judges, Legal Practitioners and officers connected with Courts of Justice so as to prevent them acquiring interests in actionable claims.

Similarly in the Civil Procedure Code, Order XXI, rules 72, 73, we find restrictions upon the right of acquiring property placed upon holders of decrees in execution and upon officers or other persons who have duties to perform in connection with Court sales.

But nowhere do we find any express provision of law by which it is declared that competency to contract is to constitute a criterion of capacity to acquire property by transfer. Bearing in mind that the Legislature thought it necessary to lay down that want of contractual capacity is a disqualification for the purpose of answering ownerships, it might reasonably be expected that if the intention was to bar transfers to persons who cannot make a valid contract that intention would have been expressed in language no less clear. And if the policy of the law of property is to allow the free alienation and circulation of property, it does not appear to us to be legitimate to import into it a disqualification which it does not expressly contain so as to restrict the right of an owner of property to dispose of it as he pleases. "The right of alienation is, as a rule, incidental to and inseparable from the beneficial ownership of property" (Dart).

That the Transfer of Property Act does not regard want of capacity to contract as a bar to the acquisition of property by transfer is clear from a reference to the provisions of section 127 of the Act relating to transfer by way of gift. To render a transfer of this nature complete there must be acceptance by or on behalf of the donee (section 123), and section 127 provides that although a donee who is not competent to contract and who accepts property burdened

(1) 13 Ind. Cas. 331; 39 C. 232; 16 C. W. N. 74; (1912) M. W. N. 22; 9 A. L. J. 33; 15 C. L. J. 69; 14 Bom. L. R. 5; 21 M. L. J. 1156; 39 I. A. 1 (P. C.).

(2) 4 Ind. Cas. 383; 33 M. 312; 19 M. L. J. 752; 7 M. L. T. 233.

(3) 27 Ind. Cas. 733; 13 A. L. J. 185.

(4) 30 C. 539; 5 Bom. L. R. 421; 7 C. W. N. 441; 30 I. A. 114 (P. C.).

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by an obligation is not bound by his acceptance, he may become so bound if after becoming competent to contract, and being aware of the obligation, he retains the property which has been given to him. In other words, the want of competency in the donee to contract does not prevent the property being transferred to him.

A similar principle is recognised in section 248 of the Indian Contract Act, which provides for the case of a minor admitted to the benefits of a partnership.

Lastly we may notice that the definition of the expression "transfer of property" contained in section 5 of the Transfer of Property Act does not import any disqualification on the part of a minor to acquire property by transfer.

We can see no good reason, therefore, for the proposition that a minor, because he is not competent to contract, is debarred from taking property under a transfer by sale.

As for the argument that such a transfer should be deemed void because section 55 of the Transfer of Property Act imposes certain liabilities upon the purchaser, the answer appears to be that these liabilities do not arise out of contract. They are liabilities which the law declares to be incidental, not to a contract, but to a transfer of property in this particular way.

The law has thought proper to protect the interests of minors by declaring them incompetent to dispose of their property but we are unable to see how such a provision can be treated as, or transmuted into, a legal disability on the part of a minor to acquire property by transfer. We cannot, therefore, in the absence of any authority higher than those which have been cited to us, accept as good law the proposition that a sale to a minor is void. Nor can we agree with the Court below that such a principle is deducible from the judgment of their Lordships of the Privy Council reported as *Mir Sarwarjan v. Fakhruddin Mahomed Chowdhuri* (1).

That was a case in which a plaintiff was suing for specific performance of a contract for the sale of immoveable property entered into by his guardian on his behalf while he was still a minor. It was held that it was not within the competence of the guardian to bind the minor or his estate by such a contract, that the minor was not bound and that

accordingly there being no mutuality the minor was not entitled to have the contract specifically performed. There was no question of any transfer of property to the minor, for a contract for the sale of immoveable property does not operate to pass any interest in the property to which the contract relates and the judgment, in our opinion, cannot be treated as laying down by implication that a sale of immoveable property to a minor is void. It simply lays down that a guardian cannot bind the minor by any purely personal covenant.

We have before us in this case a transaction of sale evidenced by a duly registered deed executed in 1907, five years before this suit for pre-emption was brought. We have evidence to show that the negotiations for the purchase of the land were carried on through Ram Sahai, the uncle of the minor, who, if he was not the legal guardian of the minor at the time, may be treated as having acted on behalf of the minor's mother who was then his legal guardian. The full consideration was paid at the time of registration, the conveyance was made over and has been produced in Court on behalf of the purchaser, and he has been in possession ever since. In these circumstances we hold that there has been a complete transfer to the plaintiff of the property specified in the conveyance and by virtue of that ownership he is entitled to maintain the suit for pre-emption.

The price of the property is not in dispute; it was Rs. 17,970 and the plaintiff admitted that he was liable in addition to pay a sum of Rs. 180 on account of the stamp duty levied on the sale-deed. The vendees sought to charge the plaintiff with a further sum of Rs. 125 incurred for costs of registration, but the lower Court held that the plaintiff was not liable to pay this sum and the finding to this effect has not been challenged here in appeal.

The result is that we accept the appeal, set aside the decree of the Court below and direct that the plaintiff be given a decree for pre-emption in the usual form directing payment into Court, on or before a day three months from the date of the decree of this Court, of Rs. 18,150.

The plaintiff is entitled to costs both here and in the Court below against the defendants.

Appeal allowed.

BAIJ NATH v. SHEO GOBIND.

OUDH JUDICIAL COMMISSIONER'S
COURT.

RENT APPEAL NO. 87 OF 1914.

February 25, 1915.

Present:—Mr. Stuart, A. J. C.

BAIJ NATH—PLAINTIFF—APPELLANT
versus

SHEO GOBIND AND OTHERS—DEFENDANTS—
RESPONDENTS.

Lambardar, liability of—Gross negligence—Misconduct—Profits, suit for, by co-sharer.

A *lambardar* who deliberately neglects his duty as such in making no attempt to collect rents of a certain share and allows the tenants of that share to cultivate the holdings therein without paying any rent, is guilty of gross negligence and misconduct and is liable to pay the co-sharer his proportionate amount of profits.

Shambhu Prasad v. Deputy Commissioner, Lucknow, 1 O. C. 183, referred to.

Appeal from the decree of the District Judge, Lucknow, dated the 6th March 1914, reversing that of the Assistant Collector, Lucknow, dated the 11th September 1913.

Babu Salig Ram, for the Appellant.

Babu Lachhman Prasad Varma, for the Respondents.

JUDGMENT.—The circumstances of this case are peculiar. A village belonged to four brothers, Sheo Gobind, Badri, Bans Gopal and Jagan Nath. Each brother owned a quarter share. The village was undivided according to the entries in the revenue papers, and Sheo Gobind was *lambardar*. Baij Nath obtained possession of Jagan Nath's share by virtue of a decree of the Civil Court. He has been unable to obtain any benefit from the share. Jagan Nath continued to retain possession of his *sir*, of which he had become ex-proprietary tenant, and of certain *khulka* land. He has according to representations made consistently refused to pay anything to Baij Nath as rent. Baij Nath endeavoured to dispossess him through the Revenue Courts. His attempt was defeated, as the Revenue Court held that according to the provisions of section 126, Act XXII of 1886, only Sheo Gobind, the *lambardar*, could eject Jagan Nath. Having failed to obtain satisfaction by ejectment and being further under the provisions of the same section debarred from suing Jagan Nath for the recovery of arrears of rent, Baij Nath has come into the Revenue Court to obtain his share of profits from the *lam-*

bardar, that is, from Sheo Gobind, a brother of Jagan Nath. Sheo Gobind replied that he had never collected anything in connection with Jagan Nath's share, and that Jagan Nath made his own collections. The learned District Judge found that, as Sheo Gobind had collected nothing, Baij Nath could not obtain any profits from him. The appellant has thus been unable to obtain anything in respect of the share that is his, and owing to the decision of the Revenue Courts to the effect that everything must be done in this village through the *lambardar*, he is debarred from enforcing his own rights either against Jagan Nath or against the tenants. I cannot agree with the learned District Judge that in these circumstances he has also no claim against the *lambardar*. Upon the facts it is clear that Sheo Gobind has deliberately neglected his duty as *lambardar*. The Revenue Courts have held that the *lambardar* alone can eject, and from this it follows that he alone can collect rents. He admits that he made no attempt to collect rents of this share, and it is clear from the facts that he permits his brother, who has lost the share, to cultivate certain holdings without paying rent and to collect the rents of tenants. He has thus shown gross negligence and misconduct and is liable for the appellant's share in the profits, as decided in *Shambhu Prasad v. Deputy Commissioner, Lucknow* (1). The amount of profits has been calculated by the learned Assistant Collector, and I find that it has been correctly calculated.

I, therefore, set aside the order of the learned District Judge and award the appellant a decree for Rs. 460 against Sheo Gobind, who will pay his own costs and those of the appellant in all Courts.

The cross-objections are dismissed. The objectors will pay their own costs and those of the appellant. Badri and Musamat Ram Pyari, widow of Bans Gopal, will pay their costs throughout.

Appeal allowed.

(1) 1 O. C. 183.

JAGANNATH BAKHSH V. MENDANA.

ODUH JUDICIAL COMMISSIONER'S
COURT.

PRIVY COUNCIL APPEAL No. 4 OF 1914.

February 9, 1915.

Present:—Mr. Lindsay, J. C. and

Mr. Kanhaiya Lal, A. J. C.

JAGANNATH BAKHSH AND ANOTHER—

DEFENDANTS—APPLICANTS

versus

Musammat MENDANA AND ANOTHER—

PLAINTIFFS—OPPOSITE PARTY.

Privy Council, appeal to, leave as to, application for—Subject-matter of suit, real or market-value of, investigation as to—Civil Procedure Code (Act V of 1908), O. XLV, r. 5—Admission in pleadings, effect of—Estoppel.

The real or market-value of the matter in dispute is the test as to whether or not an appeal lies to the Privy Council. But where the plaintiff asserts in his plaint that such value is less than Rs. 10,000 and it is accepted by the defendants in their written statement and is not challenged even afterwards in appeal, they cannot subsequently be heard to say that in spite of their admission in the written statement, the real value is over Rs. 10,000 and claim that they have a right to have this matter investigated for the purpose of determining the question of their right to appeal to the Privy Council. [p. 205, col. 1.]

Pichayee v. Sivagami, 15 M. 237; *Mohun Lal Sookul v. Debee Doss*, 7 M. I. A. 428; 1 Suth. P. C. J. 451; 1 Sar. P. C. J. 739; 19 E. R. 370; *Gaurmoney Debia v. Khaja Abdool Gummy*, 8 M. 1. A. 268; 1 Sar. P. C. J. 874; 19 E. R. 532 and *Baboo Lekhray Roy v. Kanhya Singh*, 1 I. A. 317; 18 W. R. 494, referred to.

Mr. St. G. Jackson, for the Applicants.

Mr. A. P. Sen, for the Opposite Party.

JUDGMENT.—This is an application for leave to Appeal to His Majesty in Council made by Jagannath Bakhsh and Ram Ratan Lal who were defendants in a suit brought by Musammat Mendana and Sheopal Singh for recovery of possession of share in certain immoveable property.

The applicants in their petition have valued the subject-matter in dispute on appeal at about Rs. 14,000 and the application is opposed on the ground that this value is excessive. It is pleaded that the value is less than Rs. 10,000 and that the applicants have no right of appeal.

In this connection we have to refer in the first place to the pleadings.

In paragraph 12 (b) of the plaint it was alleged that the Government revenue payable in respect of the property in dispute was Rs. 436-13-4 and for purposes of Court-fee the valuation of the suit was five times that amount. The Court-fee on the plaint was paid in accordance with this calculation. It

was further alleged that the market-value of the property in dispute was "about Rs. 7,300" and for purposes of jurisdiction the suit was valued at Rs. 7,300.

The defendants in their written statements did not challenge these valuations, but admitted them [See paragraph 12 (b) of the written statements filed by the defendants-applicants]. The suit of the plaintiffs was dismissed and they appealed to this Court valuing the appeal for the purpose of jurisdiction at the same figure, namely, Rs. 7,300.

An appeal so valued is cognizable by a single Judge of this Court.

On the 16th May 1913 a petition was put in, signed by Counsel for both parties, as being that the appeal should be referred for disposal to a Bench of two Judges. It was represented that the value of the property involved in the case was over Rs. 7,300 and that the question of the joint status of the family to which the parties belonged affected not only the property in dispute, but other property as well. It was further said that "in the interests of justice" it was expedient that the case should be decided by a Bench.

This petition was rejected. The Judge who heard it was of opinion, after consideration of the allegations in the plaint that there was no need to refer the appeal to a Bench for disposal. The case came up in due course and was heard by a single Judge who, by his judgment dated the 15th April 1914, allowed the appeal and decreed the plaintiffs' claim. And it is against this decree that the defendants now desire to appeal to His Majesty in Council.

It is to be observed here that nowhere in the petition of the 16th May 1913 was it alleged that value of the property was over Rs. 10,000. Had such a case been put forward and established by either of the parties, the appeal would necessarily have had to be laid before a Bench of two Judges.

The question now is whether in view of the facts above stated the defendants are entitled to come here and say that the true value of the property in dispute on appeal is over Rs. 10,000.

Mr. Jackson, who appears for the applicants, has referred us to Order XLV, rule 5, which empowers this Court in cases where there is a dispute regarding the valuation of the subject-

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matter to call upon the Court of first instance to determine what the actual value of the property is. And he has also referred us to various authorities which lay down the rule by which such value is to be determined. We need only refer to one of these, a Full Bench ruling of the Madras High Court reported as *Pichayee v. Sivagami* (1). There it was held with regard to certain decisions of their Lordships of the Privy Council that the real or market-value of the matter in dispute is the test as to whether or not an appeal lies to the Privy Council.

In *Mohun Lall Sookul v. Debee Doss* (2) their Lordships held, in a case in which the value was laid in the plaint as being under Rs. 10,000, that as the calculation was estimated with reference to the stamp-duty only, and that if satisfactory evidence was produced the real or market-value of the property exceeded Rs. 10,000, leave to appeal would be granted. A similar opinion was expressed in the case reported as *Gourmonee Debia v. Khaja Abdool Gunny* (3).

In *Baboo Lekhraj Roy v. Kankya Singh* (4) it was laid down that "the stamp-duties imposed for fiscal purposes are calculated on a certain rule fixed by law, but the right of appeal depends upon the value which is a matter of fact." But in the case now before us there can be no foundation for an argument that the valuation of the property was made upon an arbitrary basis prescribed for the purpose of determining the amount of stamp-duty leviable upon the plaint. The Court-fee was paid upon five times the Government revenue represented by a sum of Rs. 2,184-2-8 only. But it was asserted also that the real or market-value of the property was Rs. 7,300 and that valuation was accepted by the defendants and was not challenged even afterwards in appeal. We accept the proposition that the value of the property is a question of fact and that question has been settled by the defendants on their own admissions. They cannot, in our opinion, now be heard to say that in spite of their admissions, the property is worth over Rs. 10,000 and claim that they have

a right to have this matter investigated for the purpose of determining the question of their right to appeal to the Privy Council.

The defendants are concluded by their own admissions and we hold, therefore, that the real market-value of the property is Rs. 7,300 only.

This being so there is no right of appeal to the Privy Council. We dismiss this application with costs.

Application rejected.

OUDH JUDICIAL COMMISSIONER'S COURT.

EXECUTION OF DECREE APPEAL No. 1 OF 1915.
February 24, 1915.

Present:—Mr. Stuart, A. J. C.

Navab Syed RAZA HUSAIN—JUDGMENT-DEBTOR—APPELLANT

versus

GAYA PRASAD—DECREE-HOLDER—RESPONDENT.

Jurisdiction of Court—Powers of Judge raised—Notification, delay in publication of, effect of—Execution of decree.

Delay in issuing a notification to the effect that the powers of the Judge of a Court have been raised retrospectively from a certain previous date, does not affect his authority to dispose of a matter which he did dispose of between that previous date and the date on which the notification was published, and which he had otherwise no power to dispose of. [p. 206, col. 1.]

Appeal against the order of the District Judge, Lucknow, dated the 28th August 1914, upholding that of the Additional Munsif, Lucknow, dated the 4th July 1914.

Babus *Har Govind Das* and *Salig Ram*, for the Appellant.

Babu *Har Dayal*, for the Respondent.

JUDGMENT.—In this case a money-decree was passed by the Subordinate Judge of Lucknow on the 21st August 1905 in a suit of a valuation between Rs. 1,000 and Rs. 2,000. At that time the Court of the Subordinate Judge was the lowest Court in which a suit between Rs. 1,000 and Rs. 2,000 could be instituted. Subsequently a Munsif was posted to Lucknow who had authority to try suits up to Rs. 2,000. The first application for execution was made in the Subordinate Judge's Court on

(1) 15 M. 237.

(2) 7 M. I. A. 428; 1 Suth. P. C. J. 458; 1 Sar. P. C. J. 739; 19 E. R. 370.

(3) 8 M. I. A. 268; 1 Sar. P. C. J. 774; 19 E. R. 532.

(4) 1 I. A. 317; 18 W. R. 494.

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the 3rd February 1906. The second was made in the same Court on the 10th August 1908. The third was made in the same Court on the 6th February 1911. The fourth was made in the Court of Munshi Fateh Bahadur, Munsif, on the 5th February 1914. Munshi Fateh Bahadur had taken over charge at Lucknow on the 21st January 1914 and his powers were then powers to try suits up to Rs. 1,000. He had evidently some reason to suppose that his powers were going to be raised, and as a matter of fact they were raised by an order dated the 21st February 1914 with retrospective effect to the 21st January 1914, and he was given the power to hear suits up to Rs. 2,000. Thus on the 5th February 1914, when the application for execution was presented to his Court he had the power to hear suits up to Rs. 2,000, although the notification authorising him to try suits of the higher value was not published till a few days later. It is clear that the delay in issuing the notification cannot affect his authority on the 5th of February 1914. But it is argued that in any circumstances this application for execution should have been made in the Court of the Subordinate Judge. Reading sections 37 and 38 of Act V of 1908 together, I am of opinion that in such a case as this, where formerly jurisdiction in cases between Rs. 1,000 and Rs. 2,000 was with the Subordinate Judge and subsequently a Munsif was appointed having jurisdiction over the same area with authority over cases from Rs. 1,000 to Rs. 2,000, the authority over such cases previously held by the Subordinate Judge passed automatically to the Munsif, and that the Munsif's Court must be considered, for the purposes of execution, as the Court which passed previous decrees in suits of that nature, although such decrees were, as a matter of fact, passed by the Subordinate Judge. Taking this view, the proceedings of the lower Courts appear to have been regular and their decisions to have been correct. I, therefore, dismiss this appeal. The appellant will pay his own costs and those of the respondent.

Appeal dismissed.

COURT OF THE BOARD OF REVENUE
UNITED PROVINCES.

REVENUE PETITION No. 97 of 1913-14 of
FYZABAD DISTRICT.
November 19, 1914.

Present:—Mr. Tweedy, S. M., and
Mr. Holms, J. M.

BHAGWAN DAT—PLAINTIFF—APPELLANT
versus

RAM DHAN—DEFENDANT—RESPONDENT.

*Ejectment—Trespasser, ejectment of, as sub-tenant—
Tenant-in-chief, ejectment by, of trespasser—Oudh Rent
Act (XXII of 1886), s. 127.*

A tenant-in-chief cannot eject a trespasser as his sub-tenant under section 127 of the Oudh Rent Act it is only the *zemindar* who is entitled to do so.

Badlu v. Ramzan, 4 O. C. 24, referred to.

Appeal from the decree of the Officiating Commissioner, Fyzabad, dated the 31st July 1914, upholding that of the Assistant Collector, Fyzabad, dated the 17th April 1914.

Mr. Muhammad Ayub, for the Appellant.

JUDGMENT.

HOLMS, J. M. (November 13th, 1914.)—This appeal must succeed. Under *Badlu v. Ramzan* (1) a tenant-in-chief cannot eject a trespasser as his sub-tenant under section 127 of the Rent Act. It is only the *zemindar* who can do so.

I would accept the appeal and cancel the notice of ejectment. As appellant is admittedly a trespasser after his legal ejectment, he will bear his own costs throughout.

This judgment will go to the member in charge of the Court of Wards, so that if he thinks fit immediate action may be taken to eject the appellant as a trespasser.

TWEEDY, S. M.—I concur.

Appeal allowed

(1) 4 O. C. 24.

HIRDE v. MUHAMMAD ABDUL HASAN KHAN.

OUDH JUDICIAL COMMISSIONER'S
COURT.

FIRST CIVIL APPEAL No. 72 OF 1914.

May 11, 1915.

Present:—Mr. Stuart, A. J. C., and
Mr. Kanhaiya Lal, A. J. C.

HIRDE *alias* HARDIN AND OTHERS—
DEFENDANTS—APPELLANTS

versus

Raja MUHAMMAD ABDUL HASAN
KHAN—PLAINTIFF—RESPONDENT.

Declaration that defendants are not proprietors or under-proprietors, suit for—Cause of action, accrual of—Revenue Court cancelling notice of ejectment on ground that plaintiff is under-proprietor, effect of—Jurisdiction of Civil and Revenue Courts—Perpetual lease, plea as to—Tenancy, nature of, determination of—U. P. Land Revenue Act (III of 1901), s. 233 (i)—Civil Court, power of—Estoppel—Relief claimed on many grounds—Abandonment of grounds of relief before decision of case, right of party as to.

Although the order of a Revenue Court, passed in a suit to contest a notice of ejectment, to the effect that A is an under-proprietor, is not warranted by the pleadings in the case, yet it gives a sufficient cause of action to the landlord to go to the Civil Court and seek a declaration that A has no superior or inferior proprietary rights. [p. 207, col. 2.]

The plaintiff sued the defendants in the Civil Court for a declaration that the latter had no right, either superior or inferior, in the village, and the defendants admitted that they had no such right but pleaded that they were perpetual *thekadars* in the village. The Court found that the defendants held the land under certain *qubuliats* executed by their ancestors in favour of the predecessor-in-title of the plaintiff and were estopped from setting up a perpetual tenancy:

Held, that in view of the defendants' own admission and the provisions of section 233, clause (i), of the U. P. Land Revenue Act, the Civil Court ought to have passed merely a decree for a declaration that the defendants had no superior or inferior proprietary rights, but was precluded from going into the question as to the nature of the tenancy. [p. 208, col. 1.]

Held, further, that the finding of the Civil Court on the question of estoppel was also erroneous. [p. 208, col. 1.]

It is open to a party, who claims a relief on more grounds than one, to give up any of the grounds at any time he likes before the case is decided. [p. 208, col. 1.]

Appeal from the decree of the Subordinate Judge, Gonda, dated the 14th March 1914.

Pandit Gokaran Nath Misra, for the Appellants.

Syed Wazir Hasan, for the Respondent.

JUDGMENT.—The plaintiff is the superior of *Mauza Munjar Sukul*, which appertains to the *taluqa* of Birwa Mahnon. He sued the defendants for a declaration that the latter had no right, either superior or inferior, in the said village. The defendants

admitted that they had no under-proprietary or superior proprietary rights in that village, but pleaded that they were perpetual *thekadars* of 13 annas 3 pies 11 *kiran's* share and had been in possession and occupation thereof from before the Regular Settlement. They further pleaded that they were declared perpetual *thekadars* by a judgment of the Revenue Court dated the 16th March 1893, and that the plaintiff had no cause of action for the suit. The learned Subordinate Judge found that the defendants held the land under certain *qubuliats* executed by their ancestors in favour of the predecessors-in-title of the plaintiff and were estopped from setting up a perpetual tenancy and that the plaintiff had a good cause of action for the claim. He decreed the suit accordingly with costs.

The main question for consideration in this appeal is, whether the Court below was justified in going into the question of the nature of the tenancy and whether the plaintiff had no cause of action for the relief claimed. It appears that in the year 1320 *Fasli* the plaintiff issued a notice of ejectment against the defendants-appellants alleging that they were in possession of the village under an expired lease. The defendants contested the notice on the ground that they were perpetual tenants of the village by *birt* right and were also in possession as under-proprietors. They subsequently applied to the Revenue Court, withdrawing their claim as under-proprietors, and asking for permission to amend the plaint by removing the words "*Aur ba tariq matahatdari ke qabiz hain*" from it (Exhibit A 2). The Revenue Court disallowed the application as barred by time and proceeded on the strength of some orders passed in previous proceedings to hold that the defendants were in possession of the village as under-proprietors by *dahyak* right (Exhibit 7). It was open to the plaintiff-respondent to have challenged the propriety of that order, in the face of the defendants' own admission that they were not claiming under-proprietary rights, by an appeal to a higher tribunal, but he preferred to go to the Civil Court and sought a declaration that the defendants had no superior or inferior right in the village. The order of the Revenue Court gave the plaintiff a sufficient cause of action for such a suit. We are not concerned with the merits of that order,

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for which, judging from the application for amendment made by the defendants on the 27th May 1912 several days before that order was passed, the defendants were in no way responsible. On the defendants admitting in their written statement that they had no superior proprietary rights or under-proprietary rights, the proper course for the Subordinate Judge would have been to have passed a decree for a declaration that the defendants had no superior proprietary or under-proprietary rights, without going into the nature of the tenancy. Section 233, clause (i), of U. P. Act III of 1901 precluded the Civil Court from determining the class of tenancy to which the defendants belonged. The portion of the judgment dealing with that question will, therefore, be set aside. It is open to a party, who claims a relief on more grounds than one, to give up any of the grounds at any time he likes before the case is decided, and the finding of the learned Subordinate Judge on the question of estoppel is also erroneous. It appears that an attempt was made by the parties to settle the matters in difference between them and had so far succeeded in the Court below at the first hearing of the suit that the defendants agreed to the plaintiff getting a decree that they had no superior proprietary or under-proprietary rights in the village and the plaintiff consented to give up his costs, but the compromise failed because the plaintiff wanted the defendants to give up their claims to a perpetual tenancy in exchange for a tenancy at will (*Vide* the order of this Court dated the 12th December 1913). The plaintiff is, therefore, mainly responsible for the continuance of this litigation.

We dismiss the appeal, so far as it concerns the declaration granted to the plaintiff that the defendants are not entitled to any superior proprietary or under-proprietary rights in the village, but having regard to the fact that the defendants had, prior to the order passed by the Revenue Court, withdrawn their claim in regard to under-proprietary rights and had not set up any such right in this suit, we direct the parties to bear their own costs throughout.

Appeal partly allowed,

COURT OF THE BOARD OF REVENUE,
UNITED PROVINCES.REVENUE PETITION 23 OF 1913-14
OF RAE BARELI DISTRICT.

November 19, 1914.

Present:—Mr. Tweedy, S. M., and
Mr. Holms, J. M.BHAIRON—DEFENDANT—APPELLANT
versus

Lala SHANKAR SAHAI—PLAINTIFF—

RESPONDENT.

Oudh Rent Act (XXII of 1886), s. 107E—Local custom—Land held rent-free at grantor's pleasure—Wajib-ul-arz, entry in, weight of—Muafidars' attestation wanting, effect of.

The entry in a *wajib-ul-arz*, not attested by the *muafidars*, that the land is held rent-free by local custom at the pleasure of the grantor, is not sufficient to establish such custom under section 107E of the Oudh Rent Act, as it is no more than a statement of the wishes of a *Talukdar*.

Dukh Haran Bharthi v. Raja Pirthi Pal Singh, 3 Rev. L. J. 103, referred to

Appeal from the decree of Commissioner, Lucknow, dated the 16th May 1914, upholding that of the Deputy Commissioner, Rae Bareli, dated the 15th October 1913, reversing that of the Assistant Commissioner, Rae Bareli, dated the 9th August 1913.

Mr. *Fakhruddin Hasan*, for the Appellant.

Babu *Hargobind Das*, for the Respondent.
JUDGMENT.

HOLMS, J. M. (*November 14th*, 1914.)—The only evidence that the land is held rent-free by local custom at the pleasure of the grantor under section 107E of the Oudh Rent Act, is the entry in the *wajib-ul-arz* which was not attested by the *muafidars*.

It is no more than a statement of the wishes of a *Talukdar* and, under the ruling in *Dukh Haran Bharthi v. Raja Pirthi Pal Singh* (1), is in itself not sufficient to establish the local custom.

I would set aside the orders of the Appellate Courts and restore that of the Assistant Collector who should proceed to assess rent. Respondent to pay costs in all the Appellate Courts.

TWEEDY, S. M.—I concur.

Appeal allowed.

(1) 3 Rev. L. J. 103.

ABDUS SALAM v. ABDUL RAHMAN.

ODDH JUDICIAL COMMISSIONER'S
COURT.

EXECUTION OF DECREE APPEAL No. 2 OF 1915.
April 20, 1915.

Present:—Mr. Lindsay, J. C.

ABDUS SALAM AND ANOTHER—JUDGMENT-
DEBTORS—APPELLANTS

versus

ABDUL RAHMAN—DECREE-HOLDER

AND OTHERS—JUDGMENT-DEBTORS—

RESPONDENTS.

Jurisdiction of Civil and Revenue Courts—Revenue-paying land, division of—Civil Procedure Code (Act V of 1908), s. 54, O. XX, r. 18—U. P. Land Revenue Act (III of 1901), s. 233—Commissioner, partition by—Parties cannot by their consent confer jurisdiction upon Court—Jurisdiction, plea, as to—Late stage, plea raised at—Court, duty of.

A Civil Court acting through a Commissioner is not competent to make a division of revenue-paying land, although the parties may consent to it, inasmuch as their consent cannot confer a jurisdiction upon that Court to do what it is prohibited to do by section 54 and Order XX, rule 18, Civil Procedure Code, and section 233 of the U. P. Land Revenue Act. [p. 210, cols. 1 & 2.]

A Court is bound to take cognizance of a plea which challenges its jurisdiction, although the plea is raised very late. [p. 210, col. 1.]

Appeal from the decree of the Subordinate Judge, Bara Banki, dated the 23rd December 1914.

Syed Nabi Ullah, for the Appellants.

Mr. Muhammad Wasim, for the Respondents.

JUDGMENT.—The facts of this case are shortly as follows. The parties are related to each other and in the course of a suit which was brought by the respondent-decree-holder, Abdul Rahman, for partition of certain property a compromise was arrived at, which was embodied in a decree dated 25th February 1913. The present appeal has arisen out of proceedings taken in connection with the execution of this decree. The property which was to be divided consisted mainly of shares in revenue-paying lands, and under the terms of the compromise it was agreed, amongst other things, that the partition was to be effected either by the parties themselves, or if they could not agree, through a Vakil named Munshi Sajjad Husain, who was to be appointed as a Commissioner for the purpose. In paragraph 7 of this compromise it was stated that the *amin* (i. e., Munshi Sajjad Husain)

was to assess the land revenue which was to be payable in respect of the 4-annas share of the plaintiff, Abdul Rahman. This revenue, it was declared, would become payable either by the plaintiff himself or through the *lambardar*. There were other conditions in this compromise, some of which relate to the partition of house property. It appears that after this decree had been passed, proceedings were taken by way of execution and Munshi Sajjad Husain was appointed for the purpose of dividing the property. Certain objections were taken to the division effected by Munshi Sajjad, Husain but those were dismissed by the Subordinate Judge of Bara Banki on the ground that Sajjad Husain was acting as an arbitrator and that the parties were bound by his decision. In appeal to this Court, however, it was held that Sajjad Husain's position was not that of an arbitrator but merely that of a Commissioner appointed by the Court. The case was, therefore, sent back to the Subordinate Judge for disposal of the objections. Certain of these objections which were put forward by some of the judgment-debtors have been overruled by the Court below and hence this appeal. One of the objections (which were raised at a very late stage of proceedings) was to the effect that the Commissioner had no authority to carry out a partition of the revenue-paying lands. The Subordinate Judge got over this objection by holding apparently that the parties were bound by the compromise decree and that this compromise conferred a jurisdiction upon the Court to carry out the division of the revenue-paying lands by means of a Commissioner. It is argued here in appeal that if the law forbids the partition of such lands by a Civil Court, then no consent of parties can confer a jurisdiction which the law does not permit to be exercised. In this connection a reference has been made to section 54 of the Code of Civil Procedure and also to the provisions of Order XX, rule 18, of the Code of Civil Procedure. The point seems to me to be perfectly clear and, in my opinion, the decision of the Court below is wrong. Section 54 lays down that where the decree is for the partition of an undivided estate assessed to the payment of revenue

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to the Government, or for the separate possession of a share of such an estate, the separation of the share shall be made by the Collector or any gazetted subordinate of his, deputed by him in this behalf, in accordance with the law, if any, for the time being in force, relating to the partition and the separate possession of shares of such estate. Similarly, provision is to be found in Order XX, rule 18, which lays down that when the Court passes a decree for the partition of property or for the separate possession of a share therein, in the case of land assessed to revenue, the decree is only to declare the rights of the several parties interested in the property, and ought to contain a direction for the partition or separation to be made by the Collector or any gazetted subordinate appointed by him in this behalf. I must hold, therefore, that it is not competent for the Civil Court in this case, acting through the *amin*, Munshi Sajjad Husain, to make a division of such of the property as consists of land assessed to the payment of Government revenue. It is, no doubt, an unfortunate thing that this matter was overlooked, and it is also true, as has been pointed out by the learned Counsel who appears on behalf of the decree-holder-respondent, that the objection was put at a very late stage. Be that as it may, the Court is bound to take cognizance of the plea which challenges the jurisdiction of the Civil Court to effect a partition of revenue-paying lands by an *amin* appointed by the Court or by the parties and the decree cannot be executed in contravention of the express provisions of section 54 of the Code of Civil Procedure. It was sought to be argued that the division of these lands by the Commissioner might be supported on the ground that there was no attempt to distribute the Government revenue over the various shares, but as I have pointed out already, the compromise decree clearly contemplates the ascertainment and assessment of the shares of the revenue which was to be payable in respect of the 4-annas share awarded to Abdul Rahman. Apart from this, however, I think the language of section 54 is sufficiently clear and, in my opinion it prohibits altogether the division of

a revenue-paying estate through any other agency than that of the Collector. I may also refer to the provisions of section 233 of the U. P. Land Revenue Act. Under that enactment the partition of a revenue-paying property into separate shares is a matter which is exclusively reserved to the Revenue Courts. I must, therefore, allow this appeal. The decree, of course, can be executed so far as it relates to division of the house property. The question of any division of houses has not been argued before me. The only objection that has been pressed is with respect to division of revenue-paying land. So far as these latter lands are concerned, the only way the execution of the decree can be obtained is by application by any of the interested parties to the Revenue Courts for partition of the property in accordance with the shares declared by the decree. I, therefore, set aside the order of the Court below. The Subordinate Judge will refer the parties to the Revenue Court for partition of revenue paying lands. I make no order as to the costs of this appeal.

Appeal allowed.

CALCUTTA HIGH COURT.
APPEAL FROM APPELLATE DECREE No. 1051 of
1913.

July 21, 1915.

Present:—Mr. Justice D. Chatterjee and
Mr. Justice Mullick.

NILMONI BEHARA—PLAINTIFF—

APPELLANT
versus

RUKUNA BEWA AND OTHERS—DEFENDANTS
—RESPONDENTS.

Lease, execution and registration of, if sufficient to pass title—Parties, intention of, to be looked to—Findings—Transaction, when complete.

The execution and the registration of a deed are not always sufficient to pass title. It is always a matter of the intention of the parties. [p. 211, col. 1.]

Mauladan v. Rughunandan Pershad Singh, 27 C. 7, referred to.

Where in the matter of an alleged execution of an *istemrari* lease for consideration, it is found that there was no payment of consideration, no delivery of possession and no delivery of the document, the transaction is not complete and no title passes. [p. 211, col. 2.]

SHEO PAL SINGH v. KRIPALA.

Appeal against the decree of the officiating Subordinate Judge of Cuttack, dated the 30th of January 1913, reversing that of the Munsif at Jajpur, dated the 13th of December 1911.

Babus *Provash Chander Mitter* and *Harihar Prasad Sinha*, for the Appellant.

Babu *Sarat Chandra Ghosh* (for Babu *Asutosh Mookerji*) and Babu *Satyendra Nath Mookerji*, for the Respondents.

JUDGMENT.—The plaintiff's case was that defendant No. 1 had executed an *istemrari* lease in his favour for consideration and registered it and put him in possession, but that he had lost the document and been subsequently dispossessed of a part of the lands sold: he, therefore, sued for declaration of title and recovery of possession of some lands and confirmation of possession in respect of others. The defendant's plea that she had executed the document under a misapprehension has been found against her. Her further plea was that the consideration had not been paid and she had taken back the document from the Registration Office and never parted with possession but that the document was lost in a flood. The lower Appellate Court has found that there was no payment of consideration, no delivery of possession and no delivery of the document. It is contended before us that the title of the plaintiff was complete by the registration of the document and he is entitled to a decree even if no consideration was paid and no delivery of possession effected, and that the delivery of the document was not at all material. It is not correct to say that the execution and the registration are always sufficient to pass title; see *Mauladan v. Rughunandan Pershad Singh* (1). It is always a matter of the intention of the parties. In this case the learned Subordinate Judge says: "Now even assuming that there was the delivery of the *patta* it amply appears from the certified copy of the *patta* itself and the oral evidence on the plaintiff's side that it was the intention of the parties that there should be immediate payment of the consideration money", and then finds that the evidence as to the payment of the consideration is unreliable. This being so, we think the learned Subordinate Judge was

right in holding that the transaction was not complete and no title passed. In this view of the case it is immaterial whether the landlord recognised the plaintiff and when he did so. We dismiss the appeal with costs.

Appeal dismissed.

OUDH JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS APPEAL NO. 43 OF 1914.

March 11, 1915.

Present:—Mr. Lindsay, J. C.

SHEO PAL SINGH—OBJECTOR—APPELLANT
versus

Musammal KRIPALA—APPLICANT—RESPONDENT.

Limitation Act (IX of 1908), s. 5—Appeal, presentation of, to wrong Court—Bona fide mistake—Sufficient cause—Saving of limitation—Proper Court, delay in filing appeal to, when excusable—Minor appellant—Counsel not engaged, effect of.

A presentation of an appeal to a wrong Court under a *bona fide* mistake may be sufficient cause within the meaning of section 5 of the Limitation Act. [p. 212, col. 1.]

Dadabhai Jamsetji v. Maneksha Sorabji, 21 B. 552 and *Brij Mohan Das v. Mannu Bibi*, 19 A. 348; A. W. N. (1897) 86, referred to.

Thus, where proceedings were conducted on behalf of a minor appellant by his mother unaided by Counsel and she filed the appeal in a wrong Court but, the memorandum of appeal being returned for presentation to the proper Court, she presented the memorandum to the latter Court beyond the period of limitation:

Held, that the mistake in filing the appeal in the wrong Court was *bona fide* and that the delay in presenting the appeal to the proper Court was excusable. [p. 212, cols. 1 & 2.]

Appeal from the decree of the District Judge, Lucknow, dated the 29th August 1914, upholding that of the Assistant Commissioner, Unao, dated the 9th April 1914.

Mr. K. Darabji and Babu Girja Saran Lal, for the Appellant.

Babu Hargobind Das, for the Respondent.

JUDGMENT.—This appeal has been up before me already. By an order dated 10th December 1914 it was sent back to the Court of the Additional District Judge of Lucknow so that a proper judgment might be written. The short question for disposal is whether or not the appellant here showed good cause to the Additional Judge for the admission of

(1) 27 C. 7.

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an appeal which was undoubtedly presented beyond time. It appears that the case had its origin in the Revenue Court. The appellant, Sheo Pal Singh, as a minor acting under the guardianship of his mother, *Musammât Janaka*, filed an objection to an application for partition brought by a woman, *Musammât Kripala*. The objection undoubtedly raised a question of title, for it was asserted that Kripala had no share in the village by reason of her having become unchaste. The Assistant Collector held that the widow's unchastity was no reason for depriving her of her share. The objection of Sheo Pal Singh was, therefore, dismissed. An appeal was then taken to the Deputy Commissioner, where it was kept pending for some time for various reasons to which I need not refer. Eventually the Deputy Commissioner having had his attention drawn to the matter came to the conclusion that the appeal did not lie to him. He returned the memorandum of appeal for presentation to the Court of the Additional District Judge. The Additional District Judge has held that no good cause within the meaning of section 5 of the Limitation Act has been shown which would justify the entertainment of this appeal beyond the period of limitation. Section 14 of the Limitation Act, of course, cannot help the case of the appellant for that section applies only to suits and applications. But it has been held in various rulings, of which I need refer only to *Dadabhai Jamsetji v. Maneksha Sorabji* (1), that a presentation of an appeal to a wrong Court under a *bona fide* mistake may be sufficient cause within the meaning of section 5 of the Limitation Act. *Brij Mohan Das v. Manu Bibi* (2), which is a Full Bench ruling, is to the same effect. I have looked into the record of this case and I find that the proceedings have been conducted on behalf of this minor appellant by his mother and that no Counsel seems to have been engaged for the purpose of filing the appeal after the Assistant Collector had passed the order dismissing the objection. In these circumstances, I think, it may very well be held in the appellant's favour that the taking of the appeal to the Court of the Deputy Commissioner was a *bona fide* mistake and having regard to all the circumstances I think the

delay in presenting the appeal in the Courts of the Additional Judge may very well be excused. I, therefore, allow this appeal, set aside the order of the Court below and direct the Additional District Judge to entertain the appeal now and dispose of it in accordance with law. I pass no order with regard to costs in this Court.

Appeal allowed.

CALCUTTA HIGH COURT.

LETTERS PATENT APPEAL No. 94 of 1912.

March 18, 1914.

Present:—Sir Lawrence Jenkins, Kt., Chief Justice, and Mr. Justice D. Chatterjee.

NONI GOPAL BASU—PLAINTIFF—

APPELLANT

versus

TARESH CHANDRA GHOSH—

DEFENDANT No. 1—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 66, scope of—Infant, manager of, buying property on infant's behalf, position of—Conduct, fraudulent, effect of—Civil Procedure Code (Act XIV of 1882), s. 317.

Where the manager of an infant used the money of the infant for the purpose of buying property on the infant's behalf at an execution sale, and admitted that the infant was the real purchaser, but maintained that he was able to deprive the infant of the property because of section 317 of the Civil Procedure Code of 1882 (section 66 of the Code of 1908) and the manager's conduct was found to be fraudulent:

Held, that if the manager's contention were the true view, then section 317 of the old Code would be the occasion of a grave fraud, and that section 317 did not furnish any answer to the plaintiff's claim. [p. 213, col. 1.]

Appeal against the decree of the Hon'ble Mr. Justice Richardson, one of the Judges of this Court, dated the 8th of August 1912, in Appeal from Appellate Decree No. 2006 of 1910.

Babu Sarat Chandra Roy Chowdhury, for the Appellant.

Babus Basanta Kumar Bose and Jadu Nath Kanjilal, for the Respondent.

JUDGMENT.

JENKINS, C. J.—In my opinion the judgment of Mr. Justice Richardson cannot stand.

The facts are simple. The manager of an infant used the money of the infant for the purpose of buying property on the

(1) 21 B. 552.

(2) 19 A. 348; A. W. N. (1897) 86.

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infant's behalf at an execution sale. He admits that the infant was the real purchaser, but he maintains that he is able to deprive the infant of the property because of section 317 of the Code of Civil Procedure. If that were the true view, then that section of the Code would be the occasion of a grave fraud. It appears to me that the conduct of defendant No. 1, the manager, was and has been found to be fraudulent and section 317 does not furnish any answer to the plaintiff's claim.

We must, therefore, reverse the judgment of Mr. Justice Richardson and restore the decree of the Subordinate Judge.

Defendant No. 1 must pay the costs of this litigation throughout.

D. CHATTERJEE, J.—I agree.

Judgment reversed.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 248 OF 1913.

March 30, 1915.

Present:—Mr. Lindsay, J. C.

KUNJ BEHARI LAL—DEFENDANT—
APPELLANT

versus

RAM SAHAI—PLAINTIFF AND OTHERS—
DEFENDANTS—RESPONDENTS.

Execution of decree—Decree for mesne profits and costs—Applications, separate, for execution of decree as to costs and as to mesne profits—Court-sale—Lis pendens—Attachment, effect of—Pendent lite proceedings—Sale of property in execution during pendency of suit concerning same property—Auction-purchaser, position of.

Where a decree was passed for mesne profits and costs, and the decree-holder first applied for execution of the decree as to costs only, and afterwards for that of the decree as to mesne profits alone:

Held, that the second application was not in continuance of the first, but that they were quite separate and distinct applications. [p. 215, col. 1.]

The doctrine of *lis pendens* applies to execution sales as well. [p. 214, col. 2.]

A mere attachment of a property does not confer any title upon any one. It only prevents the property being alienated by the person to whom it belongs during the continuance of the execution proceedings. [p. 215, col. 1.]

Execution proceedings taken against a property during the pendency of a suit in respect of the same

property and resulting in a sale of that property sometime after the suit is decreed, are proceeding *pendente lite*, which cannot in any way affect the rights of the decree-holder, although the property may have been under attachment from before the institution of the suit. [p. 215, col. 1.]

Appeal from the decree of the District Judge, Sitapur, dated the 15th March 1913, upholding that of the Subordinate Judge, Sitapur, dated the 7th May 1912.

Babu Ramapat Ram, for the Appellant.

Babu Basdeo Lal, for Respondent No. 1.

JUDGMENT.—The dispute in this case relates to a share of 1 *biswa* 5 *biswansis* of a village called Sarora Khurd. The facts are somewhat complicated and it is necessary to refer to a number of transactions which have led up to the present situation. One Muhammad Husain Khan was the owner of a hamlet called Badal Nagar and also of a 6-*biswas* share in Mauza Sarora Khurd. In the year 1885 he made a mortgage of Badal Nagar and of a 2-*biswas* 10-*biswansis* share in Sarora Khurd to one Nil Kanth. This mortgage was by way of a conditional sale. In the year 1895 Nil Kanth, the mortgagee, was given possession as owner over the whole of the hamlet of Badal Nagar. He was also put in possession as mortgagee of the 2-*biswas* 10-*biswansis* share of Sarora Khurd. In the mutation proceedings which took place in this connection, it seems to have been put on record that the area of the Badal Nagar hamlet was 289 *bighas* 9 *biswas* and on this footing Nil Kanth was given possession. As a matter of fact the total area of Badal Nagar was only 229 *bighas*. In consequence of this, in the year 1900 a suit was brought by Muhammad Husain Khan for the recovery of possession of 60 *bighas* odd. This suit was instituted against the two sons of Nil Kanth, namely, Prag Dat and Sundar Lal. A decree was passed in favour of Muhammad Husain Khan. He was given possession of 60 *biswas* odd and was also awarded costs and mesne profits. On the 27th of May 1901 Prag Dat and Sundar Lal mortgaged the hamlet of Badal Nagar to one Sahdeo. In their mortgage they described the area of Badal Nagar as being 289 *bighas* and 9 *biswas*. The mortgage-deed contained a covenant

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that if by any reason the mortgagee came to lose possession of any portion of this area, the mortgagors were to be liable to give him compensation out of their other property, moveable and immovable. The result of the suit brought by Muhammad Husain Khan was, therefore, to deprive this mortgagee, Sahdeo, of an area of 60 *bighas*. On the 9th of November 1906 one Kunj Behari took a mortgage of the half of Badal Nagar from Sundar Lal and in February 1907 he redeemed the mortgage which had been executed in favour of Sahdeo on the 27th of May 1901. Having done this Kunj Behari, on the 16th of February 1907, brought two suits. One of these suits was against Sunder Lal. This was a suit for possession of one half of Badal Nagar based upon the mortgage executed in his favour by Sunder Lal on the 9th of November 1906. The second suit was against Prag Dat. This was a suit for possession of the other half of Badal Nagar on the strength of the mortgage in favour of Sahdeo which the plaintiff, Kunj Behari, had redeemed. In this latter suit Kunj Behari alleged that 60 *bighas* out of Badal Nagar had been lost by reason of the decree obtained by Muhammad Husain. Prag Dat was liable to give him compensation to the extent of his share. He, therefore, asked for possession of 1 *biswa* and 5 *biswansis* of Sarora Khurd, that being the share which was in possession of Prag Dat as mortgagee. Both these suits of Kunj Behari were decreed on the 23rd of April 1907 and he was awarded possession of Badal Nagar and of the 1-*biswa* 5-*biswansis* share of Sarora Khurd in the month of June in that year. We have now to consider certain proceedings which were taken subsequent to the decree passed in favour of Muhammad Husain Khan. It has already been mentioned that Muhammad Husain obtained a decree not only for possession of 60 *bighas* of Badal Nagar but also for costs and mesne profits. He assigned his interest in this decree, so far as it concerned the costs and mesne profits, to one Fakir Muhammad and in the month of December 1906 Fakir Muhammad put in an application for execution of so much of the decree as related to costs. He asked for attachment of property belonging to the judgment-debtors including the share in this village of Sarora Khurd. These execution proceedings were dealt with in a file which is described

as File No. 386 of 1906. I have not before me the full record of what took place in these execution proceedings, but at any rate there is upon the record a copy of the attachment order which was issued in this case. In March 1907 Fakir Muhammad made another application for execution of the decree which had been assigned to him. This time he was seeking execution so as to recover the amount of Rs. 500 odd which had been awarded as mesne profits. In this application, which is contained in a separate Execution File No. 76 of 1907, Fakir Muhammad asked for attachment of the property which had already been put under attachment in pursuance of his application of December 1906. It would seem that attachment had not been raised in the meantime. In pursuance of this latter application for execution of the decree for mesne profits the mortgagee rights of Prag Dat and Sundar Lal in *Mauza* Sarora Khurd were sold and purchased by one Ram Sahai for Rs. 2,405-4. The date of this purchase was the 25th of July 1907. Ram Sahai is the plaintiff in this case and his claim is that by reason of this purchase at auction he is entitled to possession of the property he purchased. On the contrary Kunj Behari, who was the third defendant in the case, pleads that he is entitled to retain possession as against Ram Sahai by virtue of the decree which he obtained against Prag Dat in the month of April 1907. He pleaded that Ram Sahai's purchase having been made *pendente lite* cannot, in any way, affect his (Kunj Behari's) right under the decree which he had obtained. Both the Courts below rejected this defence and decreed the plaintiff's claim. It is contended here that the decision of the Courts below was wrong, that it ought to have been held that the doctrine of *lis pendens* applied to the plaintiff's purchase and that he was bound by the decree which had been passed in favour of Kunj Behari. In my opinion both the Courts below are wrong. There can be no doubt whatever that the application for execution which led to the sale of this property purchased by the plaintiff, Ram Sahai, was made while the suit brought by Kunj Behari against Prag Dat was still pending. The Court of first instance (Subordinate Judge) refused to entertain this plea of *lis pendens*,

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on the ground that this second application for execution was merely a continuation of the execution application which had been presented by Fakir Muhammad in the month of December 1906. I am unable to accept this view of the matter. It seems to me quite clear that there were two distinct and separate applications for execution and that it cannot be said that the second application was in continuation of the first. The first application was for execution to satisfy the decree for costs. The second application which was dealt with entirely separately was an application for execution of the decree for mesne profits. There can be no dispute that the doctrine of *lis pendens* applies to execution sales, and it seems to me quite clear, therefore, that the execution proceedings which were taken during the pendency of Kunj Behari's suit and which resulted in a sale to the plaintiff, Ram Sahai, of the property in dispute some months after Kunj Behari had actually got his decree, were proceedings *pendente lite* which cannot be allowed in any way to affect the rights which Kunj Behari got under his decree of April 1907. Even if it be assumed that the second application was an application in continuation of the first application of December 1906, I do not see how that alters the situation. It may be that the property in suit was attached in consequence of that first application and that that attachment was still continuing at the date when the second application for execution was made, but the mere attachment of the property does not confer any title upon any one. It only prevents the property being alienated by the person to whom it belongs during the continuance of the execution proceedings. Fakir Muhammad acquired no title to this property by putting it under attachment and so it is difficult to understand how this auction-purchaser, Ram Sahai, can, in any way, set up a right against the right which Kunj Behari obtained under his decree. A number of authorities were cited to the Judge of the lower Appellate Court—authorities which he thought it was not necessary for him to consider inasmuch as he agreed with what he calls "the broad view" taken by the Court of

first instance. In my opinion this "broad view" was entirely erroneous. I can see no reason whatever why Ram Sahai should be held to be in a position to insist upon possession as against the prior title of the appellant, Kunj Behari—a title which, according to the doctrine of *lis pendens*, could in no way be affected by the proceedings which ended in the purchase made by Ram Sahai.

I, therefore, accept this appeal, set aside the order of the Court below and direct that the suit of Ram Sahai be dismissed with costs. The defendant-appellant, Kunj Behari, is entitled to his costs against Ram Sahai in all three Courts.

Appeal accepted.

ALLAHABAD HIGH COURT.
SECOND CIVIL APPEAL No. 1175 OF 1914.
July 19, 1915.

Present:—Sir Henry Richards, Kt.,
Chief Justice, and Justice Sir
P. C. Banerji, Kt.

NATHU AND ANOTHER—PLAINTIFFS—
APPELLANTS
versus

Musammat GOKALIA AND ANOTHER—
DEFENDANTS—RESPONDENTS.

Agra Tenancy Act (II of 1901), s. 22—Succession—Occupancy holding—Collateral—Full male owner of occupancy right died prior to Act II of 1901—Widow, death of, after enforcement of new Act—Devolution of tenancy.

P, who was an occupancy tenant, died prior to the passing of Act II of 1901. His widow succeeded to his holding. The widow died leaving a daughter while Act II of 1901 was in force. The collaterals of P sued the daughter for possession of the holding and some of them alleged to have been in joint cultivation with P:

Held, that the plaintiffs could not succeed to the holding after the death of the widow. [p. 216, col. 1.]

Deoki Rai v. Parbati, 23 Ind. Cas. 100, followed.
Musammat Sumari v. Jageshwar, 20 Ind. Cas. 7;
Dulari v. Mul Chand, 5 Ind. Cas. 384; 7 A. L. J. 293;
32 A. 314, referred to.

Second appeal from the decision of the District Judge of Moradabad, dated the 20th May 1914.

Mr. M. L. Agarwala, for the Appellants.

Mr. Mohan Lal Sandal, for the Respondents.

JUDGMENT.—This appeal arises out of a suit in which the plaintiffs claimed posses-

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sion of an occupancy holding. The holding at one time belonged to one Parbhu. He died before the present Tenancy Act came into force. He was succeeded by his widow, who remained in possession for a number of years and died after the present Act came into force. The plaintiffs alleged themselves to be brothers and nephews of Parbhu, and two of them allege that they were joint in cultivation with Parbhu. The principal defendant is the daughter of Parbhu. The Court of first instance dismissed the plaintiff's suit and this decision was affirmed by the lower Appellate Court.

On behalf of the appellant the case of *Musammal Sumari v. Jageshar* (1) has been cited; also an unreported decision in Second Appeal No. 1148 of 1914. On the other side the case of *Dulari v. Mul Chand* (2) and also the case of *Deoki Rai v. Parbati* (3) are cited. It seems to us that the plaintiff in a suit for ejectment had to prove a title vested in him which gave him a right to the possession of the land in dispute. Section 22 of the Agra Tenancy Act provides for the devolution of the interest of an occupancy tenant, but it is perfectly clear from the language of the section that it only provides for such devolution where the tenant dies after the passing of the Act. If we regard Parbhu's widow as the full tenant of the occupancy holding, the plaintiffs have no right, because they are not the male lineal descendants of Parbhu's widow, nor did they share in the cultivation with her. If we consider that Parbhu was the last full tenant and that his widow only succeeded to a widow's estate, then it seems to us that section 22 of the Tenancy Act has not provided for the devolution in such a case. It is admitted that at the time of Parbhu's death the present plaintiffs could not have succeeded even if Parbhu left no widow. In the unreported case to which reference has been made a learned Judge of this Court says, "the Board of Revenue appears to have taken a decided view that in circumstances like the present a succession would be governed by the provisions of section 22 of Act II. of 1901". We doubt if this statement is quite accurate. So far as we are aware the practice of the Board of

Revenue is to look upon the party who has succeeded to the occupancy holding as the "full tenant". We have pointed out that even if this be the true aspect, the plaintiffs would have no right to succeed. We think that in principle the present case is governed by the case of *Deoki Rai v. Parbati* (3). We think that the view taken by the Courts below was correct and ought to be affirmed. We accordingly dismiss the appeal with costs.

Appeal dismissed.

ODDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 92 OF 1914.

February 24, 1915.

Present:—Mr. Lindsay, J. C., and

Mr. Kanhaiya Lal, A. J. C.

NARENDRA BAHADUR SINGH AND

ANOTHER—PLAINTIFFS—APPELLANTS

versus

Haji ABDUL HAQ AND OTHERS—

DEFENDANTS—RESPONDENTS.

Hindu Law—Joint family property—Evidence, nature of—Self-acquired property, when becomes joint property—Nucleus of joint family property, accretion to—Son's liability to pay father's debts—Debts contracted for immoral purposes—Proof, nature of.

In order to establish that a certain property constitutes joint Hindu family property, it must be shown that the property falls within one or other of the three classes, viz., (1) ancestral property, *i. e.*, property inherited from a direct male ancestor, (2) property acquired by the members of a joint family by or with the assistance of joint funds or by their joint labour, and (3) property originally self-acquired but afterwards voluntarily thrown by the owner into the joint stock with the intention of abandoning all separate claims upon it. [p. 217, col. 2.]

Very strong evidence is required to prove that the property falls in class (3) mentioned above. Thus, it cannot be established that the property which had come to a father as self-acquired became the joint property of the family consisting of himself and his sons, merely from the fact that they lived together. [p. 218, col. 1.]

A self-acquired property obtained previously to an ancestral property cannot be said to have accreted to the nucleus of joint family property formed by that ancestral property, although it may be proved to have been voluntarily thrown into the joint stock. [p. 218, col. 1.]

General allegations as to a father's immorality cannot exempt the sons from their liability to dis-

(1) 20 Ind. Cas. 7.

(2) 5 Ind. Cas. 384; 32 A. 314; 7 A. L. J. 293.

(3) 23 Ind. Cas. 100.

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charge the father's debts, unless they prove that the particular debts in question were contracted for immoral purposes [p. 218, col. 2.]

Appeal from the decree of the Subordinate Judge, Bara Banki, dated the 30th May 1914.

Mr. *St. George Jackson*, for the Appellants.

Babu *Jiban Krishna Banerjee*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit brought by the two plaintiffs-appellants against five defendants. The fifth defendant in the case was the father of the plaintiffs by name Babu Ram Singh. The first four defendants were persons who had obtained money-decrees against Babu Ram Singh and were seeking to execute those decrees by sale of certain villages which, they alleged, belonged to Babu Ram Singh. One of the plaintiffs in the suit is a minor. The claim put forward on behalf of the plaintiffs was that the property in suit consisting of three villages, Akhyapur, Alladadpur and Muhammadpur, constituted joint family property in which they had shares amounting to 2/3rds, while the remaining 1/3rd share was owned by the fifth defendant, their father. In paragraph 3 of the plaint it was alleged that the decree obtained against Babu Ram Singh by the defendants Nos. 1 to 4 had been got in respect of debts which Babu Ram Singh had contracted with them for immoral purposes. The plaintiffs, therefore, pleaded that they were in no way liable for the discharge of these debts and that no property of theirs could be taken in execution of decree to satisfy them. The lower Court dismissed the suit. It found that the villages referred to in the plaint were not joint property of the plaintiffs and the defendant No. 5. With regard to the debts the Subordinate Judge was of opinion that although it had been shown that Babu Ram Singh was a man of licentious habits, the plaintiffs had failed to prove that any of the particular debts in respect of which decrees had been obtained by the defendants Nos. 1 to 4 had been incurred for immoral purposes. The plaintiffs have appealed. We think their appeal must be dismissed on the finding of the Court below that the villages which the plaintiffs claimed to be the joint family property of themselves and their father are not joint family property. The position with respect

to these villages is very clear. It appears that they belonged to the *taluka* of Akhyapur which was originally in possession of Bhikham Singh, whose name was entered in Lists 1 and 3 of the Lists prepared under section 8 of Act I of 1869. After Bhikham Singh's death this *taluka* descended to his son, Lal Bahadur Singh. Lal Bahadur Singh was the maternal grandfather of Babu Ram Singh and it is admitted that Babu Ram Singh came into possession of the villages now in suit under a Will executed by Lal Bahadur Singh. The Will was dated the 24th of December 1888 and it appears from the documentary evidence on the record that two at least of these villages now in suit were entered in the revenue registers in the name of Babu Ram Singh in October 1889. There can be no contention, therefore, that on the history of these villages they are in any way ancestral property in the hands of Babu Ram Singh. As is pointed out by Mr. Mayne in his work on Hindu Law, 7th Edition, paragraph 275, *et seq.*, co-parcenary property falls into three classes. In the *first* class we have ancestral property, that is to say, property which a man inherits from a direct male ancestor. In such property some acquire an interest by birth. *Next*, the property may be joint property without having been ancestral. For example, the case in which members of a joint family acquire property by or with the assistance of joint funds or by their joint labour, and *thirdly*, there is the case of property which being originally self-acquired may become joint property by being voluntarily thrown by the owner into the joint stock with the intention of abandoning all separate claims upon it. In order to succeed in proving that the property in suit constituted joint family property it was for the plaintiffs to show that it falls within one or other of these three categories. Plainly it does not fall within the first category, for it is not property which had been inherited from a direct male ancestor. Neither can it be said to be joint property acquired with the assistance of joint funds or by the joint labour of members of a joint family. Obviously no question of the expenditure either of funds or of labour belonging to the joint family could arise in a case where a man acquires property as here under a Will. *Lastly*, it appears to us that there can be no ground for hold-

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ing that this property, which was undoubtedly in its inception self-acquired, was ever thrown by the owner into the joint stock with the intention of abandoning separate claims upon it. Very strong evidence would be needed to make out a case of this kind and the most we can find on the record is that the fifth defendant and his two sons, the plaintiffs, have been living together. This, in the case of a father and his sons, is what would naturally be expected. But it cannot be inferred from the fact that, because Babu Ram Singh keeps his sons in the house and maintains them, it is established that the property which came to Babu Ram Singh as self-acquired property has thereby become the joint property of the family. An attempt was made in the Court below to show that the property here in suit should be treated as an accretion to joint property, which was already in the family. It seems that in the course of some litigation regarding the estate of his own father, Babu Ram Singh by means of a compromise got possession of a village called Pandapur and we have been asked to hold, therefore, that this village of Pandapur constitutes a nucleus of joint family property to which the villages now in suit have accreted. It has, however, been pointed out by the Subordinate Judge that Pandapur did not come into Babu Ram Singh's possession until after he had got possession of the villages now in dispute; and this disposes of the argument to the effect that the property now in question accreted round a nucleus of property consisting of the village of Pandapur. We find no evidence at all which would justify us in assuming that the villages regarding which this suit has been brought have ever been voluntarily thrown into the joint stock. Indeed as observed by the lower Court in its judgment, it would be difficult to say that there was any joint stock at all belonging to the plaintiff and the fifth defendant, into which this property could be thrown. We are satisfied that the property in suit is in no way joint property and that consequently the plaintiffs were not entitled to have any relief by way of declaration such as they sought. It is not necessary for us to discuss the other issue involved in the case at any length. But we agree with the Subordinate Judge in holding that until definite evidence is forthcoming that a

particular debt was incurred for immoral purposes the sons cannot claim to be exempted from their liability to discharge it. General allegations as to the immorality of their father would not entitle them to have relief of this kind.

The appeal fails and is dismissed with costs.

Appeal dismissed.

ODDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 15 OF 1913.

February 24, 1915.

Present:—Mr. Lindsay, J. C., and

Mr. Kanhaiya Lal, A. J. C.

RAM ASRE AND OTHERS—DEFENDANTS—
APPELLANTS

versus

Raja MUHAMMAD ABUL HASAN
KHAN—PLAINTIFF AND OTHERS—DEFENDANTS
—RESPONDENTS.

Under-proprietary rights, claim for—Settlement decree for dahyak—Possession of land not owing to decree for dahyak, effect of—Dahyak, right to, whether confers under-proprietary right in land—Cause of action—Declaration that defendant is not under-proprietor, suit for—Adverse possession—Lessee—Tenancy, class of, determination of—Jurisdiction of Civil and Revenue Courts.

Where a Settlement Court does not pass a decree for under-proprietary rights or for sub-settlement but merely for *dahyak* rights, and the decree-holder's continued possession of land is not by virtue of that decree, he has no right to possession of land as distinguished from the right to *dahyak* decreed to him. [p. 220, col. 2.]

Deputy Commissioner, Gonda v. Bhagwan, 2 Ind. Cas. 297; 12 O. C. 124 and *Parneshar Dat v. Raja Mohammad Abul Hasan Khan*, 13 Ind. Cas. 809; 14 O. C. 335, referred to.

Where the plaintiffs in a suit to contest a notice of ejectment claim to be under-proprietors of the land, and the notice is cancelled by the Revenue Court on the finding that they have greater rights than those of a mere tenant, such decision of the Revenue Court affords a good cause of action to the landlord to go to the Civil Court for a declaration that the plaintiffs do not possess any under-proprietary rights. [p. 220, col. 2.]

Amrit Lal v. Jang Bahadur Singh, 11 Ind. Cas. 920; 14 O. C. 196, referred to.

A lessee cannot set up under-proprietary rights by adverse possession. [p. 220, col. 2.]

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The determination of the class of tenancy to which a tenant belongs, is exclusively cognizable by the Revenue Courts [p. 220, col. 2.]

Appeal from the decree of the Subordinate Judge, Gonda, dated the 13th December 1912.

Babu Ishuri Dayal, for the Appellants.

Mirza Sami Ullah Beg, for Respondent No. 1.

JUDGMENT.—The dispute in this case relates to *Manza* Datai, which forms a part of Birwa Mahnon Estate. The plaintiff is the superior proprietor of an 8-annas share in the said village by purchase from Ardawan Singh and has acquired the remaining 8-annas share by purchase at auction in execution of a decree against Achal Ram during the pendency of this suit. The defendants-appellants claim to be the under-proprietors of the said village. The plaintiff sought to eject them through the Revenue Court, treating them as tenants-at-will, but was unsuccessful. The present suit was filed by him to obtain a declaration that the contesting defendants had no right to hold possession of the village as superior proprietors or under-proprietors. The learned Subordinate Judge found against the defendants and decreed the claim.

The main grounds urged in the appeal are that the defendants-appellants are entitled to under-proprietary rights in the village by virtue of a Settlement decree dated the 1st February 1872 and by reason of their prescriptive possession for more than 12 years, that the plaintiff has no cause of action for the suit and that he is in any case not entitled to a decree in regard to more than an 8 annas share owned by him on the date of the suit.

It appears from the judgment of the Extra Assistant Commissioner dated the 22nd December 1870 that Sheo Sahai Misra, the predecessor-in-interest of the defendants-appellants, sued *Musammam* Sarfaraz Kunwar, the predecessor-in-interest of the plaintiff, for *pukhtadari* or sub-settlement of the village, basing his claim on a *birt jangal tarashi*, said to have been granted him in 1205 *Fasli* by *Musammam* Jura Kunwar, the then proprietor of the village (Exhibit 4). It was asserted that the claimant had been in continuous possession of the village from 1250 to 1263 *Fasli* and that the *talukdar* gave *haq dahyak*, when he held the land under *kham tahsil*. The existence of the alleged under-proprietary right was denied by the Court of Wards, which took charge

of the Birwa Mahnon Estate on the death of *Musammam* Sarfaraz Kunwar. The Extra Assistant Commissioner found that the claimant had failed to establish the *patta* or grant on which he relied and had not succeeded in proving that any *dahyak* dues were realized by him. He accordingly dismissed the claim. On appeal the Commissioner of the Fyzabad Division set aside that order and gave a decree in the following terms:—"There seems quite sufficient reason to believe that the *patta* for 1262-63 is genuine and taken in connection with other documentary evidence substantiates the appellants' claim to *dahyak*. *Dahyak* in *Manza* Pura Datai, Pargana Gonda, is decreed to appellant, order of the lower Court modified accordingly" (Exhibit 5). It is obvious from this order that what the Commissioner did was to modify the order of the Court of first instance in so far as to decree the claim for *dahyak* without disturbing the decree of the Court below, disallowing the sub-settlement. Sheo Sahai Misra appears to have thereafter continued in possession of the village under the lease of 1262-63, which the Commissioner had affirmed, and his successor, Khushi Ram Misra, subsequently renewed the tenancy by executing other leases in favour of the Court of Wards on the 15th December 1872 and the 23rd April 1878, agreeing to pay the rents secured by the said leases for the periods therein mentioned. The *taluqa* thereafter passed into the possession of Achal Ram, who in 1890 applied for the issue of a notice of ejectment against Jaddu Misra, Bhagwan Din Misra and other persons who had succeeded to the holding. Jaddu and Bhagwan Din contested the notice of ejectment on the ground that they were not tenants but *birtdars*, holding under a decree of the Settlement Court dated the 1st February 1872 and entitled to claim all *zemindari* rights, including *mal* and *sayer*. The Court of first instance upheld the notice, but on appeal the Board of Revenue cancelled it on the ground that the appellant held "a decree for *daswant* from the Settlement Court, having been in possession of the village before and at Settlement and ever since; and being *prima facie* possessed of rights superior to those of a tenant [as defined in section 4 (10) of the Rent Act] ought not to be ejected by notice under section 53 of the Act" (Exhibit A10).

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It is conceded on behalf of the defendants-appellants that their names were never recorded in respect of the village in question in the under-proprietary register, but they continued to pay the rent reserved to the *talukdar* after deducting the *dahyak* decreed to them by the Settlement Court. No decree for under-proprietary rights or sub-settlement was passed in their favour, and as held in *Deputy Commissioner, Gonda v. Bhagwan* (1) though rights to *dahyak* and *daswant* are in a sense under-proprietary rights, a right to a cash *nankar* or to *dahyak* or *daswant* does not necessarily connote a right to possession of land as under-proprietor or in any other capacity. In *Parmeshar Dat v. Raja Mohammad Abul Hasan Khan* (2), where certain persons brought a suit in the Settlement Court for sub-settlement on the assertion that they held the village in *birt* tenure and their claim for sub-settlement was disallowed and all that they were held entitled to was a decree confirming their existing possession, coupled with a condition that the *talukdar* was always to retain the power of fixing their rent and of renewing the lease, subject to an allowance of 10 per cent. on account of *dahyak* on the rent fixed by the *talukdar*, and there was a further condition that if they refused to accept the terms they were to be paid 10 per cent. out of the annual rental received by him, it was held that whether or not the right to receive *dahyak* was heritable and transferable, a right of possession, such as was conferred by the above decree, was in no sense so. The possession of the defendants-appellants and their predecessors-in-title continued in this case by virtue of the *patta* for 1262-63 *Fasli* and the leases of 1872 and 1878 above referred to, and no connection is shown to have existed between the right of *dahyak* under the decree of the Settlement Court and their right to possession of the village under the decree aforesaid. The *patta* of 1262-63 *Fasli* has not been filed, and in the face of the Settlement decree which merely grants a right to *dahyak*, we are not prepared to hold that the defendants-appellants are entitled to the possession of under-proprietary rights in the land of the said village as

distinguished from the right to *dahyak* decreed to their ancestor.

The plaintiff has a good cause of action for the suit, inasmuch as *zemindari* or under-proprietary rights were set up in the ejectment proceedings which preceded the suit. In *Amrit Lal v. Jang Bahadur Singh* (3), where the plaintiffs in a suit to contest a notice of ejectment claimed to be under-proprietors of the land, and the notice was cancelled by the Revenue Court on the finding that they had greater rights than those of a mere tenant, it was held that the decision of the Revenue Court afforded a cause of action to the landlord to go to the Civil Court for a declaration that the plaintiffs did not possess any under-proprietary rights.

No question of adverse possession or of limitation arises in this case, because the possession of the defendants-appellants and their predecessors-in-title has continued under the leases already referred to. An assertion of an under-proprietary title in face of the Settlement decree and the leases cannot invest the defendants-appellants with a right inconsistent with that under which they entered into possession. We are not concerned with the determination of the class of tenancy to which the defendants-appellants belong, for its determination is exclusively within the cognizance of the Revenue Courts.

The appeal is, therefore, dismissed with costs.

Appeal dismissed.

(3) 11 Ind. Cas. 920; 14 O. C. 196.

ODDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 30 OF 1914.

February 9, 1915.

Present:—Mr. Justice Stuart, A. J. C.

CHANDAN SINGH—PLAINTIFF—
APPELLANT

versus

BHABHUTI SINGH—DEFENDANT—
RESPONDENT.

Hindu Law—Reversioner, nearest—Evidence, nature of—Property, claim to—Descent and legitimacy, essential

(1) 2 Ind. Cas. 297; 12 O. C. 124.

(2) 13 Ind. Cas. 809; 14 O. C. 335.

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elements for establishment of claim, effect of—*Legitimacy*
—*Burden of proof*.

A person claiming as the nearest reversioner to a deceased Hindu must establish that there is no intermediate heir in existence with a better claim to succeed to the property of the deceased than he asserts. [p. 221, col. 2.]

Mathura Prasad Singh v. Bhulan Singh, 14 Ind. Cas. 339; 15 O. C. 364, referred to:

Where a plaintiff comes forward to claim property and his descent and legitimacy is a necessary element for the establishment of his claim, he is in the absence of the defendant's acquiescence bound to prove his descent and legitimacy. [p. 222, col. 1.]

Aparbal Singh v. Narpat Singh, 23 Ind. Cas. 972; 1 O. L. J. 89, distinguished from.

Appeal from the decree of the Subordinate Judge, Unao, dated the 12th November 1913.

Mr. A. P. Sen, for the Appellant.

Pandit Gokaran Nath Misra, for the Respondent.

JUDGMENT.—A certain Meharban Singh died about the year 1888 leaving landed property to which his widow, Mithana Kuar, succeeded. She died on the 27th February 1909. Meharban Singh was the son of Laik Singh. Laik Singh had a brother, Pem Singh. On the death of Mithana Kuar, Bhabhuti Singh and Chandika Singh succeeded to the property as the sons of Pem Singh. The present suit has been brought by Chandan Singh with his transferees, and he claims to succeed to the property on the following allegations:—

He alleges that he is the legitimate son of Bahadur Singh; that Bahadur Singh's grandfather, Pirthi Singh, and Laik Singh's grandfather, Khushal Singh, were own brothers, being the sons of Partab Singh, and that he is the nearest reversioner to Meharban Singh, Bhabhuti Singh and Chandika Singh being on his allegation the illegitimate sons of Pem Singh.

The learned Subordinate Judge has found that Chandan Singh has failed to establish that the line of Pahar Singh, another brother of Khushal Singh and Pirthi Singh, is extinct, that there were two descendants of Pahar Singh by name Gulab Singh and Champa Singh who, if they were alive, would be nearer reversioners to Meharban Singh than Chandan Singh could be, and that Chandan Singh has failed to show that Gulab Singh or Champa Singh is dead. Further he has found that Chandan Singh has failed to establish that he is the legitimate son of

Bahadur Singh. On these two findings he dismissed the suit. Chandan Singh and his transferees have filed the present appeal.

The learned Counsel for the appellant admits that it was necessary for Chandan Singh to establish, in accordance with the principles laid down in *Mathura Prasad Singh v. Bhulan Singh* (1), that there is no intermediate heir in existence with a better claim to succeed to the property of Meharban Singh than he asserts. But he argues that on the evidence on the record it should be found that Gulab Singh and Champa Singh are dead, and that the claims of Khetal Singh and Bharat Singh having been dismissed in a previous suit, Chandan Singh has established that he is the nearest reversionary heir to Meharban Singh on the allegation that Bhabhuti Singh and Chandika Singh are illegitimate.

The evidence adduced by the appellant upon this point is both inadequate and untrustworthy and has been rightly discredited by the learned Subordinate Judge. That evidence consists in the main of the deposition of a certain Din Dyal Brahman, who appears to me, as he appeared to the learned Subordinate Judge, to be an absolutely unreliable witness. The learned Counsel for the appellant can only support his argument, apart from the evidence of this witness, by asking this Court to draw deductions from the fact that no claim has been brought on behalf of Gulab Singh or Champa Singh to this property, to the effect that both these men must be dead. No legal deduction or presumption arises upon any of the facts brought out in evidence on which it could be possibly found that either of these men is dead. Therefore, upon this point alone the appeal must fail. But in addition, the appeal fails upon another point. Chandan Singh has not been able to establish that he is the legitimate son of Bahadur Singh. The other side denied that he was the son of Bahadur Singh, either legitimate or illegitimate, and the burden of proof was distinctly upon him to establish his legitimacy. The learned Counsel for the appellant has drawn my attention to a decision of this

(1) 14 Ind. Cas. 339; 15 O. C. 364.

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Court, *Aparbal Singh v. Narpal Singh* (2), and asks me to form, on the principles enunciated in that decision, the conclusion that in this particular case it was not for Chandan Singh to prove his legitimacy but for the other side to prove his illegitimacy. The facts in that case were not similar to the facts in the present case. There it was laid down that in a case in which certain persons sued for the redemption of a mortgage on the ground that they were the sons of one of the mortgagors and the other side did not contest their legitimacy directly in the written statement, but only asserted that they were not the representatives of the mortgagor, and in which the evidence showed that they had been recognized as the legitimate sons of the mortgagor and had succeeded to his property as his legitimate sons, the burden of proof was on the mortgagees to establish in an unequivocal manner that they were not the legitimate sons. But here the case is very different. The defendants deny all knowledge of Chandan Singh. They say that they do not know who he is, or who is his father, and they put him to the proof, as they had every right to do, to establish his claim, one necessary element for the establishment of the claim being that he is the legitimate son of Bahadur Singh. In such a case as this in which a man comes forward to claim property, he has usually in absence of acquiescence to establish his descent and his legitimacy, and, therefore, the burden of proof was rightly placed upon Chandan Singh. He called several witnesses to establish his legitimacy.

The learned Subordinate Judge has discussed the evidence that he has produced at considerable length, and it is not necessary for me to do more than indicate generally the conclusion at which I have arrived as to the value of this evidence.

The first witness whom he called was a certain Pohkar. The learned Subordinate Judge has pointed out strong defects in the evidence of Pohkar and those defects are apparent. I consider that he was justified in discrediting the evidence of Pohkar absolutely. The next witness is Din Dayal who, as I have already found, gave unreliable evidence as to the deaths of Gulab

Singh and Champa Singh. His evidence with regard to the legitimacy of Chandan Singh is equally unreliable. The next witness was Rukmin, the mother of Chandan Singh. She made many slips in her evidence which would be hardly possible if she were telling a true story. For example, she stated that Khushal Singh, Bahadur Singh's father, was alive at the time of her marriage. I agree with the learned Subordinate Judge that it is satisfactorily established that Khushal Singh had died before the date of the alleged marriage. It is not only for this reason that I find her evidence unreliable. It is sufficient to say that I do find it absolutely unreliable. This is all the direct evidence as to the marriage between Bahadur Singh and Rukmin.

The remaining evidence led to prove the legitimacy of Chandan Singh is evidence led to prove the treatment of his mother and himself as the wife and legitimate son of Bahadur Singh. The first witness on this point was a certain Kuar Singh who showed himself ready to swear to practically anything that he thought would help Chandan Singh's case and whose evidence was rightly rejected as of no value. The next witness on the point was a certain Bhure Singh. His evidence is palpably false as he swore to what had happened at Chandan Singh's marriage, and it is admitted that Chandan Singh has never been married. The next witness was Becha Singh, who flatly contradicted what he stated in his evidence during the mutation proceedings, and who is as false a witness as Bhure Singh. The evidence of the remaining witnesses Menda Singh and Kundan Lal, carries no weight as to Chandan Singh's legitimacy. On this evidence it is impossible to find that Chandan Singh has established that he is the legitimate son of Bahadur Singh, and thus his case must fail. As Chandan Singh's case has failed on the facts, it is not necessary for me to go into the question whether the learned Subordinate Judge was or was not right in finding that the defendants had been unable to prove that they were the legitimate sons of Pem Singh. Chandan Singh has failed to establish his title as the legitimate son of Bahadur Singh.

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dismissed. The appellants will pay their own costs and those of the respondents.

Appeal dismissed.

OUDH JUDICIAL COMMISSIONER'S
COURT.

CIVIL REVISION PETITION No. 164 of 1914.

March 18, 1915.

Present:—Mr. Lindsay, J. C.

JWALA PRASAD—DEFENDANT—

APPLICANT

versus

BACHCHA RAM—PLAINTIFF—OPPOSITE
PARTY.

Contract Act (IX of 1872), s. 70—Contract, alleged, not proved—Compensation, reasonable, for work done—Court, right of, to grant relief.

Where the plaintiff alleged a contract under which the defendant had employed him to negotiate a loan on a promise to pay him a certain commission, and it was found that he had really done the work for the defendant but he failed to prove the alleged contract:

Held, that having regard to the provisions of section 70 of the Contract Act, the plaintiff was nevertheless entitled to a reasonable compensation for the work done by him. [p. 224, col. 1.]

Application against the order of the District Judge, Gonda, dated the 7th September 1914, modifying that of the Munsif, Gonda, dated the 4th July 1914.

Mirza Sami Ullah Beg, for the Applicant.

Mr. S. P. Kain, for the Opposite Party.

JUDGMENT.—These are cross-applications in revision. They are directed against an order passed by the District Judge of Gonda in an appeal which was preferred to him by one Jwala Prasad. The facts are as follows. Jwala Prasad was the defendant in the Court of first instance. The suit against him was brought by Bachcha Ram who claimed to recover Rs. 300 on the business on an alleged contract. The story was that Jwala Prasad, being in need of money and having occasion to raise a loan of Rs. 15,000, employed the plaintiff, Bachcha Ram, to negotiate the loan on a promise to pay him 2 per cent. commission. The plaintiff's case was that in pursuance of this contract he managed to raise the loan of Rs. 15,000 on mortgage from one Prag at the rate of 6 per cent.

per annum. The mortgage was executed, the money was advanced, and the allegation was that the defendant refused to pay the plaintiff his commission. The defence was that there was no such agreement for commission, and it was stated by the defendant that he had negotiated the loan himself and that the plaintiff had done nothing for him. The Munsif who tried the case found that the contract alleged by the plaintiff was proved and he, therefore, gave the plaintiff a decree for Rs. 300. On appeal to the District Judge it was held that the plaintiff had not established by satisfactory evidence that there was any contract between himself and the defendant for the payment of the commission at the rate of 2 per cent., but the learned Judge found, and there is plenty of evidence on the record to support the finding, that the plaintiff had done work for the defendant in connection with the raising of this loan and, in short, that had it not been for the exertions of the plaintiff, the defendant would not have been able to procure the loan on such favourable terms. Consequently, although the learned Judge was unable to find that a contract according to the terms alleged by the plaintiff was proved, he was of opinion that the plaintiff was entitled to a reasonable compensation for work done. I understand this judgment of the learned Judge to be based upon the principle which is recognised in section 70 of the Contract Act. Both parties come here in revision. The defendant's case is that as the Judge found that the plaintiff had failed to establish the contract set up by him, he ought to have dismissed the claim altogether. On the other hand the plaintiff by way of reply states that the Judge ought to have found that the contract was established. This contention, however, is not open to the plaintiff in these proceedings and in fact it was admitted that the plaintiff would not have applied for revision had not the defendant filed an application for revision before him. I have listened to the argument of Counsel and have come to the conclusion that there is no ground upon which I should be justified in interfering in revision. I do not think it is open to the defendant's Counsel to argue that the Judge was bound to dismiss the suit *in toto* because the plaintiff had failed to prove

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the terms of the agreement relating to the compensation for work done. It seems to me that on the materials before him the Judge was entitled to grant the plaintiff any relief to which he considered he had a right and I can see no reason in law why the Judge should not have taken action under section 70 of the Contract Act and given to plaintiff the decree he did. I am clearly of opinion that there is no case of the learned Judge having acted in the exercise of his jurisdiction illegally or with material irregularity. The result is that I dismiss both these applications for revision with costs.

Application dismissed.

OUDH JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION PETITION No. 13 OF 1915.
April 13, 1915.

Present: —Mr. Lindsay, J. C.

Syed NAZIM HUSAIN —DEFENDANT—

APPLICANT

versus

Lala MAHABIR PRASAD — PLAINTIFF—
OPPOSITE PARTY.

Mortgage-deed, interpretation of—Construction of document—Personal liability of mortgagor—Remedy provided for satisfaction of mortgage-debt—Transfer by way of sale—Mortgagor covenanting to be personally liable in case of dispute as to or defect in title to property, effect of—Payment of mortgage-money within fixed period, promise as to.

The question of the personal liability of a mortgagor depends upon the construction of the instrument in each case, the test being the remedy provided for the satisfaction of the mortgage-debt. [p. 225, col. 1.]

Where the remedy provided for the satisfaction of the mortgage-debt is transfer of the mortgaged property by way of sale to the mortgagee, there is no personal liability on the part of the mortgagor to pay. Nor can such liability be inferred from a provision in the mortgage-deed that in case of there being any dispute as to the title to the mortgaged property or in case of any defect in title coming to light the mortgagor would be personally liable, so long as no such contingency has arisen. Nor does a mere promise to pay the money within a certain fixed period import the liability, for such a covenant is entered into in every form of mortgage. [p. 224 col. 2; p. 225, col. 1.]

Musammatt Kuraishi Begam v. Mumtaz Mirza, 3 Ind. Cas. 871; 12 O. C. 275 and *Kalka Singh v. Paras Ram*, 22 I. A. 65; 22 C. 434, referred to.

Appeal from the decree of the Officiating Subordinate Judge, Fyzabad, dated the 14th November 1914, exercising Small Cause Court powers.

Babu Jiban Krishna Banerji, for the Applicant.

Babu Basdeo Lal, for the Opposite Party.

JUDGMENT.—This is an application under section 25 of the Provincial Small Cause Courts Act for revision of an order passed by the Subordinate Judge of Fyzabad sitting in the exercise of his Small Cause Court jurisdiction. The facts appear to be as follows. On the 21st July 1911 the defendant, who is the applicant here, executed a mortgage by way of conditional sale in favour of the plaintiff for a sum of Rs. 300. The document was not registered and consequently the plaintiff brought this suit in the Small Cause Court for the recovery of principal and interest amounting in all to Rs. 416 and odd. The principal issue for decision in the case was whether the defendant was personally liable. The defence which was set up was based upon a ruling of this Court reported as *Musammatt Kuraishi Begam v. Mumtaz Mirza* (1). That was a case in which a suit similar to the present was brought. There was in that case also a mortgage by conditional sale. The deed had not been registered and a suit was brought to enforce the personal contract. It was held, with reference to the language of that deed that the defendant was not personally liable and that the suit could not succeed. The Judge of the Court below has attempted to distinguish the facts of the case now before me and the case reported as *Musammatt Kuraishi Begam v. Mumtaz Mirza* (1), and on his construction of the mortgage-deed there was personal obligation upon the mortgagor to re-pay the mortgage-debt. I am wholly unable to agree with the interpretation which the Court below has put upon the instrument and I am of opinion that he has altogether failed to distinguish the present case from the one to which a reference has already been made. The learned Subordinate Judge laid hold of a certain clause in the mortgage-deed, which provided that in case of there being any dispute as to the title to the mortgaged property or in case any defect in title should come to light the mortgagor was to be personally responsible. But it is quite clear that in the present instance no such contingency has arisen so as to render the mortgagor personally liable. In short, the case for the mortgagee was that the

(1) 3 Ind. Cas. 871; 12 O. C. 275.

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money had not been re-paid and that he was, therefore, entitled to recover it personally from the mortgagor. The view of the case taken by the Judge of the Court below is, in my opinion, wrong. As is explained in the reported case above-mentioned, a mere promise to pay the money within a certain fixed period does not import a personal liability, for such a covenant is entered into in every form of mortgage. The test is, what is the remedy provided for the satisfaction of the mortgage-debt in each case. A reference was made in this case to a decision of their Lordships of the Privy Council reported as *Kalka Singh v. Paras Ram* (2). There it was held that the question of the personal liability of the mortgagor must depend upon the construction of the instrument in each case. In the present case, the remedy provided for the satisfaction of the mortgage-debt was the transfer by way of sale to the mortgagee. I am unable to hold that there was any personal liability on the part of the mortgagor to pay. I allow this application, therefore, set aside the decree of the Court below and direct that the plaintiff's claim be dismissed with costs. The plaintiff opposite party will pay the applicant's costs of revision in this Court.

Application accepted.

(2) 22 I. A. 68; 22 C. 434.

MADRAS HIGH COURT.

FIRST CIVIL APPEAL No. 310 OF 1913.

April 26, 1915.

Present:—Sir John Wallis, Kt., Chief Justice, and Mr. Justice Coutts-Trotter.

G. DORAISAWMY PILLAI AND ANOTHER—
PLAINTIFFS—APPELLANTS

versus

SANDANATHAMMAL AND OTHERS—

DEFENDANTS—RESPONDENTS.

Trust—Gift for charitable purpose—Construction of document—Cypres doctrine of, when applicable.

If a gift is for a charitable purpose the question is, is the testator's intention to promote some specific and well-defined purpose and that only, or is there a general charitable intention, which the testator wishes to carry out in a particular way, in which latter case the Court will give effect to his wishes *cypres*. [p. 226, col. 2; p. 229, col. 1.]

A deed creating a charity and providing for its conduct by competent members of the family is void for uncertainty as it is difficult to ascertain who are the competent members. [p. 227, col. 1.]

Webb's case, 1 Roll. Ab. 609 (D) 1.

An Indian Christian executed two deeds of trust under the first of which he gave certain property to a *chattaram* which he recited as having been built by himself. The *chattaram* was in fact never built, and the property was, with the acquiescence of the settlor, applied to a purpose quite different to that of the trust. In a suit by the plaintiffs claiming as trustees under the deed for recovery of the property, the subject of the trust:

Held, that the purpose of the trust failed as the *chattaram* did not come into existence, and as no general charitable intention could be gathered from the deeds, the doctrine of *cypres* did not apply. [p. 227, col. 1; p. 229, col. 2.]

Appeal against the decree of the Court of the Temporary Subordinate Judge of Trichinopoly, in Original Suit No. 21 of 1913.

FACTS of the case appear fully from the judgment.

Messrs. T. Ranguchariar and T. Narasimha Iyengar, for the Appellants:—Exhibit A contains a general charitable intention. The gift of property to a non-existing charity certainly implies such an intention. Jarman on Wills, Volume I; *Rymer, In re; Rymer v. Stanfield* (1); *Mann, In re, Hardy v. Attorney-General* (2); *Wallis v. Solicitor General for New Zealand* (3); *Davis, In re, Hannen v. Hillyer* (4); *Sinnett v. Herbert* (5); *Sheo Prasad v. Aya Ram* (6) and *Sheoratan Kunwari v. Ram Pargash* (7).

Messrs. K. Srinivasa Iyengar and T. Arumainatham Pillai, for the Respondents:—Exhibit A only evidences a gift *in presenti* to an institution which does not exist, but which gift, however, is to operate when it came into existence. The gift is, therefore, conditional on the institution coming into existence and since it never came into existence, the gift lapsed. *Loscombe v. Wintringham* (8); *Clergy Society, In re* (9); *Maguire*,

(1) (1895) 1 Ch. D. 119; 64 L. J. Ch. 86; 12 R. 22; 71 L. T. 590; 43 W. R. 87.

(2) (1903) 1 Ch. D. 232; 72 L. J. Ch. 150; 51 W. R. 165; 87 L. T. 734.

(3) (1903) A. C. 173; 72 L. J. P. C. 37; 38 L. T. 65; 19 T. L. R. 230.

(4) (1902) 1 Ch. D. 876; 71 L. J. Ch. 459; 86 L. T. 292; 50 W. R. 378.

(5) (1872) 7 Ch. Ap. 232; 41 L. J. Ch. 388; 16 L. T. 7; 20 W. R. 270.

(6) 29 A. 663; A. W. N. (1907) 210; 4 A. J. 565.

(7) 18 A. 227 at p. 232; A. W. N. (1896) 37.

(8) 13 Beav. 87; 51 E. R. 34; 88 R. R. 432.

(9) 2 K. & J. 615; 69 E. R. 928; 110 R. R. 396.

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In re (10); *Biscoe v. Jackson* (11); *Wilson, In re, Twentyman v. Simpson* (12); *In re University of London Medical Sciences Institute Fund, Fowler v. Attorney-General* (13); *White's Trusts, In re* (14); *Cherry v. Mott* (15); *Clark v. Taylor* (16); *Russell v. Kellett* (17); *Chamberlayne v. Brockett* (18), Jarman on Wills, Volume I, pages 241, 243 and *Corbyn v. French* (19).

JUDGMENT.

WALLIS, C. J.—This is a suit by the plaintiffs claiming as trustees under two deeds of trust, Exhibits A and B, executed in the years 1851 and 1853 by the deceased Selvanayagam Pillai, a Roman Catholic Christian, to recover from the defendants possession of the suit properties, which are alleged to be the subject of the trust. The Subordinate Judge has found that it was not the intention of Selvanayagam to create any trust by these instruments, and that if it was otherwise, the trust was merely for the maintenance of the institution therein referred to, a *chattram* on the Tanjore Road in Trichinopoly alleged to have been built by the settlor, that this purpose failed as the institution never came into existence and that, as no general charitable intention can be gathered from the deeds, there is no occasion for applying the *cypres* doctrine and the gifts must be held to have failed and a resulting trust to have arisen for the settlor and his heir.

According to the translation of Exhibit A given by the Subordinate Judge, the property was given as *sarvamanyam* (or endowment) "to the *chattram* which I have built for charity in the new road to Tanjore opened

by the Engineer, Mr. Lapport, east of Varaganeri village and near the Vayakōndan river, for the expenses of the upkeep and maintenance of the said *chattram* and for the daily feeding of poor *paradesis* in the said *chattram*." *Paradesi* means stranger and is frequently applied to the Hindu religious mendicants who wander about the country and to pilgrims. Now it is quite clear that the object of the charity which was not varied by Exhibit B, was the maintenance of the *chattram* at that particular spot and the feedings of *paradesis* there. As already stated, the settlor had not constructed any such *chattram* at the date of the deed, Exhibit A, and did not do so subsequently and in fact there never was any such *chattram*. It may be that at the time he intended to construct one, and that he afterwards abandoned the idea because, as suggested somewhere in the evidence, the local *Brahmins* successfully opposed the grant of a site for the building, or as alleged in Exhibit I, because his female grandchild subsequently gave birth to a son. However this may be, it is quite clear the *chattram* never came into existence and that the gift under Exhibits A and B cannot be applied for the specific charitable purpose therein stated. We are asked, however, to hold that Exhibits A and B indicate a general charitable intention on the part of the settlor and the Court is invited to give effect to it *cypres*. Assuming that the decisions of the English Courts on this subject are applicable here as part of the rules of justice, equity and good conscience, I think that, as observed by Kennedy, L. J., in *In re University of London Medical Sciences Institute Fund, Fowler v. Attorney-General* (13), the question is correctly stated in Theobald on Wills, 7th Edition, at page 373: "If the gift is for a charitable purpose, the question is, is the testator's intention to promote some specific and well-defined purpose and that only, or is there a general charitable intention, which the testator wishes to carry out in a particular way," in which latter case, the Court will give effect to his wishes *cypres*. On the facts I do not think that any such general intention is sufficiently made out. *Chattrams* or feeding places for poor *paradesis*, mostly religious mendicants, were to be found on all the main roads in pre-railway days and it was

- (10) 9 Eq. 632; 39 L. J. Ch. 710; 18 W. R. 623.
- (11) 35 Ch. D. 460; 56 L. J. Ch. 540; 56 L. T. 753; 35 W. R. 554.
- (12) (1913) 1 Ch. D. 314; 82 L. J. Ch. 161; 108 L. T. 321; 57 S. J. 245.
- (13) (1909) 2 Ch. 1 at p. 9; 78 L. J. Ch. 562; 100 L. T. 423; 53 S. J. 302; 25 T. L. R. 358.
- (14) 55 L. J. Ch. 701; 33 Ch. D. 449; 55 L. T. 162; 34 W. R. 771; 50 J. P. 695.
- (15) 40 E. R. 323; 1 Myl. & Cr. 123; 5 L. J. Ch. (N. S.) 65; 43 R. R. 156.
- (16) 1 Dr. 642 at p. 644; 61 E. R. 596; 1 W. R. 476; 21 L. T. (O. S.) 287; 94 R. R. 786.
- (17) (1855) 3 Sm. & Giff. 264; 2 Jur. (N. S.) 132; 65 E. R. 653; 107 R. R. 32.
- (18) (1872) 8 Ch. Ap. 206; 42 L. J. Ch. 368; 28 L. T. 248; 21 W. R. 299.
- (19) 31 E. R. 213; 4 Ves. 418; 4 R. R. 254.

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probably thought that one was required at the place indicated on the new road from Trichinopoly to Tanjore opened by the Engineer Mr. Lapport as mentioned in Exhibit A. At the same time this form of charity is not likely to have appealed very strongly to an Indian Christian, and when the settlor came forward to supply the want, he was probably actuated by a desire to show his munificence and public spirit and to enhance his consideration with his fellow-citizens of all classes who joined in attesting these deeds. Subsequently in circumstances which cannot now be precisely ascertained, he abandoned the intention of erecting the *chattram* for the maintenance of which provision was made in these deeds, and shortly before his death and most probably with his knowledge and at his suggestion, part of the endowment was diverted to the support of a convent of nuns of his own religion. In the circumstances, I do not think we should be warranted in finding that he had any general charitable intention of feeding religious mendicants elsewhere than at the institution to be founded by him which never came into existence. A great many English decisions have been cited, but in none of them did the facts resemble those of the present case and I do not think it necessary to refer to them. They show, however, that the general charitable intention must be clearly made out and this, I think, has not been done.

There is one point taken for the respondents which it is desirable to notice. It is said the plaintiffs are not entitled to claim to succeed to the trusteeship under Exhibit B, as the settlor had no power to alter the succession to the office of trustee provided for in Exhibit A, which did not reserve any power of revocation. Exhibit A provided that after the settlor's decease those members of his family who were competent to manage the affairs of the said *chattram* should manage it. It seems to me that this was bad for uncertainty and did not preclude the founder from subsequently exercising his right in Exhibit B to provide for the succession to the trust. In Jarman on Wills, Volume I, Chapter, XIV, III, page 470, there is a reference to *Webb's* case (20) where it was held

that if a man devise to twenty of the poorest of his kindred, this is void for uncertainty who may be adjudged the poorest. I think the provision in Exhibit A is void for the same reason, and that the Court cannot be required to undertake an investigation as to the competency of the various members of the family to manage the endowment. However, the appeal fails on the other grounds and must be dismissed with costs.

COUTTS-TROTTER, J.—This was a suit brought by the plaintiffs as descendants of one Gnanamuthu Pillai, otherwise known as Appavu Pillai, to have themselves declared the trustees of certain property which originally belonged to a Native Christian convert called Selvanayagam Pillai, and to be put in possession of it. Their title, if any, rests on two documents filed as Exhibits A and B in the suit. By the first, which is described as a deed of charity, dated 3rd April 1851, Selvanayagam Pillai purported to devote the suit lands as "*manyam* (i.e., endowment) to the *dharma chattram* (choultry or rest house for charitable purposes) constructed in my name by me. ...For the maintenance of the charity of the *chattram* constructed for the purposes of charity by me in the new road to Tanjore and for the daily feeding of poor *paradesis* (mendicants) in the said *cha'tram*." The document goes on to provide that the settlor shall manage the charity during his life-time, and that after his death "those members of my family who are competent to manage the affairs of the said *dharma chattram* shall manage the said charity." Selvanayagam Pillai procured the signature of upwards of 50 persons to this document, among them Brahmins, Muhammadans and Native Christians. Three years later he executed the second document, Exhibit B, described as a *karar* or agreement, dated the 7th February 1854, and this document was also executed by his daughter, Vedanayagam Ammal. It recites the former donation to the *dharma chattram* and allocates a further Rs. 10,000 worth of Government securities to the fund. It proceeds to vary the provisions of the former deed with regard to the management of the charity, which is now vested in the settlor and his daughter for their lives, and after the decease of the survivor of them is

(20) 1 Roll. Ab. 609 (D) 1.

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to pass to Gnanamuthu Pillai and his sons.

The facts proved or admitted are set out in the findings of the learned Subordinate Judge. We are not seriously pressed to disturb them nor do I see any reason for doing so. They disclose a somewhat remarkable history. Selvanayagam Pillai had not in fact built any *chattram* at the time he executed Exhibit A, nor did he afterwards at any time build one or provide any fund for doing so. Selvanayagam Pillai died some time in 1858. On the 4th June 1858, by a deed of that date (Exhibit C), Vedanayagam Ammal conveyed the Government securities dealt with by the agreement of 7th February 1854 (Exhibit B) to the Catholic Bishop of Madura as a charitable gift to a nunnery in his diocese. There is no direct evidence to show whether Selvanayagam Pillai was alive or not at the date of the last alienation; but, as will be seen hereafter, there is good reason for thinking that he was and that he concurred in it. The next piece of evidence is a document executed by Vedanayagam Ammal on the 31st July 1884 (Exhibit I); this document could only in the first instance be admissible as against the defendants but both parties crave it in aid and agree that its recitals, in so far as they are statements of fact, are reliable. From them we can complete the history. Shortly before the death of Selvanayagam Pillai, his grand-daughter, Thangathammal, the daughter of Vedanayagam Ammal, gave birth to a male child, there being up to that time no male in the family in the direct line of descent. Selvanayagam Pillai thereupon finally abandoned his design of building a *chattram*, gave the Government securities to the nunnery, and in the words of his daughter in Exhibit I "reserved the land as usual for the maintenance of the family." This must mean that he resolved to do so, not that he executed any document purporting to have that effect. The first document purporting to affect the lands was Exhibit I itself, executed by Vedanayagam Ammal in 1884, whereby she conveyed them to her grandson and another male relative, from whom the present defendants derive their title. Finally, an attempt was made at the trial to prove that both Selvanayagam Pillai and Vedanayagam Ammal fed poor

pariales at their house, despite the non-existence of the *chattram*. The learned trial Judge heard the evidence as to this, and characterised it as contradictory and unworthy of belief and I accept his finding of fact that nothing of the kind ever took place. Vedanayagam Ammal remained in possession of the land and personal enjoyment of its proceeds till her death in December 1910. In April 1912 the plaintiffs instituted the present suit. The learned Subordinate Judge dismissed their suit on a variety of grounds, and they have appealed to this Court against that dismissal.

The substantial question for our determination is whether the documents of April 1851 and February 1854 constituted a good and valid charitable gift; or whether the gift failed with a resulting trust for the benefit of the settlor, by reason either that it was intended for a particular purpose which could not be carried out, or that it never was and never was intended to be a valid charitable gift *ab initio*. Of one matter, I may dispose at once. It was said on behalf of the respondents that even if there were a good charitable gift, it was incompetent to the present plaintiffs to sue, as they were not in any event the persons entitled to be trustees, Selvanayagam Pillai having settled the devolution of the trusteeship by the deed of 1851, and having thereby rendered it incompetent to himself to vary the devolution by the later document of 1854 upon which the plaintiffs' claim to be trustees rests. The settlor's first appointment was of "those members of my family who are competent to manage the affairs of the said *dharma chattram*." I think that such an appointment, in the absence of a designated tribunal to determine what persons were competent, was too vague to be enforceable, and that the settlor's hands were free to make a subsequent valid appointment. This objection, therefore, fails.

On the main question, in the course of two learned and exhaustive arguments, most, if not all, of the English cases on the subject were brought to our notice. Mr. K. Srinivasa Aiyangar indeed entered upon that field under protest and with this large reservation that we ought to give the go-by to all the English cases and consider ourselves as

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unfettered by them. He urged that the English Courts adopted a principle of construction in regard to charitable trusts which was at variance with the principles applied in all other matters; that this was due to the historical accident of the past connexion of charitable trusts with the Anglican Church and the civil law which that Church favoured; and that Indian Courts should determine such matters in the light of "justice, equity and good conscience." Accepting this to be so, I nevertheless think that a construction beneficent to a *bona fide* charitable gift is in accordance with justice, equity and good conscience; and I am ready to follow the English cases, whether they be binding on me or not, as guides to those desirable goals. The principle of the English decisions is clear, though its application may be difficult, and it is concisely stated by Kindersley, V. C., in *Clark v. Taylor* (16): "There is a distinction well-settled by the authorities. There is one class of cases in which there is a gift to charity generally, indicative of a general charitable purpose, and pointing out the mode of carrying it into effect; if that mode fails, the Court says the general purpose of charity shall be carried out. There is another class in which the testator shows an intention not of general charity, but to give to some particular institution; and then if it fails, because there is no such institution, the gift does not go to charity generally." This is the principle which we have to apply, and I do not think any useful purpose would be served by a detailed examination of reported cases in which it has been applied to different words in other documents. Such a proceeding seldom offers much enlightenment, and is particularly unlikely to do so in the present case, which has one feature in it which, so far as I know, is unique and particular to itself. In this case the settlor purported to endow an institution which not only did not exist, but which he knew not to exist and which nevertheless he recited to exist and to have been founded by himself. That circumstance is so remarkable that, in my opinion, it must dominate any construction of the deed. It is said for the appellants that that consideration is conclusive as ascribing to the settlor a general charitable intention; he settled property to feed certain persons in a *chattram*, the *chattram* to his knowledge did not exist, therefore, his

paramount intention must have been to feed the designated class of persons. That at first sight is a cogent argument, but I do not think it is sound. In the first place, the document itself continuously harps on the *chattram*: the lands are given "as *manyam* to the *chattram*;" the *chattram* is the one "constructed in my name"; the gift is "for the maintenance of the charity of the *chattram*"; the purpose is that of feeding "any mendicant in the *chattram*;" the lands "have been given for the expenses of the said *chattram*;" the affairs to be managed by the trustees are "the affairs of the said *dharma chattram*." This language all seems to suggest that what Selvanayagam Pillai had in mind was a *chattram* built in a particular spot, bearing his name, and standing as an outward and visible monument of his beneficence to the community. His position as a well-to-do Hindu Christian convert, and his anxiety to get men of all creeds and classes to witness his deed support the same conclusion. Moreover, if his intention be supposed to have been generally charitable, who were to be the objects of his charity? If and when the *chattram* came into being, they became ascertainable at once—such mendicants as choose to avail themselves of its shelter. The *chattram* when built would have a definite limit of accommodation and a definite site. But in its absence what mendicants are to be fed? There is nothing to limit the gift to mendicants from all over India, to mendicants in the district or to mendicants in the village. It may be assumed that he intended to build a *chattram* at the date of the deed of gift, and because of that intention he spoke of it as a thing already done. But I think that there is equally little doubt that his gift was what he described it to be, an endowment of that particular contemplated *chattram*; and he made it solely with a view to its employment in the *chattram*; and that in the absence of the *chattram* there was no general charitable purpose actuating him, inasmuch as without its existence the objects of the charity are incapable of limitation or ascertainment. In fact he revoked his intention of building the *chattram*; and with that revocation, I think that the deed of the gift which was conditional on the erection of the *chattram* falls to the ground. I think, therefore, that assuming Selvanayagam Pillai to have intended a charitable

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gift, it became incapable of attainment, and that the plaintiffs' appeal fails. This is sufficient to dispose of the case on the view most favourable to the plaintiffs; but it is impossible not to feel grave doubts as to whether any *bona fide* charitable gift was intended at all. Sham gifts to charities are often made in India to keep property out of the reach of creditors, actual or potential. It is difficult to see why a Native Christian should found a charity for the benefit of a class of persons of whom the great majority if not the whole would be Hindu or Muhammadan devotees; indeed some would translate '*paradesi*' as meaning 'religious mendicant.' The false recital of the existence of a *chattram* is also a circumstance of grave suspicion. Nor are the doubts raised at the origin of the alleged charity in any way resolved by the subsequent conduct of the settlor. He not only took no steps whatever to carry out his charitable intention, but within a few years of his gift was dealing with the property as if no charitable gift were in existence. However, though the whole translation is full of suspicion, it is unnecessary to decide against its genuineness, and my construction is adverse to the plaintiffs even on the assumption that it was genuine.

The appeal fails and is dismissed with costs.

Appeal dismissed.

ODDH JUDICIAL COMMISSIONER'S COURT.

EXECUTION DECREE APPEAL NO. 4 OF 1915.
February 24, 1915.

Present:—Mr. Stuart, A. J. C.

ALI MUHAMMAD—AUCTION-PURCHASER—
APPELLANT
versus

ALIA KHANUM—JUDGMENT-DEBTOR AND
ANOTHER—DECREE-HOLDER,—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 151, O. XXI, r. 84—Deposit of one-fourth purchase-money, time for, extension of—Sale officer—Court-sale vitiated by failure to deposit one-fourth purchase-money—Confirmation of sale, order for, when bad—Transferee from bidder—Auction-purchaser—Court, power of, to set aside its own order—Limitation.

An officer conducting a Court-sale has no authority to extend the time in which the purchaser can under Order XXI, rule 84, Civil Procedure Code, deposit 25 per cent. of the purchase-money, which has to be deposited *immediately*. [p. 230, col. 2.]

A failure to deposit anything out of 25 per cent of the purchase-money under Order XXI, rule 84 Civil Procedure Code, vitiates the sale *ab initio*. [p. 231, col. 2.]

Bhim Singh v. Sarwan Singh, 16 C. 33; *Ahmad Bakhsh v. Lalta Prasad*, 28 A. 238; A. W. N. (1905) 263; *Munshi Mahomed Ali Mia v. Srimati Kiberia Khatun*, 9 Ind. Cas. 66; 15 C. W. N. 350; *Intizam Ali Khan v. Narain Singh*, 5 A. 316; A. W. N. (1883) 38 and *Amir Begam v. Bank of Upper India, Limited*, 30 A. 273; A. W. N. (1908) 107; 5 A. L. J. 336, referred to.

An order confirming a Court-sale in favour of a transferee from the bidder, who himself alleges not to be the actual purchaser, is erroneous, as the transferee is not the auction-purchaser. And a Court making such order has every right to set it aside under the provisions of section 151, Civil Procedure Code, when the error comes to its notice, and no question of limitation arises in such a case. [p. 232, col. 1.]

Appeal against the order of the District Judge, Lucknow, dated the 8th January 1914, upholding that of the Additional Munsif, Lucknow, dated 5th December 1914.

Mr. Manmohan Nath Chak and Syed Shahanshah Husain, for the Appellant.

Mr. P. C. Bhattacharji and Babus Bhairon Prasad and Salig Ram, for the Respondents.

JUDGMENT.—In execution of a decree a certain house was attached and brought to sale. On the 11th July 1914 the house was knocked down to a certain Wilayat Husain for Rs. 110. Under the provisions of Order XXI, rule 84, it was incumbent upon Wilayat Husain to pay a deposit of Rs. 27-8 immediately after he was declared to be the purchaser. He did not pay that deposit and the officer conducting the sale apparently endeavoured to extend the time in which the deposit could be paid, for I find that he issued a notice to Wilayat Husain directing him to deposit the money by the 17th July 1914. The officer conducting the sale had no authority to extend the time. The words of the rule are clear. The amount of the deposit has to be paid immediately; the rule does not direct that it is to be paid within a time to be fixed by the officer conducting the sale. The officer again extended the time to the 18th July 1914. Wilayat Husain, after having received notice that it was necessary for him to deposit the amount of Rs. 27-8 by the 18th July 1914 at latest, made no appearance and made no deposit, and on that day the Court passed an order that the property should be re-sold after issuing a fresh sale-proclamation and that Wilayat Husain would be held responsible for the deficiency in price, if any.

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On the 23rd July 1914 Wilayat Husain filed an application stating that he had not been bidding on his own behalf but on behalf of the decree-holder, and that he was not responsible for the payment of anything. The Court refused to consider his application and a fresh sale-proclamation was issued directing a re-sale on the 25th July 1914. On the 23rd July Wilayat Husain put in another application stating that he had transferred his rights as auction-purchaser to Ali Muhammad (who was not the decree-holder) and that Ali Muhammad would deposit the purchase-money, and asked that Ali Muhammad's tender should be accepted and that a sale-certificate should be issued to Ali Muhammad. Ali Muhammad put in a tender and was ordered to deposit the money. On the 28th July 1914 Ali Muhammad presented another tender. On the 1st August 1914 the Court issued an order that notice was to issue to the judgment-debtor for the 11th August 1914 to show cause why the sale in favour of Ali Muhammad should not be confirmed. Service of this notice on the judgment-debtor (who is a *pardanashin* lady) was made by affixing the notice on her house. She did not appear and made no objection, and on the 11th August 1914 the sale was confirmed in favour of Ali Muhammad. The sale was thus confirmed in favour of a person who had never made a bid at all and who was not even the alleged principal of the last bidder. The last bidder, Wilayat Husain, had not complied with the imperative direction of Order XXI, rule 84, in the matter of depositing 25 per cent. of the purchase-money. He subsequently came forward and alleged that he had been bidding on behalf of the decree-holder and that he had no interest in the matter. No permission had apparently been obtained by the decree-holder under Order XXI, rule 72, for bidding at the sale. But even overlooking these points and assuming (though there is no reason why such an assumption should be made) that Wilayat Husain had been bidding on behalf of the decree-holder and that the decree-holder had a right to bid, it is difficult to understand how the lower Court could have seen reason to confirm the sale in favour of Ali Muhammad. According to Wilayat Husain he was not the purchaser. The decree-holder was the purchaser. But the decree-holder had not transferred the house to Ali Muhammad.

Wilayat Husain, who on his own showing had no title to transfer the house, was the person who transferred it to Ali Muhammad. Thus Ali Muhammad without any legal transfer in his favour, without having made a bid and without having taken any part in the sale, or complied with any of the provisions of the Code, was declared to be the purchaser of the house. There has been considerable argument before me as to whether a failure to deposit the 25 per cent. of the purchase-money is merely irregular or whether such failure vitiates the sale *ab initio*. In favour of the view that such an omission is a mere irregularity, the learned Counsel for the appellant has quoted the decisions in *Bhim Singh v. Sarwan Singh* (1), *Ahmad Bakhsh v. Lalta Prasad* (2) and *Munshi Mahomed Ali Mia v. Srimati Kiberia Khatun* (3). In support of the opposite view the decisions in *Intizam Ali Khan v. Narain Singh* (4) and *Amir Begam v. Bank of Upper India, Limited* (5) have been put forward. According to the two latter decisions the omission to deposit one-fourth of the purchase-money vitiates the sale *ab initio*, and the decision in *Mahomed Ali Mia v. Srimati Kiberia Khatun* (3) goes to support that view in a case such as this in which the bidder has never deposited anything. There may be some difference of opinion as to whether the fact that a deposit has been made late or whether the fact that one-quarter of the purchase-money has been deposited inadvertently, constitutes more than an irregularity. But there is no difference of opinion as to the fact that a failure to deposit anything vitiates the sale. But apart from this the order confirming the sale in favour of Ali Muhammad was absolutely erroneous. Ali Muhammad was not the bidder and in no circumstances could he be declared an auction-purchaser at a Court-sale. At the best he might have been considered the transferee from the auction-purchaser at a Court-sale. But in such case the sale-certificate should have been given to the auction-purchaser and not to the transferee. For the above reasons

(1) 16 C. 33.

(2) 28 A. 238; A. W. N. (1905) 263.

(3) 9 Ind. Cas. 66; 15 C. W. N. 350.

(4) 5 A. 316; A. W. N. (1883) 38.

(5) 30 A. 273; A. W. N. (1908) 107; 5 A. L. J. 336.

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I have no hesitation in deciding that the order of 11th August 1914 confirming the sale in favour of Ali Muhammad is insupportable, and that no sale has ever taken place.

I next come to the question whether the Court had a right to set it aside. No question of limitation arises here, for this is not a case in which a judgment-debtor has sued to set aside a sale under the provisions of Order XXI, rule 90. It is a case in which a Court has itself set aside an order because it discovered that it had no authority to pass it. I find that the learned Munsif had every right to correct his mistaken order. It is true that the lady applied under the provisions of Order XXI, rule 90. But in the circumstances of the case there was no reason for her to do anything more than bringing the error to the notice of the Court. The Court had jurisdiction to set aside this order under the provisions of section 151, Act V of 1908, and this is what it has done. There has been no legal sale and the order now passed, that there should be a sale, is the proper order that should be passed.

For the above reasons I dismiss this appeal. The appellant will pay his own costs and those of the judgment-debtor-respondent.

Appeal dismissed.

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 96 OF 1913.
February 19, 1915.

Present:—Mr. Stuart, A. J. C., and
Mr. Kanhaiya Lal, A. J. C.

LACHHMAN PRASAD—PLAINTIFF—
APPELLANT

versus

Mir FIDA HUSAIN AND ANOTHER—
DEFENDANTS—RESPONDENTS.

*Transfer of Property Act (IV of 1882), ss. 54, 118—
Exchange—"Thing," meaning of—Equity of redemption
—Pre-emption—Transferee's intention, effect of—
"Price," meaning of.*

The word "thing" as used in the definition of "exchange" in section 118 of the Transfer of Property Act, does not include tangible things only, but

intangible things as well, such as the equity of redemption. [p. 232, col. 2; p. 233, col. 1.]

No right of pre-emption can be exercised in a case where the mortgagee in order to avoid pre-emption gets the equity of redemption by way of exchange and not by way of sale. [p. 234, col. 1.]

Majida Bibi v. Malik Fazl Karim, 19 Ind. Cas. 679; 16 O. C. 9, referred to.

Where certain rights in land are given in lieu of a right of equity of redemption, neither of them is a "price" for the other within the meaning of section 54 of the Transfer of Property Act. [p. 233, col. 2.]

Ariyaputhira Pedayachi v. Muthukumaraswamy Padayachi, 15 Ind. Cas. 343; 12 M. L. T. 425; 23 M. L. J. 339; (1912) M. W. N. 854; 37 M. 423, referred to.

Appeal from the decree of the Subordinate Judge, Mohanlalgunj, Lucknow, dated the 30th May 1913.

Babu Ishwari Prasad, for the Appellant.

Syed Wazir Hasan, Mirza Sami Ullah Beg, Sayed Zahur Akbar and Pandit Gokaran Nath Misra, for the Respondents.

JUDGMENT.—In this case a certain Jugraj Brahman had mortgaged two separate properties to a certain Syed Fida Husain. Subsequently he transferred his right of equity of redemption in favour of Fida Husain in consideration of Fida Husain assigning to him proprietary rights over lands in a certain village subject to the payment of Rs. 4 per annum in lieu of land-revenue. The value of these rights was stated to be Rs. 1,600.

A certain Lachhman Prasad instituted a suit for pre-emption of the proprietary rights of Jugraj thereby conveyed to Fida Husain, on the allegation that the transaction was in fact a transaction of sale. The learned Subordinate Judge found that the transaction was a transaction of exchange and that no right of pre-emption could accrue upon it under the provisions of Chapter II, Act XVIII of 1876. According to the terms of the document the right of equity of redemption over certain property was transferred for proprietary rights over another property subject to the payment of a small sum as land-revenue.

The present appeal is against the decision of the learned Subordinate Judge. The first point taken before us in appeal is that as under the provisions of section 118, Act IV of 1882, exchange can only take place when one thing is transferred for another thing, the transaction is not an exchange inasmuch as the equity of redemption is not a "thing." It is advanced in support of the argument

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that an equity of redemption is not a "thing," that a "thing" must be tangible. It is impossible to accede to this argument. In section 54 of Act IV of 1882 things are classified as tangible and intangible and a reversion is given as an example of an intangible thing. A right of equity of redemption is also an intangible thing and would fall within the definition of the word "thing" in section 118.

It was next argued that the transaction set forth in the deed was purely imaginary, that no transfer was made to Jugraj of land, but that he gave up his right of equity of redemption over the property mentioned in the deed to clear off a different debt which was due from him. We are unable to find any evidence in support of this assertion. In the first place there is evidence on the record, which we see no reason to disbelieve, to the effect that Jugraj has obtained possession of the land transferred. There is nothing in the terms of the deed which could be set forward as showing the satisfaction of any other debt. The deed could not be operative in clearing off any other debt due from Jugraj.

The next argument was to the effect that on the evidence properly considered it was established that the parties had agreed to a sale, and that the document executed was false from beginning to end and came into existence simply to cover the real nature of the transaction. We were referred to the evidence of Abdul Ali, the manager of the Salempur Estate, who deposed that on the 26th May 1911 Jugraj approached him with the suggestion that his employer should purchase the right of equity of redemption. Fida Husain has deposed that Jugraj wanted money, that he did not feel disposed to advance him money or to purchase the equity of redemption from him, inasmuch as, if he purchased that equity of redemption, he would be exposed to a suit for pre-emption. He, therefore, suggested an exchange. We see no reason to distrust the statement of Abdul Ali, but we further see no reason to distrust the statement of Fida Husain. The two statements together show that Jugraj wished to sell the right of equity of redemption to the Raja of Salempur, who did not agree to buy it, and that he afterwards tried to obtain a loan from Fida Husain, that

Fida Husain refused to buy the equity of redemption from him but agreed to exchange something else for the right of equity of redemption. Fida Husain said in effect that he would not buy but that he would exchange, and there is nothing in the fact that he did so to show that the transaction was a sale and not an exchange. Abdul Ali has deposed that Fida Husain approached him after the transaction took place and requested him to use his influence to persuade the Raja to refrain from instituting a suit for pre-emption. But if Fida Husain made endeavours to prevent his title being challenged, that circumstance does not show that he had no title. There is further evidence that a third person endeavoured to buy the right of equity of redemption from Jugraj who refused to give him an answer. Upon this evidence it is impossible to find that a sale really took place but that a fictitious deed was executed to give the transaction the colour of an exchange.

Reliance is placed on a passage in a recent ruling of a Bench of the High Court of Madras in *Ariyaputhira Padayachi v. Muthukumaraswamy Padayachi* (1). This decision does not help the appellant in any way. Sadasiva Aiyar, J., considered at page 428 whether the word "price" as used in section 54 of Act IV of 1882 was necessarily the price paid in current coin or whether it might not consist simply of a release from debts due prior to the transaction. He was inclined to give a broader meaning to the word "price" but at page 429 he suggests that in the case of a release from a debt the transaction would be an exchange rather than a sale. Here Fida Husain gave certain rights in land and received a right of equity of redemption. Neither of the things can possibly be held to be a "price." It is true that both have an estimable value. In the ordinary transaction of business articles exchanged would have an estimable value. If two men exchange horses each horse has an estimable value but neither horse could be considered to be a "price."

We have examined the terms of the deed carefully and are satisfied that on the face of it it is a deed of exchange and not a deed

(1) 15 Ind. Cas. 343; 37 M. 423; 12 M. L. T. 425; 23 M. L. J. 339; (1912) M. W. N. 854.

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of sale. We have further considered the evidence and find that there is nothing in it to show that the transaction was fictitious and that the parties really sold the property and drew up an absolutely fictitious deed of exchange to conceal the nature of the actual transaction. It is perfectly true that Fida Husain deliberately refused to purchase the right of equity of redemption and exchanged something else for it in order to avoid the possibility of pre-emption. His Counsel is frank upon that point and admits that as his client knew that if he purchased the property he would be liable to have to give it up again if a suit for pre-emption were brought against him, he, therefore, deliberately adopted a form of transfer which would not lay himself open to such a claim. There are many rulings of this Court which show that in such circumstances no right of pre-emption arises. The argument in support of this proposition has perhaps been put most forcibly in the judgment of a Bench in *Majida Bibi v. Malik Fazl Karim* (2), where at page 18 the proposition is summed up as follows:—

"Nor is it forbidden to a person to circumvent the law of pre-emption by taking a transfer which falls short of a sale but which may eventually have the same effect as a sale."

The Legislature has created in Chapter II, Act XVIII of 1876, a right of pre-emption which arises under the provisions of section 10 when a person proposes to sell any property or when he forecloses a mortgage upon any property in respect of which any person would have a right of pre-emption. It does not arise when a person proposes to exchange any property, and by no possible construction of the terms of the chapter, upon which alone the title of the appellant is based, can it be held that the right of pre-emption can be exercised with respect to an exchange. As we find that the transaction was an exchange, this appeal necessarily fails and is dismissed. The appellant will pay his own costs and those of the contesting respondents.

Appeal dismissed.

(2) 19 Ind. Cas. 679; 16 O. C. 9.

OUDE JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL NO. 2 OF 1914.

April 30, 1915.

Present:—Mr. Stuart, A. J. C., and

Mr. Kanhaiya Lal, A. J. C.

JANGI RAM AND OTHERS—DEFENDANTS—

APPELLANTS

versus

Chaudhri SHEORAJ SINGH AND ANOTHER—

PLAINTIFFS—RESPONDENTS.

Estoppel—Mortgagee cannot dispute mortgagor's right to redeem—Surrender of vendee's rights—Mortgage rescinding previous sale—Registered sale-deed, cancellation of, by agreement evidenced in mortgage-deed—Conduct of mortgagee—Evidence Act (I of 1872), s. 92 cl. 4—Release executed by Hindu widow in favour of reversioners, effect of—Reversioner's right of redemption in widow's life-time—Transfer of Property Act (IV of 1882), s. 72—Improvements on mortgaged property, making of, mortgagee how far entitled to.

A mortgagee cannot go behind the mortgage to dispute the mortgagor's right to enforce redemption. [p. 237, col. 1.]

A vendee can surrender his rights as such by entering into a mortgage in respect of the property already sold to him, so long as there is no law describing the form in which the surrender is to be made. [p. 237, col. 1.]

Thakur Sheo Singh v. Rani Raghubans Kunwar, 8 O. C. 317, referred to.

A sale was effected in 1879 and six months later the vendor mortgaged the property covered by the sale to the vendee. On a suit for redemption having been brought in 1913, the mortgagee contended that the registered sale-deed could not have been cancelled by an oral agreement and that the mortgage in suit was fictitious and invalid for want of consideration. It was found, however, that the mortgagee did not set up any higher rights than those of a mortgagee at any time since the date of the mortgage and that the mortgage could not be fictitious:

Held, that section 92, clause (4), of the Evidence Act did not apply to the case, as prior to the passing of the Transfer of Property Act there was no law which required the sale of immoveable property to be in writing and as the mortgage-deed which evidenced the oral agreement rescinding or superseding the previous sale-deed was also registered. [p. 237, col. 1.]

The effect of a deed of release executed by a Hindu widow in favour of the reversioners of the deceased is to accelerate the vesting of the estate or, at all events, of transferring the widow's life-interest to them for life. [p. 237, col. 2.]

The reversioners of a deceased Hindu are entitled to sue for redemption in the life-time as well as after the death of the widow. [p. 237, col. 2.]
Gumani Singh v. Chakkar Singh, 8 O. C. 349, referred to.

Section 72 of the Transfer of Property Act does not permit a mortgagee to make improvements at the expense of the mortgagor with the object of deriving greater benefit during the period of his

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enjoyment from the mortgaged property and to add the costs of the same to mortgage-money. [p. 237, col. 2; p. 238, col. 1.]

Arunachella Chetti v. Sithayi Ammal, 19 M. 327, referred to.

Appeal from the decree of the Subordinate Judge, Sitapur, dated the 13th October 1913.

Messrs. *St. George Jackson* and *A. P. Sen*, for the Appellants.

Mr. *Mumtaz Husain* and Babus *Chhail Behari Lal* and *Puttu Lal*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit for redemption brought by the plaintiffs-respondents in respect of a mortgage, effected by Bahadur Singh in favour of Durjan Dube on 25th February 1879. The allegation of the plaintiffs was that the mortgagor died on 20th November 1889, leaving a son, Ratan Singh, and a widow, *Musammāt* Sabit Kunwar, that Ratan Singh died childless on the 21st March 1890, leaving a widow, *Musammāt* Muna Kunwar, who succeeded to his estate, that *Musammāt* Muna Kunwar died on 5th October 1908 and was succeeded by *Musammāt* Sabit Kunwar, who relinquished her rights in favour of the plaintiffs, and that the plaintiffs as the nephews and the nearest reversioners of the original mortgagor thus became entitled to the estate. They further alleged that the defendants had cut trees and groves standing on the mortgaged property worth Rs. 2,500, and that the plaintiffs were entitled to redeem the mortgage on payment of Rs. 6,000 on account of the balance of the mortgage-money.

The defendants are the heirs and representatives-in-interest of the deceased mortgagee. Their defence was that Bahadur Singh had sold his rights in the mortgaged property to Durjan Dube prior to the mortgage, that the mortgage relied on by the plaintiffs was effected with the ostensible object of defeating a right of pre-emption, sought to be asserted in respect of the said sale, that the mortgage was in reality fictitious and without consideration, that Ratan Singh died in the life-time of his father, Bahadur Singh, whose widow, daughters and grandsons by those daughters were alive, that the plaintiffs had no right to sue for redemption or claim the estate of Bahadur Singh as his reversioners, that the

trees cut down by the defendants were worth not more than Rs. 338-12, that the defendants constructed two wells on the mortgaged property at a cost of Rs. 1,500 and that they were entitled to add the costs of improvements effected to the mortgage-money. In reply the plaintiffs pleaded that Durjan Dube surrendered his rights under the sale-deeds executed in his favour by Bahadur Singh when he took a mortgage and that there was a custom in the family of Bahadur Singh by which daughters and their issue were excluded from inheritance.

The learned Subordinate Judge found that the mortgage-deed superseded the previous sale-deeds by mutual agreement, that Ratan Singh died after Bahadur Singh, that the daughters of Bahadur Singh and their issue were excluded by family custom, that the defendants had cut trees worth Rs. 338-12 and had not established any necessity for the construction of the wells the cost of which was claimed, and that the plaintiffs were entitled to redeem the mortgage subject to the payment of Rs. 8,161-4 on account of the balance of the mortgage-money.

In appeal it is contended on behalf of the defendants-appellants that the plaintiffs have no reversionary or other kind of interest in the mortgaged property and that the mortgage relied on by them was fictitious and without consideration.

We see no reason, however, to differ from the findings of the learned Subordinate Judge. It appears that Bahadur Singh was the owner of a 3-annas share in two villages named Malthu and Kundai. On the 10th August 1878 he sold a one-anna share in each of the villages to Durjan Dube, the predecessor-in-interest of the defendants, in lieu of Rs. 2,500. On the 12th September 1878 he sold the remaining two-annas share in the two villages to Durjan Dube in lieu of Rs. 6,000. The vendee got mutation of names effected in respect of the first sale-deed, but before any steps could be taken to obtain mutation of names in respect of the second sale, something appears to have happened which led the vendor and the vendee to re-consider their position and to arrange to re-place the sale-deeds by a mortgage. The explanation for the substitution, as given in the mortgage-deed, is that Raghu

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Nath Singh, the elder son of Bahadur Singh, then alive, was disputing the right of his father to transfer the ancestral property without his consent; and that explanation is borne out to some extent by the deposition of Raghu Nath Singh in the suit for pre-emption, subsequently filed by Ishri Singh, uncle of Bahadur Singh, wherein he stated as follows:—"My father sold one anna to Durjan Dube. Then he sold two annas. My father did not consult me about these sales. He usually consulted me and my brother but he did not do so on this occasion. I was angry about the first sale of one anna and when I heard the sale of two annas, I was very angry. I said that an equal money could be got by mortgage. I complained to Durjan. He said he did not want to buy and that if I paid the money he would return the deeds of sale. I then said that if he took mortgage for one year, I would raise the money and pay him. He said that he would not allow more than one year. I had to do *khushamad* to get Durjan to agree to this. The sales had been completed. He took the price of the stamp and costs of registration of the deeds of sale from me..... No one has ever claimed a right of pre-emption. The mortgage was not substituted for the purpose of causing injury to the plaintiff..... I consented to mortgage to Durjan to supersede the sales." (Exhibit 17). According to the statement of Babu Pitam Rai, a Pleader who appeared in the pre-emption case on behalf of the vendee, the vendee had not obtained full possession until the mortgage was executed, and though an application had been made for mutation of names in respect of the one-anna share, nothing had been done with reference to the sale of the remaining two annas (Exhibit 16). The mortgage-deed in suit was executed on the 25th February 1879, that is, within six months of the execution of the second sale-deed, to secure the payment of Rs. 8,500, being the aggregate amount of the consideration moneys paid under the two previous sale-deeds. Applications for mutation of names were made in pursuance of the mortgage soon afterwards (Exhibits 2 and 4); and on the 19th April 1879 orders were passed directing that the name of Durjan Dube should be entered as mortgagee in respect of the disputed property and that the previous entry in respect of the sale of a one-anna share should be

treated as cancelled (Exhibits 3 and 5).

On the 31st March 1879 Ishri Singh, uncle of the vendor, sued for pre-emption in respect of both the sale-deeds, alleging that the mortgage effected in substitution for the sale-deeds was illusive and fictitious (Exhibit 15). The defence of Durjan Dube was that Ishri Singh had no right to sue for pre-emption in respect of the sales which had been superseded and cancelled by mutual agreement, and that in any case the vendee had a preferential right of purchase (Exhibit 6). The suit was decreed by the Court of first instance (Exhibit A 2), but dismissed on appeal by the lower Appellate Court on the ground that the mortgage was not fictitious and, even if the sales were operative, inasmuch as the vendee was a nearer co-sharer, he was entitled to preference. On further appeal to this Court, the finding of the Court below that the vendee had a superior right was upheld (Exhibits A 3 and A 4).

It appears that Durjan Dube did not set up any higher rights than those of a mortgagee at any time since the date of the execution of the mortgage. He had four brothers, Gokul, Sital, Parmanand and Partab. In 1893 he consented to the entry of their names in the revenue papers in respect of the property in dispute as his co-mortgagees (Exhibits 12 and 13), and in 1894 he filed a suit against certain persons, claiming possession of a grove by escheat in the village Malthu, describing his interest in the village as a vendee of a two-annas share from Jwahir Singh and a mortgagee of three-annas share of Bahadur Singh (Exhibit A 3).

It is contended by the learned Counsel for the defendants that a registered sale-deed could not have been cancelled by an oral agreement, and that the mortgage which is the subject of redemption was fictitious and invalid for want of consideration. The mortgage-deed, however, provided for foreclosure, if the mortgage-money was not paid in *Jeth* 1286 *Fasli* or 1287 *Fasli*, and the substitution of mortgage-deed for a sale-deed could have the effect of postponing the exercise of the right of pre-emption but not of preventing it (*Vide* section 9 of the Oudh Laws Act). No object could, therefore, have been gained by a fictitious mortgage.

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Section 92, clause (4), of the Evidence Act does not apply to the case, because prior to the passing of Act IV of 1882 there was no law which required a sale-deed of immoveable property to be in writing. The mortgage-deed, which evidenced the oral agreement, rescinding or superseding the previous sale-deeds, was moreover registered, and there was nothing in law to prevent the vendee from surrendering his rights under the sale-deeds in any manner he thought proper. A mortgagee, besides, could not go behind the mortgage to dispute the right of the mortgagor to enforce redemption.

The surrender by the vendee of his rights under the sale-deeds was the consideration for the mortgage executed by the vendor in favour of the vendee, in lieu of the consideration money which he had previously received, and, as observed by their Lordships of the Privy Council in *Thakur Sheo Singh v. Rani Raghubans Kunwar* (1), it is competent to an absolute owner of an estate to enter into an arrangement by which he may surrender the estate held by him under a grant to the grantor, and receive it back again from the grantor under a different grant, so long as there is no law describing the form in which the surrender is to be made.

The rules of the Hindu and Muhammadan Law relating to the transfer of property by sale were not abrogated till the passing of Act IV of 1882, and the effect of the transaction of surrender was to rescind the previous sale-deeds by mutual agreement and to substitute therefor a mortgage which now forms the subject of redemption.

Bahadur Singh was succeeded on his death by Ratan Singh, who is proved by the evidence to have died several months after the date of the death of the former. The mutation proceedings instituted after the death of Bahadur Singh and Ratan Singh and the evidence of the witnesses adduced on behalf of the plaintiffs, including Mahabir Prasad, one of the sons-in-law of Bahadur Singh, leaves no room for doubt that Ratan Singh survived Bahadur Singh, and that mutation of names was effected on his death in favour of *Musammam Muna*

Kunwar, his widow, and *Musammam Sabit Kunwar*, his mother, by mutual consent.

It is unnecessary to refer to the statements said to have been made by *Musammam Muna Kunwar*, *Musammam Sabit Kunwar* and *Jugal Kishore*, the *patwari* of the village, during the pendency of the mutation proceedings, for the report of the Tahsildar, which embodies the result of the inquiry and was accepted by the Sub-Divisional Officer, clearly establishes the order in which Bahadur Singh and Ratan Singh had died. There is no reliable evidence on behalf of the defendants to prove to the contrary. On the death of *Musammam Muna Kunwar*, *Musammam Sabit Kunwar* succeeded to the estate as the holder of a life-estate which she subsequently relinquished in favour of the plaintiffs, who are the nephews and nearest reversioners of her husband, under a deed of release, dated the 5th January 1909. The execution of that release is satisfactorily proved by the evidence of the plaintiffs, who are consequently entitled to sue for redemption. The effect of the release was to accelerate the vesting of the estate in the reversioners of Bahadur Singh or at all events at transferring the life-interest, held by *Musammam Sabit Kunwar*, to them for life.

It is not necessary, therefore, to determine whether the daughters of Bahadur Singh and their issue would be excluded from inheritance by a custom or not. The plaintiffs have a right to sue for redemption in either event. Even as reversioners their right to redeem cannot be denied [*Gumani Singh v. Chakkar Singh* (2)].

The defendants have not shown that there was any necessity for the construction of the wells, the cost of which is claimed by them. Section 72 of the Transfer of Property Act permits a mortgagee to spend such money as is necessary for the due management of the mortgaged property and the collection of the rents and profits thereof and for its preservation from destruction, forfeiture or sale, but as pointed out in *Arunachella Chetti v. Sithayi Ammal* (3), it does not permit a mortgagee to make improvements at the expense of the mortgagor with the object of deriving greater benefit during the period of his enjoyment from the mortgaged property,

(1) 8 O. C. 317.

(2) 8 O. C. 349.

(3) 19 M. 327.

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and to add the costs of the same to the mortgage-money. No other grounds have been pressed in the appeal.

The learned Subordinate Judge appears to have inadvertently passed a decree directing the sale of the mortgaged property in case redemption is not effected, though the mortgage-deed provided for foreclosure.

The appeal is, therefore, dismissed with costs except in so far that in case of non-payment of the mortgage-money within the period allowed, the mortgage will be liable to be foreclosed.

The defendants appellants will bear their own costs throughout.

Appeal dismissed.

ODDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 212 OF 1915:
February 25, 1915.

Present:—Mr. Stuart, A. J. C.

GUR CHARAN PRASAD — PLAINTIFF—
APPELLANT

versus

Musammatt BACHNI AND ANOTHER —
DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 64, O. XXI, r. 62—Transfer of Property Act (IV of 1882), ss. 52, 53—Attachment—Mortgage, property sold subject to—Purchaser, not to question validity of mortgage—Sale of encumbered property subject to no encumbrance—Auction-purchaser, liability of.

Where a property is sold subject to a mortgage, as provided for in Order XXI, rule 62, Civil Procedure Code, only the judgment-debtor's right of redemption is sold, so that the purchaser does not acquire any greater rights than those of redeeming the mortgage, and the purchaser cannot question the validity of such a mortgage. [p. 238, col. 2.]

Shib Kumar Singh v. Sheo Prasad Singh, 28 A. 418; A. W. N. (1906) 68; 3 A. L. J. 200 and *Ram Kumar v. Dwarka Parshad*, 15 Ind. Cas. 5; 15 O. C. 211 at p. 218, followed.

Where a property, although encumbered, is sold subject to no encumbrance, the purchaser is nevertheless liable to discharge the encumbrance. Neither the provisions of sections 52 and 53 of the Transfer of Property Act nor those of section 64, Civil Procedure Code, help him to escape the liability. [p. 239, col. 1.]

Appeal from the decree of the District Judge, Hardoi, dated the 21st February 1913, modifying that of the Subordinate Judge, Unao, dated the 29th May 1912.

Mr. A. P. Sen, for the Appellant.

Mr. K. Darabji, for the Respondents.

JUDGMENT.—On the 7th May 1904 Musammatt Bachni attached one house and certain plots in execution of a simple money-decree. Both these properties had been mortgaged by a mortgage of a date prior to the 7th May 1904. On the 22nd July 1904 and the 23rd May 1905 the judgment-debtor executed deeds of further charge with regard to both the house and the plots. There is nothing to show that the beneficiary under the deeds of further charge had any knowledge of the attachment of 7th May 1904. On the 15th July 1905 the house was sold for Rs. 10 and purchased by the decree-holder herself. In the proclamation of sale no mention was made of prior encumbrances. On the 17th January 1906 a proclamation of sale was issued with regard to the plots in which it was declared that they were subject to the original mortgage and to both the deeds of further charge. On the 28th March 1906 the decree-holder purchased the plots herself. There is an order dated 17th January 1906, which, in my opinion, is clearly an order under section 282 of Act XIV of 1882 which was then in force. The learned District Judge has held that the purchaser of the plots is liable to satisfy only the mortgage and not the deed of further charge. I find that he is in error upon this point. It was decided in *Shib Kumar Singh v. Sheo Prasad Singh* (1), that in a case in which property is sold subject to a mortgage, as provided for in section 282, only the judgment-debtor's right of redemption is sold, so that the purchaser does not acquire any greater rights than those of redeeming the mortgage, and that it is not open to the purchaser to question the validity of such a mortgage. The decision is approved in *Ram Kumar v. Dwarka Parshad* (2). Following these two decisions I hold that, as the sale was under section 282 of the old Code and both the mortgage and the charges were declared at the time of sale, it is not open to the purchaser now to question the validity of either the mortgage or the

(1) 28 A. 418; A. W. N. (1906) 68; 3 A. L. J. 200.

(2) 15 Ind. Cas. 5; 15 O. C. 211 at p. 218.

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charges. But the case of the house is different. It was sold subject to no encumbrance. The learned District Judge has held that the purchaser is liable to satisfy the deed of mortgage. I need not discuss this point, as it was for the respondents to appeal against that decision of the learned District Judge, and they have not done so. All that I have to consider with regard to the house is whether the learned District Judge was right in holding that the purchaser is not liable on the charges of the 22nd July 1904 and the 23rd May 1905 which were not declared in the sale proclamation. The learned District Judge bases his conclusion on the point on the terms of section 52 of Act IV of 1882. I do not agree with him with regard to the application of this section. There was no transfer *pendente lite*, for the right to the house was not directly or specifically in question in the course of a contentious suit or proceeding. I have considered the effect of the provisions of section 276 of Act XIV of 1882. Here there was a private alienation of the house after attachment, which under the provisions of that section is void against all claims enforceable under the attachment. I do not, however, consider that the title to hold the house unencumbered by the subsequent charges can possibly be considered to be a claim enforceable under the attachment of a house in execution of a simple money-decree. Nor can the provisions of section 53, Act IV of 1882, be invoked to assist the purchaser, as the beneficiary under the deeds of further charge was a transferee in good faith and for consideration. This appeal, therefore, must succeed.

I set aside the decision of the learned District Judge and restore the decision of the learned Subordinate Judge upon this point. The respondents will pay their own costs and those of the appellant in all Courts.

Appeal allowed.

ODDH JUDICIAL COMMISSIONER'S COURT.

PRIVY COUNCIL APPEAL No. 21 OF 1914.

February 3, 1915.

Present:—Mr. Lindsay, J. C., and

Mr. Kanhaiya Lal, A. J. C.

NISAR HUSAIN AND OTHERS—APPLICANTS
versus

Musammat ASHRAF-UN-NISA—

OPPOSITE PARTY.

Privy Council, appeal to—Concurrent findings of Appellate Court and Court below—Substantial question of law.

No appeal lies to the Privy Council unless there is a substantial question of law arising on the concurrent findings of the Appellate Court and the Court below, *i. e.*, a question of law not already settled by several previous decisions of the Privy Council. [p. 240, col. 1.]

Karuppanan Servai v. Srinivasan Chetti, 29 I. A. 28; 25 M. 215; 6 C. W. N. 241 (P. C.); 4 Bom. L. R. 248; 11 M. L. J. 379 and *Sajjad Husain v. Nawab Abid Husain Khan*, 16 Ind. Cas. 197; 10 A. L. J. 364; 16 C. L. J. 613; 14 Bom. L. R. 1055; 16 C. W. N. 889; 23 M. L. J. 210; 34 A. 455; 12 M. L. T. 361; (1912) M. W. N. 976; 39 I. A. 156 at p. 160; 15 O. C. 271, referred to.

Babu *Ishwari Prasad*, for the Applicants.

Mr. Muhammad Nasim, for the Opposite Party.

JUDGMENT.—This is an application for leave to appeal to His Majesty in Council. The suit related to a deed of gift, said to have been executed by a *parda-nashin* lady in favour of her brother, Ata Husain, who was acting as her manager, in respect of her entire *zemindari* and house property. It was found by this Court in concurrence with the Court below that the lady executed the deed of gift without realizing its purport or understanding its consequences, that the signing of the deed was due to the trust reposed by her in the good will of Ata Husain, and that the gift was not accompanied or followed by delivery of possession and was not consequently valid and enforceable. It was further found that the gift being invalid for want of delivery of possession under the Muhammadan Law, the claim was not barred by limitation or by section 42 of the Specific Relief Act.

The valuation of the suit exceeds Rs. 10,000. But the appeal does not involve any substantial question of law, not previously determined by several decisions of their Lordships of the Privy Council.

There was no variation between pleading and proof, for the lady alleged in the plaint that she did not execute any document by

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way of a deed of gift or transfer, so as to divest herself of her entire property that she was an old, rustic, *pardanashin* lady, possessing no capacity to understand a transaction or the purport of a deed, that she had completely fallen under the influence of the defendant who was managing her estate, and used to believe everything he told her, that it was possible that he might have obtained her signature on some deed by misrepresentation and fraud and that if her signature was obtained on any such deed it was void, as having been improperly obtained without her having been made acquainted with the real purport and contents thereof, or given an opportunity of obtaining independent advice. She also alleged in the plaint that she had not delivered possession. The findings of fact arrived at by this Court and the Court below on the question of the fiduciary relationship, and the circumstances under which the deed of gift was obtained and in regard to the non-delivery of possession, are fatal to the defendants' appeal and as observed by their Lordships of the Privy Council in *Karuppanan Servai v. Srinivasan Chetti* (1) and *Saijad Husain v. Nawab Abid Husain Khan* (2), no appeal lies unless there is a substantial question of law arising on the findings of fact concurrently arrived at. The questions of burden of proof and of the invalidity of a deed of gift not accompanied by delivery of possession according to the Muhammadan Law have been settled by a long course of decisions of the Privy Council, ending with *Kali Bakhsh Singh v. Ram Gopal Singh* (3), *Khajooroonissa v. Rowshan Jehan* (4) and *Chaudhri Mehdi Hasan v. Muhammad Hasan* (5). No question of limitation arises if the gift is in itself void and unenforceable.

The application is, therefore, disallowed with costs.

Application rejected.

(1) 29 I. A. 28; 25 M. 215; 6 C. W. N. 241 (P. C.); 4 Bom. L. R. 248; 12 M. L. J. 379.

(2) 16 Ind. Cas. 197; 10 A. L. J. 364; 16 O. L. J. 613; 14 Bom. L. R. 1055; 16 C. W. N. 889; 23 M. L. J. 210; 34 A. 455; 12 M. L. T. 361; (1912) M. W. N. 976; 39 I. A. 156 at p. 160; 15 O. C. 271.

(3) 21 Ind. Cas. 985; 16 C. W. N. 282; (1914) M. W. 112; 12 A. L. J. 115; 15 M. L. T. 130; 19 C. L. J. 172; 1 C. L. J. 67; 26 M. L. J. 121; 16 Rom. L. R. 147; 38 A. 81; 16 O. C. 378.

(4) 2 C. 134; 26 W. R. 36; 3 I. A. 291 (P. C.).

(5) 28 A. 439; 10 C. W. N. 706; 3 A. L. J. 405; 8 Bom. L. R. 387; 4 C. L. J. 295; 33 I. A. 68 (P. C.). 9 O. C. 106; 1 M. L. T. 106.

ODUH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL NO. 154 OF 1914-1915.

March 16, 1915.

Present:—Mr. Lindsay, J. C., and

Mr. Kanhaiya Lal, A. J. C.

PARMESHRI DAS AND OTHERS

PLAINTIFFS—APPELLANTS

versus

GIRDHARI LAL—DEFENDANT—

RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 92—Appeal by one surviving appellant, maintainability of—Death of some plaintiffs after institution of suit, effect of—Income of property, part of, spent in upkeep of temple dedicated for public worship—Dedication—Revenue Registers, entries in, weight of—Revenue Courts, partition-officer of, power of—Private property—Waqf property—Partition proceedings, binding effect of.

The necessity for the co-operation of two or more persons in a suit brought under section 92, Civil Procedure Code, is restricted only to the institution of the suit, so that a surviving plaintiff-appellant alone in such a case is competent to carry on the appeal. [p. 242, col. 1.]

Chettikulam Prasanna Venkatachala Reddiar v. Collector of Trichinopoly, 24 Ind. Cas. 369; 26 M. L. J. 537; (1914) M. W. N. 587, referred to.

Sarabjit Bharti v. Lagan Dei, 14 Ind. Cas. 731; 15 O. C. 202, referred to and distinguished.

The mere fact that the founder of a temple intended for public worship is spending a portion of his income derived from a certain property to the upkeep of the temple is insufficient to establish that the corpus of the property is dedicated to the use of the temple. [p. 243, col. 2.]

Konwar Doorganath Roy v. Ram Chunder Sen, 2 C. 341 (P. C.); 4 I. A. 52 and *Abdul Ghafur v. Mahant Shiam Sundar Das*, 17 Ind. Cas. 303; 16 O. C. 76, referred to.

An entry made in a Revenue Register without any explanation as to how it originated or was brought into existence is, if inconsistent with other known facts, not entitled to any weight. [p. 244, col. 1.]

It is not open to a partition-officer of the Revenue Courts to convert private property into *waqf* property by giving it a particular designation, and his proceedings in regard to the distribution of and title to the land, are not conclusive as between a party to the partition and strangers. [p. 244, col. 1.]

Appeal from the decree of the District Judge, Lucknow, dated the 10th September 1912.

Babus Aditya Prasad and Hurgovind Das, for the Appellants.

Gandit Gokaran Nath Misra, for the Respondent.

JUDGMENT.—This was a suit brought by Parmeshri Das, Babu Ram and Baldeo Prasad, residents of Lucknow, for the removal of the defendant, Girdhari Lal, from the office of trustee of a temple known as *Thakurdwara Dwarka Dhish* in Lucknow.

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and for the appointment of new trustees to take charge of the management of the temple and its property. The allegation of the plaintiffs was that Jogi Mal, a Khattri of Lucknow, died about 45 years ago, leaving a sister, *Musammat* Sohni Bibi, and her husband, Gattu Mal, as his successors, that in accordance with the directions left by Jogi Mal, the temple in question was built by Gattu Mal in 1875 out of the funds left by the deceased, and that Gattu Mal subsequently purchased a share in *Manza* Pahia Azampur at auction out of the said funds and set it apart for the expenses connected with the temple. Gattu Mal died in 1880 and was succeeded by his widow, *Musammat* Hiradei, whom he had married after the death of *Musammat* Sohni Bibi. *Musammat* Hiradei was succeeded in 1888 by Kalka Das, a cousin of Gattu Mal, who left a Will bequeathing a life-estate to Sardi Bibi, the widow of his brother, Makhan Lal, and the remainder to his sister's son, Girdhari Lal, with directions to apply a specified portion of the usufruct of the property bequeathed to the upkeep and maintenance of the temple in the manner directed by the Will. The plaintiffs stated that after the death of *Musammat* Sardi Bibi, which took place in 1897, the defendant became the manager of the endowed property by virtue of the said Will and that he was not properly carrying out the instructions contained in the Will.

The defence was that the defendant was the owner of the property in dispute, including the *thakurdwara*, under the Will of Kalka Das, that the temple in question was not intended for general or public worship and that the allegations that the property in question was dedicated to the idol and that the defendant was not carrying out the instructions in the Will were incorrect. The learned District Judge found that the temple was not a public temple, that no property was dedicated to it and that the story of mismanagement or breach of trust was not made out.

The suit was instituted under section 92 of the Code of Civil Procedure with the permission of the Legal Remembrancer. But two of the plaintiffs' Parmeshari Das and Babu Ram, died during the pen-

dency of the appeal and their heirs were not brought on the record. Two other persons, who were not the heirs or legal representatives of the deceased appellants applied to be substituted in their place on the ground that they were interested in the subject-matter of the appeal, but as they were not among the persons who had originally obtained leave to institute the suit, their application was rejected. The preliminary question arising for disposal under the circumstances is whether the surviving appellant is competent to carry on the appeal.

Section 92 of the Code of Civil Procedure requires that in the case of any alleged breach of an express or constructive trust created for public purposes of a charitable or religious nature a suit to remove a trustee or for an appointment of a new trustee shall be instituted by two or more persons having an interest in the trust, after obtaining the consent in writing of the Advocate-General to the institution of such a suit. The section makes no provision for the carrying on of such a suit after it is formally instituted if any of the persons who joined in instituting the suit withdraw from the same or die before its decision or during the pendency of the appeal. We have, therefore, to fall back upon the provisions of Order XXIII, rule 1, and Order XXII, rule 2, of the Civil Procedure Code, to find out whether under these circumstances the surviving plaintiff can be permitted to carry on the suit or appeal. Order XXIII, rule 1, forbids a Court from permitting one of several plaintiffs to withdraw from a suit without consent of the others and Order XXII, rule 2, allows a surviving plaintiff to continue a suit, if the right to sue survives to him alone. The question, therefore, is whether the right to sue survives to the remaining appellant, Baldeo Prasad. The right to sue asserted by Baldeo Prasad rested on the interest claimed by him as one of the persons entitled to worship at the temple and having a right to prevent a mismanagement of the temple property. The interest has not abated by the death of the other co-plaintiffs whose heirs did not come forward to join in prosecuting the appeal, and the fact that a decree has been passed in favour of the so-called trustee, adverse to the interest of the beneficiaries including

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Baldeo Prasad, renders it necessary that the right of Baldeo Prasad to have the validity of that decree tested on appeal should not be denied to him. The necessity for the co-operation of another person is restricted by the language of section 92 of the Code to the institution of the suit. After its decision, the will of one person cannot control the action of another, for it is conceivable that one plaintiff may feel aggrieved by the decision and another may be willing to accept it. Order XLI, rule 4, therefore, provides that where there are more plaintiffs than one in a suit and the decree appealed from proceeds on any grounds common to all the plaintiffs, any one of the plaintiffs may appeal from the whole decree and thereupon the Appellate Court may reverse or vary the decree in favour of all the plaintiffs or defendants as the case may be. Order XLI, rule 33, similarly authorizes the Appellate Court to pass any decree which the interests of justice may require, notwithstanding that the appeal is as to a part of the decree. If one of the plaintiffs can appeal from a decree and get it modified or varied on a ground common to all the plaintiffs, there is no reason why if a suit has fructuated into a decree in favour of one party or another, any one of the plaintiffs or defendants should not be allowed to appeal from the decree by reason of the death of the other plaintiffs or defendants unless the right to sue has abated. It may be argued that a right to sue under section 92 vests in two persons jointly and cannot be exercised at any stage of the proceeding by one without the co-operation of the other. But no such co-operation is required for the prosecution of an appeal from a decree passed in such a case. In *Ohetikulam Prasanna Venkatachala Reddiar v. Collector of Trichinopoly* (1), where a suit was brought for removing a trustee and manager of certain charities and for a declaration that the Will in favour of the alienee of the lands belonging to the charities was invalid, it was held that the death of the trustee during the pendency of an appeal filed by the alienee did not lead to the abatement of the suit. Reliance is placed on behalf of the defendant-respond-

ent on the decision in *Sarabjit Bharthi v. Lagan Dei* (2). But in that case the remaining trustee was found to have had no real interest in the subject-matter of litigation. Suppose the decision in that case had been adverse to the trustee. Would it not have been unreasonable to refuse to allow the trustee to proceed with his appeal, if one of the persons who brought the suit against him had died or withdrawn subsequent to the decree and there were no other persons willing to carry on the suit in co-operation with the surviving plaintiff? The object of section 92, as explained in *Sarabjit Bharthi v. Lagan Dei* (2), is to enable the Civil Courts to control the administration of public trusts of a charitable or religious nature at the instance of persons interested in their proper administration and where such control has been exercised or withheld by a Court of original jurisdiction, the right of a party to challenge the exercise or withholding of such control by an appeal to a higher Court cannot be taken away by the death of the successful party or the death or unwillingness of one of the persons belonging to the losing party to proceed with the case. The right to sue in such cases is, generally speaking, personal except in so far as any costs or the liability to pay the same may have been incurred and the omission to implead the personal heirs of such a person would not affect the right of the surviving plaintiff to file an appeal. We are, therefore, of opinion that the plaintiff-appellant, Baldeo Prasad, is competent to carry on the appeal.

The next question is whether the *thakurdwara* and the other property in dispute constitute a public trust of a religious nature and whether any mismanagement of the trust property has been made out by the plaintiffs. It appears that Jogi Mal died sometime in 1868 leaving his entire property to this sister, *Musammatt Sohni Bibi*, and her husband, Gattu Mal, for their own absolute use and benefit. The Will contains no direction for the construction of a temple or the purchase of any property out of the funds of the deceased and there is no reliable evidence to show that the deceased left any such instructions. The *thakurdwara* in question was built by Gattu Mal

(1) 24 Ind. Cas. 369; 26 M. L. J. 537; (1914) M. W. N. 587.

(2) 14 Ind. Cas. 731; 15 O. C. 202.

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in 1875, many years after the death of Jogi Mal. He formally consecrated it for the worship of the idol installed there. Janki Nath and Janardan state that they attended the consecration ceremony, and there is ample evidence to show that the temple has been open since then for public worship. A *pujari* has been working in the temple as a priest from the date of the consecration, carrying on worship and making offerings of *bhog* or food at stated intervals in accordance with usage. The *bhog* used to be cooked in one of the back apartments attached to the temple, and the various religious festivals falling during the year were publicly celebrated there every year. A staff of a *mali* and a *kahar* was in attendance to minister to the needs of the worshippers and to keep the place tidy and in good order. A stone inscription was affixed over the door of the temple, describing the building as the temple of Sri Dwarka Dhish built by Gattu Mal Khattri, son of Daulat Ram, and the date of consecration was noted thereon as Monday, *Magh Sudi* 10th, *Sambat* 1931. Mr. Warburton, the District Judge, who visited the temple on the 21st February 1912 in the company of the Pleaders of the parties, observed that it was a substantial building of a considerable size situated in a thickly populated part of the Lucknow city, looking, as far as appearances and surroundings went, as a temple intended for public worship, and not a place for private or family worship. The parties agreed before him (*vide* his notes of inspection) that the founder of the temple and the present manager of it lived in a house in another street of the Lucknow city about 200 or 300 yards away from the temple with several houses intervening. The statement made in the evidence that the defendant and the female members of his family lived in the back portion of the temple and that the temple was meant for worship by only the members of the family, cannot under the circumstances be trusted. The inscription describes it as a temple and not as a dwelling house, and there would have been no need for any inscription at the gate, if the building represented nothing more than a dwelling house, with a private idol installed in a portion of it. In the account books kept by Gattu Mal and his successors the building is described throughout as a

thakurdwara, and the expenses of *bhog* (offerings of food), establishment and festive celebrations connected therewith are separately entered and debited to the account of Thakurji or *thakurdwara* from the date of the construction of the temple till 1911. We have no doubt, therefore, that the temple in question is a public temple intended for public worship.

There is nothing, however, to show that beyond the *thakurdwara* building, which bears the inscription, any other property stands dedicated to it. The share of *Mauza* Pahia Azampur purchased in 1876 was not purchased in the name of the temple or the idol installed there. The litigation which subsequently ensued to obtain possession of the property purchased was carried on in the name of Gattu Mal and in the account books of Gattu Mal the income derived from the village was credited year after year along with the income derived from other sources in one joint account. The expenditure over the maintenance of the temple amounted in the life-time of Gattu Mal to about Rs. 25 per mensem. The income of the village as described in the Will amounted to Rs. 1,300 per year and there is nothing to indicate that Gattu Mal kept the surplus income of the village apart and credited it to the temple fund. No deed of endowment was executed by Gattu Mal, or by any of his successors, and as observed in *Konwar Doorganath Roy v. Ram Chunder Sen* (3) and *Abdul Ghafur v. Mahant Shyam Sundar Das* (4), the mere fact that Gattu Mal was spending a portion of his income to the upkeep of the temple is insufficient to establish that the corpus of the property was dedicated to its use. Gattu Mal was succeeded on his death by his widow, *Musammam Hiradei*. She was a minor and was not in a position to dedicate any property. The entry made in the *khewat* of *Mauza* Pahia Azampur in the column of co-sharers against her name, declaring that she was holding the property subject to a liability to spend its income for the maintenance of the *thakurdwara* (*ba shart sarf thakurdwara Thakur Dwarka Dhish*) is, in the absence of proof of an earlier dedication, not entitled to any weight. The order for mutation of names dated the

(3) 2 C. 341; 4 I. A. 52.

(4) 17 Ind. Cas. 308; 16 O. C. 76.

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18th December 1880 therein referred to has not been filed. The entry subsequently made on the death of *Musammat* Hiradei in favour of Kalka Das merely repeated what had previously been entered when the name of *Musammat* Hiradei was recorded and is similarly of no value. An entry made in a Revenue Register without any explanation as to show how it originated or was brought into existence is, if inconsistent with other known facts, not entitled to any weight. In the Will executed by Kalka Das on the 29th June 1891 bequeathing the property in succession to *Musammat* Sardi Bibi and Girdhari Lal, there is no reference to the dedication of the corpus of the property, but provision is made for the application of Rs. 526 per year out of the income of the property to the maintenance and upkeep to the temple and the celebration of the worship and festivities there. The Will purports to devise the corpus of the property after the death of *Musammat* Sardi Bibi to Girdhari Lal in absolute proprietorship, subject to the trust created in favour of the temple to the extent of the income above specified. Reliance is placed on behalf of the plaintiff-appellant on certain partition proceedings instituted by Arshed Ali Khan, a co-sharer of *Mauza* Pahia Azampur, in 1901 wherein Girdhari Lal was described as a representative of *Musammat* Sardi Bibi and a separate *mahal* was constituted in respect of the share belonging to him in the name of "Thakur Dwarka Dhish, manager Girdhari Lal." Girdhari Lal does not appear, however, to have taken any active part in the partition proceedings. His agent, Raghuber, may have attended it at times. The partition proceedings directed that the *mahal* should be called by the name of Girdhari Lal, and it is not clear how it came to be constituted in the name of Thakur Dwarka Dhish contrary to the previous entries which stood in the name of Girdhari Lal. On the death of *Musammat* Sardi Bibi, Girdhari Lal obtained mutation of names in his favour (Exhibit A 18) and he was appointed a *lambardar* in his own right. It was not open to the partition officer to convert private property into *waqf* property by giving it a particular designation and his proceedings, in regard to the distribution of and title to the land, are not conclusive as between a party to the partition and strangers.

The defendant has given evidence to show that he has been applying the income set apart for the purposes of the temple to its upkeep and maintenance, and the celebration of the festivals and religious worship prescribed by the Will. He has filed detailed accounts of the expenditure incurred by him in connection with the *thakardwara* from the 2nd January 1898 to the 1st October 1911, and though the account books do not appear to have been very regularly kept and mix up the defendant's personal account with the account of the temple in a very undesirable manner, they contain sufficient materials to show that the defendant has not been neglecting his duties in connection with the temple, and that the instructions contained in the Will of Kalka Das have been duly carried out. The only material variation noticeable is that in the supply of *bhog* or offerings of food for which the Will allowed a sum of Rs. 12 per mensem, the defendant states that he has been making arrangements for the supply of *bhog* from his own kitchen and there is no reason to disbelieve his statement. The food offered to a diety is generally eaten by the *pujari* after it is offered, and it is not stated that any trouble has arisen in connection with it. In regard to the celebration of festivals and arrangements for lighting and worship the evidence makes it clear that there has been no default. A *pujari* is still maintained, and though no *kahar* or *chaukidar* is now employed, inasmuch as the amount allowed for the said purpose by the Will is too small, the work of dusting the place and keeping it neat and clean is duly carried out. No cow is kept because milk can be otherwise easily procured. There are cows kept in the village, which can be sent for when in milk, and no interruption either in the celebration of festivals or worship is proved to have occurred in consequence. The allegations made in paragraph 13 of the plaint regarding the cutting of trees and removal of moveable property belonging to the temple have also not been established. The defendant should not have mixed up the expenditure incurred in connection with the temple, including the *bhog*, with his personal expenditure, as he has thereby rendered the tracing of unspent annual balances difficult. He should separate the two accounts and keep the savings made from the allotted annual expenditure to

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meet extraordinary contingencies, such as repairs, white-washing and the like, that may from time to time be necessary. He is not unwilling to carry on his duties in connection with the trust as directed by the Will and to render accounts when called for, and as no misfeasance is established we see no reason to remove him from the trusteeship.

The appeal, therefore, fails and is dismissed with costs.

Appeal dismissed.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL NO. 379 OF 1913.

March 23, 1915.

Present:—Mr. Justice Tudball and

Mr. Justice Rafique.

SECRETARY OF STATE FOR INDIA IN
COUNCIL—OPPOSITE PARTY—APPELLANT

versus

ABDUL SALAM KHAN—PETITIONER

—RESPONDENT.

Land Acquisition Act (I of 1894), s. 26 (2)—Land acquired temporarily—Damage to land—Compensation, when to be calculated—Principle underlying such compensation.

Where culturable land is acquired temporarily for the purpose of quarrying *kankar* therefrom, compensation for re-levelling the land and making it fit for cultivation shall be calculated at the expiry of the period for which the land has been temporarily acquired, inasmuch as it is impossible to say in advance what damage will be caused to the land and what it will cost to make that damage good. [p. 245, col. 2; p. 246, col. 1.]

First appeal from a decree of the District Judge of Moradabad, dated the 7th of June 1913.

Mr. A. E. Ryves, Government Advocate, for the Appellant.

Mr. Hameed-ullah, for the Respondent.

JUDGMENT.—This appeal arises out of proceedings taken under section 35 of the Land Acquisition Act. Government acquired an area of four acres, twenty poles, situated in the village of Manakpur Naroli, temporarily for a term of two years under the section for the purpose of quarrying *kankar*. The land was culturable land in the hands of tenants. Compensation was offered to the tenants for the period of their ouster and a sum of Rs. 105-6 was offered as compensation to the *zemindar* and it was explained to him

that on the expiry of the two years' term, he would be entitled to further compensation for any damage done to the land, under section 36, clause (2), of the Land Acquisition Act. He objected to the amount offered to him and he put forward his plea in this way that by reason of the *kankar* being dug, the surface of the land would be lowered, earth would have to be brought from elsewhere to raise it and make it fit for cultivation. This being so he was entitled to two sorts of compensation, (1) to two years' rent for the period of occupation and (2) to compensation at the rate of Rs. 18 per *bigha kham* for levelling the ground and for bringing earth from other plots to make the ground fit for cultivation. This he put forward on the 24th of October before the Collector. The Collector refused to grant him any sum more than the amount offered and he applied for a reference to the District Judge. Before the District Judge he again claimed the same compensation and asked for an order awarding compensation for levelling the ground after the two years. The learned District Judge awarded to him the sum of Rs. 198-8. He arrived at this figure by calculating approximately the amount of *kankar* which would probably be dug out of the area occupied and valued it at Rs. 7-8 per *bigha*. The total area being 26 *bighas* 19 *biswas* he awarded Rs. 198-8. Government has appealed and the respondent has also filed objections, claiming that he is entitled to compensation at the rate of Rs. 18 per *bigha* as he has all along claimed. In our opinion the method adopted by the learned District Judge is absolutely wrong. There was no question of the valuation of the *kankar* at all. The respondent put forward no claim thereto. He had asked merely for two years' rent *plus* compensation at the rate of Rs. 18 per *bigha* to cover the cost of re-levelling the land and making it fit for cultivation. We have to point out that the compensation offered by the Collector amounted to four times the annual rent paid by the tenants of the land. It is quite clear that the respondent is also entitled to compensation under section 36, clause (2), of the Act, *i.e.*, compensation which is to cover the cost of re-levelling the land and making it fit for cultivation. But an examination of the section will show that this amount of compensation has to be calculated at the expiry of the

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period for which the land has been temporarily acquired. The reason of this is obvious, for it is impossible to say in advance what damage will be caused to the land and what it will cost to make that damage good. The respondent has really in his petition asked for the payment of that compensation in advance. But he is not entitled to this in "this" proceeding. His application in respect thereto is premature. He only asked for two years' rent. The Collector awarded him four years' rent. In our opinion he has been liberally treated. We, therefore, allow the appeal. We set aside the award of the District Judge. We award to the respondent Rs. 105-6 as offered to him by the Collector in the beginning. It will still be open to him on the expiry of the period for which the land has been acquired to apply for the compensation mentioned in section 36, clause (2), which he has claimed at Rs. 18 per *bigha* and in respect to which we express no opinion in the present proceeding. The objections are disallowed with costs and the appellant will have his costs in both Courts.

Appeal allowed.

MADRAS HIGH COURT.

APPEAL AGAINST ORDER No. 320 OF 1914.

July 19, 1915.

Present:—Mr. Justice Oldfield and

Mr. Justice Sadasiva Aiyar.

LINGAM VEERARAGHAVA ROW AND

ANOTHER—DEFENDANTS NOS. 3 AND 38

—APPELLANTS

versus

MALLAPRAGADA GURUNADHA ROW

— PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 141, O. II, r. 2, O. XX, r. 12—Execution—Decree for possession and mesne profits—Separate execution for possession and mesne profits, if allowable.

A person who holds a decree for possession of immovable property and mesne profits can execute it first for possession only and then afterwards for mesne profits.

Balasubramania Chetti v. Swarnammal, 21 Ind. Cas. 32; (1913) M. W. N. 685; 14 M. L. T. 196; 25 M. L. J. 367; 38 M. 199, followed.

Safdar Ali v. Kishun Lal, 7 Ind. Cas. 241; 12 C. L. J. 6, not followed.

Hari Charan Ghosh v. Manmatha Nath Sen, 19 Ind. Cas. 683; 41 C. 1, referred to.

Appeal against the order of the District Court of Ganjam, in Original Execution Petition No. 67 of 1913, in Original Suit No. 6 of 1903.

FACTS.—The holder of a decree for possession of immovable property and mesne profits first executed it for possession without asking for mesne profits. Some years later an application was made for executing the decree so far as it related to mesne profits. The District Judge allowed the application. The judgment-debtors appealed to the High Court.

Mr. P. Somasundaran, for the Appellants:—The application does not lie as the decree-holder failed to include the present prayer in his application for delivery of possession filed in 1911. *Vide* section 141, and Order II, rule 2, Civil Procedure Code. See also *Safdar Ali v. Kishun Lal* (1).

Mr. V. Ramesam, for the Respondent:—The case is covered by the decision reported as *Balasubramania Chetti v. Swarnammal* (2). It was quite competent to the decree-holder to apply for execution piece-meal. Section 141, Civil Procedure Code, is not applicable to execution applications. The case of *Safdar Ali v. Kishun Lal* (1) is as conflict with the later decision reported as *Hari Charan Ghosh v. Manmatha Nath Sen* (3).

JUDGMENT.—We follow *Balasubramania Chetti v. Swarnammal* (2) with the reasoning in which we respectfully concur, in preference to *Safdar Ali v. Kishun Lal* (1). The decision in the latter, moreover, appears to be irreconcilable with that of *Hari Charan Ghosh v. Manmatha Nath Sen* (3). The fact, therefore, that petitioner applied for execution in 1911 without making his present claim for mesne profits is not material. The appeal against order is dismissed with costs.

Appeal dismissed.

(1) 7 Ind. Cas. 241; 12 C. L. J. 6.

(2) 21 Ind. Cas. 32; (1913) M. W. N. 685; 14 M. L. T. 196; 25 M. L. J. 367; 38 M. 199.

(3) 19 Ind. Cas. 683; 41 C. 1; 18 C. W. N. 343.

RAJ GOBIND SINGH v. BEHARI PATHUK.

CALCUTTA HIGH COURT.

CIVIL RULE No. 319 OF 1915.

June 4, 1915.

Present:—Mr. Justice Walmsley and
Mr. Justice Roe.

RAJ GOBIND SINGH—PLAINTIFF—
PETITIONER

versus

BEHARI PATHUK AND ANOTHER—

DEFENDANTS—OPPOSITE PARTIES.

Mortgage-decree, execution of—Civil Procedure Code (Act V of 1908), O. IX, r. 13—Decretal amount, deposit of, in Court with consent of decree-holder—Appeal by other judgment-debtors—Jurisdiction of first Court to enter application under O. IX, r. 13.

In a mortgage suit a judgment-debtor against whom an *ex parte* decree had been passed submitted an application under Order IX, rule 13, Civil Procedure Code asking to have the *ex parte* decree set aside, and with the consent of both the parties the decretal amount was deposited in Court by the judgment-debtor, but afterwards the decree-holder objected to this deposit. The Munsif overruled his objection and passed an order declaring the validity of the deposit and granted the application for rehearing the suit. The other judgment-debtors who had appeared had appealed from the decree but had failed:

Held, that the Munsif had no longer jurisdiction to entertain an application under Order IX, rule 13, Civil Procedure Code. [p. 247, col. 2.]

Held, further, that the judgment-debtor was entitled to take such steps as he was advised to enforce the agreement. [p. 248, col. 1.]

Sankara Bhatta v. Subraya Bhatta, 17 M. L. J. 436; 30 M. 535 and *Kumud Nath Chowdhry v. Jatindra Nath Chowdhry*, 9 Ind. Cas. 189; 38 C. 394 at p. 402; 15 C. W. N. 399; 13 C. L. J. 221, referred to.

Rule against the order of the Munsif, 1st Court, Chapra.

Babu Niron Narayan Singh, for the Petitioner.

Babu Rajendra Prosad, for the Opposite Parties.

JUDGMENT.

WALMSLEY, J.—The facts out of which this application arises are as follows:—The petitioner obtained a mortgage-decree on the 20th August 1908 on contest against one Behari and *ex parte* against defendant No. 2, Ramdhani, who is now the opposite party. Behari appealed to the District Judge but his appeal was dismissed. The decree-holder then applied to have the decree made absolute and after securing an order to that effect, he took out execution proceedings and caused the mortgaged property to be sold. He purchased it himself and was put in possession on the 15th September 1914. On the 30th November 1914, Ramdhani, against whom the decree had been passed

ex parte, submitted an application under Order IX, rule 13, Civil Procedure Code, asking to have the *ex parte* decree set aside. On the 30th of January, some sort of agreement was arrived at between the parties to the effect that Ramdhani should pay into Court the decretal amount: and on that being done, the decree-holder should relinquish his claim to the property. Ramdhani deposited in Court the decretal amount as set out in the original decree which had been passed some six or seven years earlier. The decree-holder objected to this deposit and on the 10th March, the learned Munsif heard Pleaders on both sides and recorded the following order:—“In this view of the case the deposit made should be considered to be good. The rehearing petition should be granted after setting aside the decree. After this the necessary orders will be passed on the applicant moving the Court.” The decree-holder obtained a Rule from this Court on the opposite party to show cause why the order just mentioned should not be set aside on the grounds stated in the petition.

It has been urged before us on behalf of the decree-holder, *firstly*, that the Munsif had no jurisdiction to entertain an application under Order IX, rule 13; *secondly*, that he acted with material irregularity in not requiring from the judgment-debtor compliance with the requisition of Order IX, rule 13, Civil Procedure Code; and *thirdly*, that the judgment-debtor's application was barred by limitation.

With regard to the first contention, the argument on behalf of the decree-holder is that inasmuch as the defendant, Behari, appealed to the District Judge against the original mortgage-decree and that appeal was dismissed, the Munsif had no jurisdiction to entertain an application under Order IX, rule 13; and our attention has been drawn to the case of *Sankara Bhatta v. Subraya Bhatta* (1). That case seems to me authority for holding that the Munsif had no longer jurisdiction to entertain an application under Order IX, rule 13, in respect to the mortgage-decree. The same view was taken in the case of *Kumud Nath*

(1) 17 M. L. J. 436; 30 M. 535.

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Roy Chowdhry v. Jatindra Nath Chowdhry (2). I think, therefore, that the Munsif's order restoring the original mortgage was made without jurisdiction.

It has been urged, however, by the learned Vakil for the judgment-debtor that this is a case in which we should not interfere. It appears to me, however, that the order passed by the learned Munsif has left matters in such confusion that if it is allowed to stand, the parties may be put to extremely contentious litigation. I find it impossible to understand what the Munsif really intends to do. Another reason which influences me is this: the judgment-debtor alleges that there was a binding compromise between the parties that if the amount due under the decree at the date on which it was originally made were deposited by the judgment-debtor, the decree-holder would give up the property. The decree-holder, however, denies that the compromise was exactly in these terms. He says that what he stipulated for was the amount due under the decree at the time when he purchased the property. The only piece of evidence is the order recorded by the Munsif and I think that as the decree-holder differs regarding the exact terms of the compromise, he should be allowed an opportunity of proving that the terms were as he states. That is the second reason for thinking that the case is not one in which we should decline to interfere. I, therefore, make the Rule absolute, reverse the order of the Munsif setting aside the original decree and restoring the original suit. Under the peculiar circumstances of the case, I make no order as to costs.

ROE, J.—I agree, for the reasons given by my learned brother, that the *ex parte* decree could not be set aside by the Munsif. There being no application on the record to set aside the sale, that sale must stand good. The judgment-debtor may take such steps as he may be advised to take for enforcing the compromise arrived at between the parties on the date of the Munsif's order.

Rule made absolute.

(2) 9 Ind. Cas. 189; 15 C. W. N. 399; 38 C. 394 at p. 402; 3 C. L. J. 221.

MADRAS HIGH COURT.

APPEAL AGAINST APPELLATE ORDER No. 66 OF 1914.

July 16, 1915.

Present:—Mr. Justice Oldfield and
Mr. Justice Sadasiva Aiyar.

RAMAYANAM JOGAMMA—PLAINTIFF—
PETITIONER—APPELLANT

versus

ENAMANDRA RAMALAKSHMI—
DEFENDANT No. 3—COUNTER-PETITIONER—
RESPONDENT.

Compromise decree, penal clause in, if can be relieved against.

The power of the Court to grant relief against the enforcement of a penal clause is not confined to contracts between landlord and tenant but extends to compromise decrees also. [p. 249, col. 1.]

Bheema Venkataramana v. Bonnini Gurappa, 28 Ind. Cas. 970; 2 L. W. 537; 28 M. L. J. 488 and *Ana Sheik Mohidin v. Vadivalagiamambia Pillai*, 22 Ind. Cas. 37; (1914) M. W. N. 92, followed.

Appeal against the order of the District Court of Godavari, in Appeal Suit No. 175 of 1913, dated the 18th of December 1913, preferred against the order of the Court of the Principal District Munsif of Amalapuram, in Execution Petition No. 369 of 1913, in Original Suit No. 592 of 1865.

FACTS.—A suit by a Hindu widow for the recovery of possession of certain immoveable properties was compromised, whereby the defendants agreed to pay to the widow Rs. 14 every year on a particular date and in case of failure to deposit the same in Court within 15 days of the specified date and that in default, the widow could recover possession of a portion of the suit properties in execution of the decree in the suit. A decree followed in terms of the compromise. Payments were duly made under the decree from 1866 till 1912 when a default was committed and the widow applied in execution for the enforcement of the clause which provided for possession. The Court of first instance decreed the suit holding that the forfeiture clause could not be relieved against, but on appeal the District Judge dismissed the suit holding that the default was not wilful and could be relieved against. The widow then appealed to the High Court.

Mr. P. Somasundaran, for the Appellant:—The decree being by consent, the Court had no power to interfere with it except by consent. The forfeiture clause could not, therefore, be relieved against.

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Mr. V. Ramadoss, for the Respondent:—The Courts have ample power to relieve against penal clauses in compromise decrees. See *Bheema Venkataramana v. Bommini Gurappa* (1) and *Ana Sheikh Mohidin v. Vadivala-gianombia Pillai* (2).

JUDGMENT.

The appellant contends that the doctrine of relief against the enforcement of a penal clause is inapplicable in the case of contracts other than those between landlord and tenant. This is negatived by the authority of *Bheema Venkataramana v. Bommini Gurappa* (1) and *Ana Sheikh Mohidin v. Vadivala-gianombia Pillai* (2).

Next it is urged that the District Judge's use of his discretion to grant relief was unjustifiable. We do not agree. Time was not, in our opinion, of the essence of the contract; and the person substantially in fault was in fact the appellant.

The appeal against appellate order fails and is dismissed with costs.

Appeal dismissed.

(1) 28 Ind. Cas. 970; 2 L. W. 537; 28 M. L. J. 486.

(2) 22 Ind. Cas. 37; (1914) M. W. N. 92.

ODDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 486 OF 1912.

March 24, 1915.

Present:—Mr. Kanhaiya Lal, A. J. C.

ABDUL RAHMAN KHAN—DEFENDANT—

APPELLANT

versus

AMIR ALI KHAN AND ANOTHER—PLAINTIFFS
—RESPONDENTS.

British Indian Association, rules of—Financial Commissioner and British Indian Association, powers of, as private arbitrators—Awards, binding effect of—Construction of decree.

The rules of the British Indian Association, obscure as they were in some respects, did not exhaust powers of the Association and the Financial Commissioner as private arbitrators to settle disputes about property between the members of a family. Therefore, awards made by them irrespective of those rules were obligatory upon the parties to the submissions and upon those whose interests they represented, to the same extent as those made under the rules or filed and enforced in the manner provided by section 33 of the Oudh Estates Act. [p. 251 cols. 1 & 2.]

Nawab Ali Khan v. Wahid Ali, 5 Ind. Cas. 156; 7 A. L. J. 41 (P. C.); 14 O. W. N. 237; 11 C. L. J. 116 12 Bom. L. R. 161; 20 M. L. J. 195; 13 O. C. 74; 32 A. 92; 37 I. A. 12; *Ganga Bakhsh v. Dalip Singh*, 7 O. C. 218 and *Bhaiya Ardawan Singh v. Uday Pratab Singh*, 23 C. 838; 23 I. A. 64, referred to.

Appeal from the decree of the District Judge, Rae Bareilly, dated the 28th August 1912, reversing that of the Subordinate Judge, Sultanpur, dated the 15th June 1912.

The Hon'ble Mr. *Shahid Husain*, for the Appellant.

Syed Zahur Ahmad, holding brief of Syed Wazir Hasan, for the Respondents.

JUDGMENT.—The plaintiffs-respondents sued in this case to enforce a right of pre-emption in respect of a one-third share of certain villages sold by Ali Raza Khan in favour of the defendant-appellant on the 2nd May 1912. The villages in question formed part of *Taluqa Gangaon*, of which the defendant-appellant is the present *taluqdar*. The allegation of the plaintiffs-respondents was that the vendor had a superior proprietary right in the said villages to the extent of a one-third share under a decree of the Financial Commissioner dated the 12th July 1869; that even if he was not a superior proprietor he had at all events an under-proprietary right, and that the plaintiffs as kinsmen and co-sharers of the vendor were entitled to pre-emption as against the defendant-appellant who was a stranger. The defence was that neither the plaintiffs nor the vendor had any superior proprietary or under-proprietary right in the villages in question, that they merely held certain shares in the villages in lieu of maintenance and that no suit for pre-emption was maintainable. It was conceded during the hearing of the suit that neither the plaintiffs nor the vendor had any superior proprietary right in the said villages.

The Court of first instance found that the plaintiffs were merely *guzaradars* or holders of the land in lieu of maintenance and that they had no right to sue for pre-emption. The lower Appellate Court, however, found that the plaintiffs as well as the vendor were under-proprietors and that the suit for pre-emption was maintainable.

It appears that Sher Ali Khan, father of plaintiff No. 1 and Babar Ali Khan,

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father of plaintiff No. 2, and Husain Ali Khan, father of the vendor, were paternal cousins of Jahangir Bakhsh Khan, grandfather of the defendant-appellant. They were descended from a common ancestor named Wazir Khan, and the villages in question were originally their joint property. After the annexation of Oudh, Jahangir Bakhsh Khan managed to get the Summary Settlement made with him of the entire property. He subsequently agreed to divide the property with Sher Ali Khan, who probably represented himself and his brothers, Babar Ali Khan and Husain Ali Khan, on the 19th September 1859, allowing Sher Ali Khan to have $1\frac{1}{2}$ *pattis* forming the villages in question, with the *sir* appertaining thereto, and retaining the remainder himself. The subsequent grant of a *sanad* to Jahangir Bakhsh Khan appears, however, to have created a disturbance in the rights of the parties. Sher Ali Khan thereupon moved the British Indian Association to settle his claim. On the 4th July 1869 the Association made an award, granting Sher Ali Khan a decree for $1\frac{1}{2}$ *pattis* in *Taluqa* Gangaon, along with certain other property in accordance with the previous agreement dated the 19th September 1859, subject to the payment by him as "*haq taluqdari*" of ten per cent. of the revenue assessed on the said villages to the *taluqdar*. The award was approved by the Financial Commissioner on the 12th July 1869. The reference in the award to the previous possession of the plaintiffs and the history of the property, including the agreement of the 19th September 1859, preclude the idea that the grant was made solely in lieu of maintenance, though the effect of the grant of a *sanad* to Jahangir Bakhsh Khan was to make the latter an absolute proprietor of the *taluqa* and to give to the junior members of the family a right to maintenance. The award treated the property as the joint property of the family of Wazir Khan. Wazir Khan left three sons, Sarishta Khan, Alam Khan and Khairyat Khan. Sarishta Khan was succeeded by his three sons, Sher Ali Khan, father of plaintiff No. 1, Husain Ali Khan, father of the defendant-vendor, and Babar Ali Khan, father of plaintiff No. 2. Alam Khan left a son, Jahangir Bakhsh Khan, grandfather of

the defendant-vendee. Khairyat Khan left certain descendants with whom we are not concerned. After reciting that a custom of *jethansi* existed under which an elder brother got one-half more than the younger brother, the award stated that the *taluqa* was known as comprising $3\frac{1}{2}$ *pattis* because Sarishta Khan, the ancestor of the plaintiff, obtained possession of one *patti* and a half, while his younger brothers Alam Khan and Khairyat Khan, got one *patti* each, that there was a custom of division in the family, and that by an award of arbitration, dated the 24th April 1857, and an agreement of partition, dated the 19th September 1859, the plaintiff, who was a descendant of Sarishta Khan, was the owner of one and a half *pattis* and had been in possession of the same within limitation. It went on to say that *qubuliyats* in respect of the *taluqa* were executed from time to time by whichever party happened to be in power, that from 1248 to 1263 *Fasli*, the plaintiff was also in possession of the *taluqa* and was recorded as a *taluqdar*, and that by reason of the previous award and agreement of [partition] the plaintiff could not get a *guzara* under the rules, but was entitled to the possession of one and a half *pattis* allotted to his share previous to the *sanad*. The conclusion at which the British Indian Association arrived was expressed in the following words:—

The plaintiff can get no *guzara* now. Under the award given by the arbitrators and under the deed, dated 19th September 1859, he is entitled to get possession of one and a half *pattis*, *Taluqa* Gangaon, excluding the *sir* of the *pattidari muafti* and the old *sir* land situate in *Taluqa* Harchandpore, and to rendition of accounts in respect of one and a half *pattis*, *Taluqa* Hamirpur, under the conditions of the said deed. But in accordance with the provisions of Act XXVI of 1866, the defendant is entitled to *malikana* dues in respect of $1\frac{1}{2}$ *pattis*, Gangaon, and to rendition of accounts in respect of Hamirpur. The plaintiff's claim for a share in *Taluqa* Badshahpur is improper under the terms of this deed. For the above reasons it is ordered that a decree be passed for $1\frac{1}{2}$ *pattis* in *Taluqa* Gangaon and for rendition of accounts in respect

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of $1\frac{1}{2}$ *pattis* in *Taluqa* Hamirpur and the old *sir* lands situated in Paharapore in conformity with the provisions of the deed in favour of the plaintiff against the defendant, that *talugdari* dues at 10 per cent. on accounts of revenue of the *Taluqa* Gangaon and on the rendition of accounts in respect of Hamirpur be regularly paid to the defendant and that the claim for share in *Taluqa* Badshahpur be dismissed.

The dispute in the present case relates to a share, forming part of $1\frac{1}{2}$ *pattis*, *Taluqa* Gangaon. It is obvious from the award, read as a whole, that what was granted was an under-proprietary right in $1\frac{1}{2}$ *pattis* in recognition of the then plaintiff's previous title and possession, and the reference to the Oudh Sub-Settlement Act and *malikana* dues shows that the analogy of section 7 of that Act was adopted to fix the amount payable to the superior proprietor. The award was not made under the rules formed by the British Indian Association, which provided a uniform method of settling disputes relating to claims to maintenance, for it expressly states that the plaintiff was not entitled to claim *guzara* under the rules owing to the previous mutual settlement, and section 33 of Act I of 1869 has also no application because the award was made before that Act came into force. The rules of the British Indian Association, obscure as they were in some respects [*Nawab Ali Khan v. Wahid Ali* (1)], did not exhaust the powers of the British Indian Association and the Financial Commissioner as private arbitrators to settle disputes about property between the members of a family. They did not purport to deal with cases in which an estate was subject to division and had already been divided, for in regard to persons who were before annexation in possession of definite provision in land as maintenance, they declared that those whose land was excluded from the *taluka* when the maintenance was given and who got separate *qubuliyats* in their own names, would fall within the category of under-proprietors under the rules of Sub-Settlement Act and their claims would be adjudicated by the Courts. Awards made

by the British Indian Association and by the Financial Commissioner irrespective of those rules were, therefore, as pointed out in *Ganga Bakhsh v. Dalip Singh* (2) and *Bhaiya Ardawan Singh v. Uday Pratab Singh* (3), obligatory upon the parties to the submissions and upon those whose interests they represented, to the same extent as those made under the rules, or filed and enforced in the manner provided by section 33 of Act I of 1869.

The subsequent litigation which ensued between the predecessors-in-interest of the parties is not of much value, because in the claim for partition filed by Sher Ali Khan in 1884 and in the mutation proceedings instituted by him in 1885 and 1891 he was claiming a superior proprietary right or the rights of a co-sharer in the village which he did not possess. In the suits for profits brought by him in 1893 and 1900 his right to a share therein subject to a deduction of a certain percentage by way of "*haq talugdari*" due to the superior proprietor was recognized by the Court.

The learned Counsel for defendant-appellant conceded in the course of his argument that the rights of Sher Ali Khan and his heirs were heritable and transferable in favour of the superior proprietor; but no distinction in principle can be drawn between a sale in favour of the superior proprietor or a sale in favour of a third person, because the consent of the superior proprietor cannot make it valid, if it was otherwise without any right.

I find, therefore, the rights of the vendor in the village in question and those of the plaintiffs and their predecessors-in-interest were those of under-proprietors under the award and the Court below was justified in granting a decree for pre-emption. The other findings arrived at by the Court below are not disputed.

The appeal is dismissed with costs.

Appeal dismissed.

(2) 7 O. C. 218.

(3) 23 C. 838; 23 I. A. 64.

(1) 5 Ind. Cas. 156; 7 A. L. J. 41 (P. C.); 14 C. W. N. 237; 11 C. L. J. 116; 12 Bom. L. R. 161; 20 M. L. J. 195; 13 O. C. 74; 32 A. 92; 37 I. A. 12.

HASUNI BIBI v. SADIR MAMUD SARKAR.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 2955
OF 1911.

July 21, 1914.

Present:—Mr. Justice D. Chatterjee and
Mr. Justice N. Chatterjea.

HASUNI BIBI AND ANOTHER—DEFENDANTS—
APPELLANTS

versus

SADIR MAMUD SARKAR—PLAINTIFF—

RESPONDENT.

Bengal Tenancy Act (VIII of 1885), s. 86 (6)—Surrender—Encumbrance—Landlord, liability of—Encumbrancer, consent of—Encumbrance, validity of, limited to tenant and encumbrancer—Landlord, right of, to enter.

The validity of the encumbrance must be limited to the position of the transferor and the transferee i. e., the tenant and the encumbrancer. [p. 253, col. 1.]

A transfer of a portion of non-transferable holding of an occupancy *raiyyat* is so far valid against the landlord as not to entitle him to enter upon the portion transferred. [p. 253, col. 1.]

Therefore, a surrender made by a transferor without the consent of his transferee is not valid and has not the effect of entitling the landlord to *khas* possession in disregard of his rights. [p. 253, col. 1.]

Dayamoyi v. Ananda Mohan Roy Chowdhury, 27 Ind. Cas. 61; 20 C. L. J. 52; 18 C. W. N. 971 (F. B.); 42 C. 172, followed.

Appeal against the decree of the Subordinate Judge, third Court, Mymensingh, dated the 30th June 1911, affirming that of the Munsif, first Court, at that place, dated the 23rd of January 1911.

Babu Kali Kinker Chakravarti, for the Appellants.

Babu Satis Chandra Ghosh, for the Respondent.

JUDGMENT.—Defendant No. 4 was a *raiyyat* with a non-transferable right of occupancy. In 1902 he executed a *kat kabala* in respect of a part of his holding in favour of defendant No. 1. The term of this *kat kabala* expired in 1905 and a fresh *kat kabala* by a registered deed was given for a term of three years up to Agra 1315.

The landlord detained a decree for arrears of rent against defendant No. 4 in 1908 and on the 5th of April 1908 defendant No. 4 gave an *istafa* of his holding to the landlord by a registered deed stating that he would not be liable for the arrears due. The landlord settled the land with the plaintiff on the 16th April 1898 for five years. The land-

lord, however, executed his rent-decree and defendant No. 1 paid up the amount in order to save the holding from sale. The plaintiff then entered into possession, but was evicted in execution of decree under section 9 of the Specific Relief Act. The plaintiff now brings this suit for recovery of possession and the Courts below have given him a decree holding that although the plaintiff may have induced defendant No. 4 to make the surrender, the landlord was no party to any fraud and the plaintiff obtained a valid title by his settlement. It is contended in second appeal before us that the lower Courts are wrong and that in any case no decree for recovery of possession could be passed without charging the property with the just dues of defendant No. 1, who died pending suit and is now represented by his heirs.

Reliance is placed in support of this contention on the provisions of section 86 (6). It is contended by the learned Vakil for the respondent that the encumbrance spoken of in sub-section (6) must be an encumbrance which is binding on the landlord, and this is the view taken by the Court below. The learned Vakil for the appellant on the other hand contends, that the section makes no such restriction and it is quite sufficient if there is an encumbrance which is binding as between the tenant and the encumbrancer. In the case of *Tamizuddin Khan v. Khoda Nawaz Khan* (1) there is a dictum of the learned Judges which favours this latter contention. The question was whether the purchasers of a portion of a non-transferable *jote* were entitled to claim the protection of section 86 (6). The learned Judges said: "To enable defendants Nos. 1 to 4 to follow sub-section (6) it must be shown that the sale to them was a valid sale; and further the discussion as to the validity of that sale and the resultant interest arising therefrom must be limited to the position of the transferor and the transferees and not to the position of the superior landlord". In the result the learned Judges held that the transfer being a sale was an extinction and not a limitation of the interest of the transferor and was, therefore, not an encumbrance. The correctness of this decision on the latter point has been doubted in the

(1) 5 Ind. Cas. 116; 14 C. W. N. 229; 11 C. L. J. 16.

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case of *Asgar Ali v. Gouri Mohan Roy* (2), but so far as the point in issue is concerned the learned Judges do not seem to have thought that the encumbrance under section 86 (6) must be one that the landlord was bound to accept. Apart from authority if we read the word encumbrance in sub-section 6 as "encumbrance which is binding upon the landlord," here is no necessity for insisting on the consent of the encumbrancer for the validity of the surrender, for he does not run any risk, his rights are *ex hypothesi* binding on the landlord.

We, think, therefore, that the validity of the encumbrance "must be limited to the position of the transferor and the transferee" *i. e.*, the tenant and the encumbrancer. It has been held by the Full Bench that a transfer of a portion of non-transferable holding of an occupancy *raiyat* is so far valid against the landlord as not to entitle him to enter upon the portion transferred. *Dayamoyi v. Ananda Mohan Roy Chowdhury* (3).

We, therefore, think that the surrender in this case made without the consent of defendant No. 1 was not valid and had not the effect of entitling the landlord to *khas* possession in disregard of his rights.

Then again the landlord went on with the execution of her decree for arrears notwithstanding the surrender and defendant No. 1, who had according to the above view of his rights a subsisting encumbrance on the holding, deposited the decretal amount to prevent the sale and thereby acquired a statutory charge under section 171, Bengal Tenancy Act.

We may further observe that in any view of the case defendant No. 4 owed a duty to defendant No. 1 and upon the findings the plaintiff maliciously induced defendant No. 4 to make the surrender. He was, therefore, an abettor of the fraud of defendant No. 4. All persons concerned in the commission of a fraud are to be treated as principals and it would have been the height of injustice to allow him to reap the fruits of his fraud to the detriment of an innocent party.

(2) 21 Ind. Cas. 58; 18 C. W. N. 601; 18 C. L. J. 257.
(3) 27 Ind Cas, 61; 18 C. W. N. 971; 20 C. L. J. 52;
42 C. 172.

We have no hesitation, therefore, in setting aside the decree of the lower Appellate Court and we do set it aside and dismiss the suit of the plaintiff with costs in all Courts.

Decree set aside.

ODDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 318 OF 1913.

April 15, 1915.

Present:—Mr. Lindsay, J. C.

Babu SARUP NARAIN—DEFENDANT—
APPELLANT

versus

MADHO SINGH—PLAINTIFF,

Musammât BAIDEI AND OTHERS—DEFENDANTS
—RESPONDENTS.

Estoppel—Fraudulent transfer—Fraud successfully perpetrated—Plea as to fraud—Parties to fraud, position of.

Where in cases of fraudulent transactions the fraud has been successfully carried into effect, the parties to them cannot, either as plaintiffs or as defendants, plead fraud to vitiate the transactions and escape from the consequences of their own acts. [p. 255, col. 1.]

Siddlingappa v. Hirasa, 31 B. 405; 9 Bom. L. R. 542, referred to.

Appeal from the decree of the District Judge, Sitapur, dated the 26th April 1913, upholding that of the Subordinate Judge, Sitapur, dated the 17th June 1912.

Babu *Ishri Prasad*, for the Appellant.

Babu *Bisheshwar Nath*, for Respondent No. 1.

JUDGMENT.—This appeal has arisen out of a suit for redemption of a mortgage which was executed on the 13th of June 1882 in favour of Babu Tulshi Ram by two mortgagors, Hindu Singh and Durjan Singh. The property covered by the mortgage is a 2-annas 7-3/5 pies share of a village called Baswain. One of the mortgagors, Hindu Singh, has died. He was succeeded by his brother, Makrand Singh,

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and it appears that Makrand Singh gifted his interest in the mortgaged property to the plaintiff in this suit, namely, Madho Singh. The first three defendants in the suit represented the mortgagee, Babu Tulshi Ram. The fourth defendant was Durjan Singh, the other mortgagor, while the fifth defendant apparently is the donee of Durjan Singh's interest in the equity of redemption. The principal defence with which we are concerned here was to the effect that the mortgage in suit was an entirely fictitious transaction. From the written statement it would appear that in the year 1881 Babu Tulshi Ram, who was a Pleader practising in the Sitapur District, bought several *zemidari* shares belonging to villages in that district. It appears that after these purchases had been made, Babu Tulshi Ram was threatened with a pre-emption suit by one Ujagar Singh and in fact it is admitted that this man Ujagar Singh did ultimately bring a suit for pre-emption. It is said, therefore, that Babu Tulshi Ram, in order to defeat the claim for pre-emption put forward by Ujagar Singh, executed two fictitious sale-deeds in favour of Durjan Singh and Hindu Singh on the 30th October 1881. Having made this *farzi* transfer Babu Tulshi Ram in order to secure himself, it is said, got a fictitious mortgage-deed executed by Hindu Singh and Durjan Singh in favour of one Babu Salik Ram who was related to him (Tulshi Ram). In short the story for the defence was that Durjan Singh and Hindu Singh had never really any interest in this property, that there was in fact no mortgage and that, therefore, the plaintiff had no case upon which he could ask for a decree for redemption. Both the Courts below have decreed the claim. They have both held that it was not open to the contesting defendants to raise the plea of fraud set out in the written statement of defence. Both the Courts have held that the mortgage-deed in suit must be taken to be a genuine deed and they decreed redemption accordingly. The only ground which is argued here in appeal is that the Courts below were wrong in holding that the defendants were, in the circumstances disclosed, estopped from giving evidence to show the true state of affairs. This contention, I think, can be disposed of in a

few words. The law which governs cases of this kind in which parties to fraudulent transactions desire to escape from the consequences of their own acts has been laid down in a variety of cases. Of these, I think it sufficient to refer to one only, namely, the case reported as *Sidlingappa v. Hirasa* (1). In that case one Hirasa, in order to defeat the claims of certain creditors of his, executed a *benami* sale-deed of his property in favour of one Hanwantsa. Hanwantsa afterwards conveyed the same property to the plaintiff's deceased father. After this latter transfer the property was attached in execution of a decree by one of the creditors of the original owner, Hirasa. An objection was made to the attachment by the plaintiff's father and the result was that the attachment was raised. The plaintiff's father died. The plaintiff brought a suit for recovery of the property and the second defendant impleaded in the case was the original owner, Hirasa. Hirasa put up the defence that he was the real owner of the property and he pleaded that the sale-deed which he had executed in favour of Hanwantsa was *benami* and was of no effect in law. The learned Judges of the Bombay High Court were of opinion that it was not competent to the second defendant, Hirasa, to maintain a defence of this kind. Various authorities are referred to in the judgment of their Lordships of the Bombay High Court and a reference is made to the well-settled principle that where fraud of this kind has been carried into effect, a party to it cannot, as a plaintiff, plead the fraud to vitiate the transaction. The question before the Bombay High Court, therefore, was whether this principle ought to be applied in cases where a defendant was pleading his own fraud so as to escape liability under the claim made by the plaintiff. Their Lordships were of opinion that the principle should be so applied. There can, I think, be no question as to the soundness of this decision and I think it was properly relied upon by the lower Courts in support of their decisions. It is perfectly clear from the facts admitted by the defendants themselves that in this

(1) 31 B. 405; 9 Bom. L. R. 542.

KUMEDA PROSONNO BHUIYA v. SECRETARY OF STATE.

instance Babu Tulshi Ram successfully perpetrated a fraud by making this bogus transfer of the property. He defeated a rightful claim to pre-emption. It is not possible, therefore, for these defendants now to be heard to say that they are entitled to escape from the consequences of this fraud so as to avoid this claim for redemption. We have before us a deed of mortgage according to which the plaintiff has a right to redeem and the defendants Nos. 1 to 3, who represent Babu Tulshi Ram, are liable to be redeemed, and I agree with both the Courts that these defendants cannot be permitted to say that this deed can now be avoided on the ground that it was executed for the purpose of committing a fraud. My finding, therefore, is that the view of the law taken by the Courts below was correct and I dismiss this appeal with costs.

Appeal dismissed.

CALCUTTA HIGH COURT.
FIRST CIVIL APPEAL No. 361 of 1910.
July 7, 1914.

Present:—Mr. Justice Fletcher and
Mr. Justice Richardson.

KUMEDA PROSONNO BHUIYA—
PLAINTIFF—APPELLANT

versus

SECRETARY OF STATE FOR INDIA IN
COUNCIL AND OTHERS—DEFENDANTS—
RESPONDENTS.

Bengal Tenancy Act (VIII of 1885), ss. 103B, 111A, presumption under—Ryot, status of, conditions of—Occupancy right, acquisition of—Limitation.

Where the plaintiff held 203 *bighas* of land and was *prima facie* a tenure-holder and not a *ryot*, but no document was in existence as evidence of the terms on which he held, and oral evidence proved that the tenancy in its inception was granted to the predecessors of the plaintiff for cultivating purposes, and the plaintiff and his predecessors were describ-

ed in former Settlements as having the interest of *ryots* and the plaintiff had also granted rent receipts describing the tenants under him as under-*ryots*:

Held, that the presumption created by section 103 (B) of the Bengal Tenancy Act was rebutted. [p. 256, col. 1.]

That the plaintiff and his predecessors having held the land for more than 12 years had a right of occupancy in the land. [p. 256, col. 1.]

Kade Mandal v. Ahadali Mollah, 6 Ind. Cas. 594; 14 C. W. N. 629, referred to.

Where the Record of Rights was finally published on 14th September 1908, and on plaintiff's appeal to the Revenue Authorities against the entry in the Record of Rights affecting his status being rejected, a suit was filed on 29th June 1909:

Held, that the suit came under the proviso to section 111A and not under section 104 H. [p. 256, col. 2.]

Promoda Nath Roy v. Asir-ul-din, 11 Ind. Cas. 262; 15 C. W. N. 896, referred to.

Appeal against the decree of the Subordinate Judge, first Court of Midnapur, dated the 21st of June 1910.

Babus Nilmadhab Bose and Hirendra Nath Ganguli; for the Appellant.

Babu Ram Charan Mitra, for the Respondents.

JUDGMENT.

FLETCHER, J.—This is an appeal by the plaintiff against the decision of the Subordinate Judge of the first Court at Midnapur dismissing his suit. The plaintiff brought his suit for a declaration that he was an occupancy *ryot* of certain land mentioned in the plaint. The land in question is situate within the limits of a Government *khass mahal*. At the trial the learned Subordinate Judge dismissed the suit, on the ground that the plaintiff had failed to prove that he had served notice on the defendant No. 1 pursuant to the terms of section 80 of the Code of Civil Procedure. The other issues the learned Judge decided in favour of the plaintiff. On this appeal coming on for hearing in the first instance, a remand was directed to the lower Court to try the issue as to whether or not notice under section 80 had been served on the defendant No. 1. The learned Subordinate Judge has not certified to this Court that notice under section 80 was in fact served. This finding has not been challenged, nor could it be, by the learned Senior Government Pleader. The defendant No. 1 is, therefore, in the position of an appellant in this appeal.

GADE LAKSHME NARASIMHAM v. PILLALAMARRI JAGANADHA ROW.

Two questions only have been presented to us for our decision, namely, (a) what is the status of the plaintiff and (b) is the present suit barred by limitation? The holding in question is of an extent of 203 *bighas* odd and, therefore, *prima facie* the plaintiff is a tenureholder, not a *ryot*. No document is in existence evidencing the terms on which the plaintiff holds. But the plaintiff called evidence, which the learned Judge accepted, to prove that the tenancy in its inception was granted to the predecessor of the plaintiff for cultivating purposes. In particular the learned Judge relied on the evidence of the plaintiff's witness No. 6, who is stated to be about 87 years of age. The learned Judge remarks that this witness gave his evidence "in so straightforward a manner that even if he had been the only witness on the point still I could never have brought myself to disbelieve him." The evidence for the defendants seems to show that "all the tenants on the land are *bhagchasis* under the plaintiff." But *bhagchasis* are not necessarily tenants of the plaintiff [*Kade Mandal v. Ahadali Mollah* (1)]; it also appears that the plaintiff and his predecessors in former Settlements were described as having the interest of *ryots*. The plaintiff has also granted rent receipts describing the tenants under him as being under-*ryots*.

I agree, therefore, with the learned Judge that the presumption created by section 103B of the Bengal Tenancy Act is rebutted.

The plaintiff and his predecessors having held the land for far more than 12 years have a right of occupancy in the land.

The other question for our determination is whether the suit is barred by limitation. The Record of Rights was finally published on the 14th of September 1908. The plaintiff appears to have preferred an appeal to the Revenue Authorities against the entry on the Record of Rights affecting his status. This appeal was rejected by the Revenue Authorities as being incompetent. The present suit was filed on the 29th of June 1909.

It has been argued by the learned Senior Government Pleader that the present suit is a suit brought in respect of the settlement of any rent or omission to settle any rent under sections 104A to 104F of the Bengal

Tenancy Act. The suit, therefore, not having been instituted within the time limited by section 104H of the Bengal Tenancy Act, the same is barred.

On the other hand, it is said that the present suit falls within the proviso to section 111A of the Act, which provides that any person who is dissatisfied with an entry in, or omission from, a Record of Rights which concerns a right of which he is in possession, may institute a suit for declaration of his right under Chapter VI of the Specific Relief Act, 1877.

In my opinion the present suit comes under the proviso to section 111A and not under section 104H. A similar view was expressed in a case reported as *Promoda Nath Roy v. Asir-ud-din* (2). The present appeal must, therefore, be allowed and in lieu of the order for dismissal made by the learned Judge in the Court below the Court should declare that the plaintiff has the status of a *ryot* with a right of occupancy in the land.

The respondent to the present appeal must pay to the appellant his costs of this appeal and in the Court below. The cross-objection filed by the respondent will be dismissed. We make no order as to the costs thereof.

RICHARDSON, J.—I agree.

Appeal allowed.
(2) 11 Ind. Cas. 262; 15 C. W. N. 896.

MADRAS HIGH COURT.
CIVIL MISCELLANEOUS APPEAL No. 192 OF 1914.
July 28, 1915.

Present:—Mr. Justice Oldfield and
Mr. Justice Sadasiva Aiyar.

GADE LAKSHME NARASIMHAM
PANTULU AND OTHERS—PLAINTIFFS—
APPELLANTS

versus

PILLALAMARRI JAGANADHA ROW
PANTULU AND OTHERS—DEFENDANTS

—RESPONDENTS.

Provincial Insolvency Act (III of 1907), s. 16 (2)—Decree against the estate of deceased debtor—Execution—Heirs insolvents after decree but before execution—Estate, whether liable in the hands of Official Receiver—Civil Procedure Code (Act V of 1908), s. 52, scope of.

Where after the passing but before the execution of a decree for realisation of the debts of a deceased

(1) 6 Ind. Cas. 594; 14 C. W. N. 629.

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debtor from his estate in the hands of his heirs the heirs become insolvent, the deceased's estate like other assets of the insolvents vests in the Official Receiver and is immune from execution proceedings under section 16 (2) of the Provincial Insolvency Act and the creditor must prove his debt like other unsecured creditors.

Veerasokka Raju v. Papiiah, 26 M. 292; 13 M. L. J. 258, referred to.

Section 52, Civil Procedure Code, merely states the extent to which and the manner in which debts can be recovered and in no way provides for the reservation of property to satisfy them.

Appeal against the order of the District Court of Ganjam, in Execution Petition No. 62 of 1912 (in Original Suit No. 37 of 1906), dated the 15th December 1913.

Mr. B. Narasimha Rau, for the Appellants.

Mr. T. Ramachandra Rau, for the Respondents.

JUDGMENT.—The respondents, holders of a decree for realization of Rs. 17,094-10-1 from the estate of the late Balarama Doss in the hands of 1st and 7th defendants and other persons not before this Court, claimed an order for attachment and sale. The lower Court's order under appeal granted execution. It is contended that it did so wrongly against the 1st and 7th defendants' share of the estate, because subsequently to the decree they became insolvents, and their share with their other properties vested in the Official Receiver. 1st and 7th defendants held as heirs of Balaram Doss, and that fact cannot be altered by the embodiment of the rights of the latter's creditors in a decree. "The property of a deceased Hindu is not so hypothecated for his debt as to prevent his heir disposing of it or to allow a creditor to follow it in the hands of a third party." *Veerasokka Raju v. Papiiah* (1). There is, therefore, no question of respondent's right to a lien or charge on Balaram Doss' property in 1st and 7th defendants' hands or in those of the Official Receiver who derived it from them. Section 52 of the Code of Civil Procedure has been relied on by respondents. But it merely states the extent to which and manner in which debts, such as respondents', can be recovered and in no way provides for the reservation of property to satisfy them. Balaram Doss' estates must accordingly be treated as having vested in the Official Receiver like 1st and 7th defendants' other assets and as being immune from execution proceedings under section 16 (2) of the

(1) 26 M. 792; 13 M. L. J. 258.

Provincial Insolvency Act, respondents being left to prove their debts like other unsecured creditors.

The appeal must, therefore, be allowed, the lower Court's order so far as it affects 1st and 7th defendants being set aside and respondents' petition being dismissed as against them and the Official Receiver with costs in both Courts.

Appeal allowed.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

REVENUE PETITION NO. 21 OF 1913-14
OF HARDOI DISTRICT.

March 28, 1915.

Present:—Mr. Tweedy, J. M.

HEM NATH AND ANOTHER—PLAINTIFFS—
APPELLANTS

versus

BALDEO SINGH AND OTHERS—DEFENDANTS

—RESPONDENTS.

Oudh Rent Act (XXII of 1886, ss. 55, 127—Trespasser, position of—Ejectment by notice—Jurisdiction of Revenue Courts.

A trespasser under section 127 of the Oudh Rent Act can be ejected through the Revenue Courts by notice issued under section 55 of the Act. [p. 258, col. 1.]

Appeal from the decree of the Officiating Commissioner, Lucknow, dated 27th September 1913, upholding that of the Assistant Collector, Hardoi, dated the 20th March 1913.

FACTS.—The defendants, landlords, issued a notice of ejectment against the plaintiffs who were recorded in the *patwari's* papers as ordinary tenants holding without any rent having ever been fixed on the land under their cultivation (*arazi ba lagan bila tasfiya*). The plaintiffs contested the notice chiefly on the ground that the landlords' remedy against them was to sue them under the Resumption Chapter of the Oudh Rent Act inasmuch as they had never paid any rent, and not to have them ejected by means of a notice issued under section 55 of the Act, inasmuch as the relation of landlord and tenant did not exist between the parties because there had been no contract of tenancy between them.

Babu Hargovind Das, for the Appellants.

In re PARA THURINJI.

Pandit Gokaran Nath Misra and Pandit Bansi Dhar Misra, for the Respondents.

JUDGMENT.—I agree with the Commissioner's finding although the reason given by him may not be altogether convincing. If the appellants are trespassers they can be ejected by the Revenue Court under section 127. If they are tenants they can be ejected also as they have proved no rights of occupancy of any kind.

The appeal is dismissed with costs.

Appeal dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1759 OF 1914.

July 17, 1915.

Present:—Mr. Justice Seshagiri Aiyar.

In re PARA THURINJI AND OTHERS

—DEFENDANTS—APPELLANTS.

Evidence Act (I of 1872), s. 114, ill. (i)—Production of bond by executant—Presumption as to discharge—Onus.

The mere fact that a bond creating an obligation is in the hands of the obligor is insufficient to discharge the obligation unless there is an endorsement of discharge.

Mohammad Mehdi Hasan Khan v. Mandir Das, 17 Ind. Cas. 396; 12 M. L. J. 392; 15 O. C. 278; 34 A. 511; 14 Bom. L. R. 1073; 10 A. L. J. 373; 17 C. W. N. 49; 16 C. L. J. 629; (1912) M. W. N. 1052; 39 I. A. 68; 23 M. L. J. 741, followed.

Second appeal against the decree of the Court of the Temporary Subordinate Judge of Chingleput, in Appeal Suit No. 3 of 1914, preferred against that of the Court of the District Munsif of Conjeevaram, in Original Suit No. 18 of 1912.

FACTS.—The facts of the case appear sufficiently from the judgment.

Mr. A. S. Visvanatha Iyer, for the Appellants:—The lower Courts erred in throwing the onus on the defendant. Illustration (i) to section 114, Evidence Act, raises a presumption in favour of the defendant. It was for the plaintiff to prove that the bond was not discharged. Vide *Mohammad Mehdi Hasan Khan v. Mandir Das* (1).

JUDGMENT.—The 7th to 9th defendants (1) 17 Ind. Cas. 396; 23 M. L. J. 741; 12 M. L. J. 392; 15 O. C. 278; 34 A. 511; 14 Bom. L. R. 1073; 10 A. L. J. 373; 17 C. W. N. 49; 16 C. L. J. 629; (1912) M. W. N. 1052; 39 I. A. 68.

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produced the usufructuary mortgage, Exhibit I. There was no endorsement of discharge on it. The Courts below give weight to this piece of evidence, but point out that having regard to the fact that the person through whom the money was said to have been paid was not examined, this evidence is not enough to discharge the burden which lay on the defendants. Mr. Visvanadha Aiyar argues that the burden is on the plaintiff, having regard to illustration (i) of section 114 of the Evidence Act. That section refers to presumptions that may be raised. It does not follow that such presumptions would shift the onus of proof. The presumption is a piece of evidence in favour of the party. I do not think that the decision of *Mohammad Mehdi Hasan Khan v. Mandir Das* (1) supports the learned Vakil. In that case, the bond contained an endorsement of discharge. The production of the document coupled with the endorsement was regarded as shifting the burden. The present case is, therefore, distinguishable from that decision.

I see no reason to differ from the conclusions of the Courts below.

This second appeal is dismissed.

Appeal dismissed.

ODDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 323 OF 1913.

April 20, 1915.

Present:—Mr. Kanhaiya Lal, A. J. C.

RAM SARUP—PLAINTIFF—APPELLANT
versus

SURAJ DIN AND OTHERS—DEFENDANTS—RESPONDENTS.

Mortgagor in possession, power of, to grant leases—Perpetual lease, invalidity of—Admissibility in evidence—Collateral purpose—Tenant-at-will.

A mortgagor in possession may subsequent to the date of mortgage make a lease conformable to usage in the ordinary course of management, but cannot grant a perpetual lease in so far as it impairs the security of the mortgagee and affects prejudicially his rights as such. [p. 259, col. 2.]

Madan Mohan Singh v. Raj Kishori Kumari, 17 Ind. Cas. 1; 17 C. L. J. 584; *Qurban Ali v. Raghubar Dayal*, 16 Ind. Cas. 476; 15 O. C. 239; *Wazir Ali v. Moti Chand*, 2 A. L. J. 294 and *Musammam Ghure v. Musammam Sital Kuwar*, 23 Ind. Cas. 102; 12 A. L. J. 370; 36 A. 248, referred to.

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A lease, although not affecting the property leased for want of registration, is nevertheless admissible in evidence for collateral purposes, *e. g.*, to explain the circumstances under which the lessee got into possession. [p. 259, col. 2.]

A perpetual lessee, although he cannot be so treated owing to the lease having subsequently been found invalid, may yet be treated as a tenant-at-will. [p. 260, col. 1.]

Appeal from the decree of the Subordinate Judge, Partabgarh, dated the 28th April 1913, upholding that of the Munsif, Kundu, dated the 2nd August 1912.

Babu Hari Kishen Dhaon, holding brief of Pandit Gokaran Nath Misra, for the Appellants.

Syed Ali Muhammad, for the Respondents.

JUDGMENT.—The plaintiff-appellant sued in this case for possession of 5 *bighas* 2 *biswas* 11 *biswansis* of land in village Sheogarh and for mesne profits for the three years preceding the suit and for damages on account of certain trees alleged to have been wrongfully cut by the defendants. The defendants pleaded that they were in possession of the disputed land under a lease in perpetuity granted by the predecessor-in-title of the plaintiff and that the suit was not cognizable by the Civil Court. They denied having cut any trees with the exception of a dried mango tree in grove No. 135 *khassra*. The Courts below found that the defendants were in adverse possession of the land in dispute under assertion of a right to hold the same in perpetuity as lessees and dismissed the claim. In appeal it is contended on behalf of the plaintiff-appellant that the defendants were estopped from asserting a right inconsistent with the lease under which they got possession and that the said lease was ineffectual as against the rights acquired by the plaintiff.

It appears that Gokuldas, the predecessor-in-title of the plaintiff, owned a 2-annas 8-pies share in this village and mortgaged the same in favour of Sheo Narain on the 3rd November 1896. Gokuldas subsequently executed a lease in perpetuity in favour of his wife, *Musammam* Rupan, and his daughter-in-law, *Musammam* Naurangi, on the 30th May 1899 and gave them possession. On the 22nd October 1911 Sheo Narain obtained a decree on his mortgage against Gokuldas but omitted to implead the said lessees. In execution of that decree the 2-annas 8-pies

share belonging to Gokuldas was sold by auction on the 20th April 1904 and purchased by the plaintiff. On the 25th September 1904 the plaintiff took possession of the property purchased. *Musammam* Rupan and *Musammam* Naurangi thereupon filed a suit against the plaintiff in the Revenue Court for possession of the land leased to them by Gokuldas, alleging that they had a right to hold the same as permanent lessees and that the plaintiff had unlawfully ejected them. This suit was decreed by the Revenue Court on the 22nd December 1905. In the present suit the plaintiff seeks to treat the defendants as trespassers, alleging that the permanent lease granted by Gokuldas was invalid for want of registration and was not binding on his interest.

It is a well-settled rule of law that a mortgagor cannot execute a lease of the mortgaged property in so far as it may impair the security of the mortgagee or affect prejudicially his rights under the mortgage. A mortgagor in possession may make a lease conformable to usage in the ordinary course of management, but cannot, as observed in *Madan Mohan Singh v. Raj Kishori Kumari* (1), grant a lease on unusual terms or alter the character of the land or authorize its use in a manner prejudicial to the right of the mortgagee. In other words, a mortgagor cannot, by any dealings with the mortgaged property subsequent to the date of the mortgage, injuriously affect the rights of the mortgagee under the prior contract [*Qurban Ali v. Raghubar Dayal* (2)]. A lease in perpetuity granted by him after the mortgage cannot, therefore, bind the prior mortgagee so far as it may be prejudicial to his rights [*Wazir Ali v. Moti Chand* (3) and *Musammam Ghure v. Musammam Sital Kuar* (4)].

The lease in the present suit was not registered and could not affect the property leased. But it can be admitted in evidence to explain the circumstances under which the defendants got into possession. The

(1) 17 Ind. Cas. 1; 17 C. L. J. 384.

(2) 16 Ind. Cas. 476; 15 O. C. 239.

(3) 2 A. L. J. 294.

(4) 23 Ind. Cas. 102; 36 A. 248; 12 A. L. J. 370.

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defendants got into possession of the land leased by the license or permission of Gokuldas, and it is not open to them to deny the title of the person who gave them possession or of the person to whom that title was passed. The learned Counsel for the defendants-respondents contends that though the defendants cannot dispute the proprietary title of the plaintiff, they can set up a right by adverse possession to a limited interest as perpetual lessees. But the alleged adverse possession of the limited interest did not begin till 1905, when defendant No. 3 and the predecessor-in-interest of defendants Nos. 1 and 2 succeeded in obtaining a decree from the Revenue Court. The possession held by them prior to the auction-sale as lessees of Gokuldas terminated after their ejectment in 1904 or 1905, and their alleged adverse possession as permanent lessees did not begin as against the plaintiff till possession was awarded to them by the Revenue Court. The suit has been filed within twelve years from that date, and it is also within twelve years from the date of the auction-sale at which the plaintiff purchased. The defendants' title as permanent lessees has not been yet, therefore, perfected.

It is not, however, open to the plaintiff to treat the defendants as trespassers, for Gokuldas had a right to create a tenancy-at-will. He cannot consequently sue the defendants for possession and damages in the Civil Court, except in regard to the trees alleged to have been cut by the defendants. The plaintiff has given no evidence about the number and value of trees cut. The defendants admit that they cut one dried mango tree from the lease-hold property about a year prior to the suit. That tree was hardly worth more than Rs. 10.

The claim for possession and mesne profits, therefore, fails and is dismissed with the costs relating thereto here and below. In regard to the claim for damages, the plaintiff is allowed Rs. 10, with proportionate costs here and below against the defendants, who will set their costs in proportion from the plaintiff throughout.

Appeal dismissed.

MADRAS HIGH COURT.

APPEAL AGAINST ORDER NO. 48 OF 1914.

July 14, 1915.

Present:—Mr. Justice Oldfield and
Mr. Justice Sadasiva Aiyar.

POTLA SUBBARAYUDU—DEFENDANT—
APPELLANT

versus

RAVI LAKSHMAYYA AND OTHERS—

PLAINTIFFS NOS. 1 TO 3—RESPONDENTS.

Procedure—Disposal of suit in manner not warranted by law—Consent of parties, effect of.

No agreement between the parties to a cause would enable a Court to dispose of a case in a manner not recognised by law or by authority. [p. 261, col. 1.]

Appeal against the order of the District Court of Guntur, dated the 25th September 1913, in Appeal Suit No. 22 of 1913, preferred against that of the Court of the District Munsif of Narasarowpet, in Original Suit No. 407 of 1912.

FACTS.—In Original Suit No. 290 of 1910 on the file of District Munsif of Narasarowpet, the defendant obtained a decree against the present plaintiff in respect of a sum of money and this sum was subsequently paid to the defendant by the plaintiff. In the judgment in a connected case, however, the plaintiff's right to sue to recover back the amount so decreed was stated as reserved. The plaintiff, basing his suit upon the said reservation, sued to recover back the amount so paid. The defence was *res judicata*. The District Munsif dismissed the suit, but the District Judge on appeal reversed the decree and remanded the suit for disposal according to law. The defendant appealed.

Mr. T. Ramachandra Rao, for the Appellant:—The matter is clearly *res judicata*. The statement in the judgment in the connected case cannot override the provisions of law as to *res judicata*; consent of parties cannot enable the Court to dispose of the case in a manner not recognised by law.

Mr. P. Chenchiah, for Mr. T. Prakasam for the Respondents:—The rights of parties are governed by the decree in the connected suit and the Judge having expressly reserved this right of the plaintiff to recover by suit the amount so decreed, this suit is maintainable and the order of the lower Appellate Court ought to be upheld.

JUDGMENT.—We regret that we cannot

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accept the learned District Judge's decision. The decree of the District Munsif in Original Suit No. 290 of 1910, which is pleaded as *res judicata*, is not, in our opinion, deprived of that character, because (with or without the parties' consent) the present plaintiff's right to sue again to recover back the amount then decreed and paid was referred to in the connected judgment as reserved. The fact, if it be one, that the present defendant agreed to that reservation could not be material. For no agreement between the parties could have enabled the Court to dispose of the case in a manner not recognized by the Civil Procedure Code or by authority.

The appeal must, therefore, be allowed, the lower Appellate Court's order of remand being set aside and the District Munsif's decision dismissing the suit with costs being restored.

There will be no order as to costs here and in the District Court.

Appeal allowed.

ODDH JUDICIAL COMMISSIONER'S COURT.

RENT APPEALS NOS. 79 AND 80 OF 1914.

March 24, 1915.

Present:—Mr. Stuart, A. J. C., and

Mr. Kanhaiya Lal, A. J. C.,

MAHADEO AND OTHERS—PLAINTIFFS—

APPELLANTS

versus

JAGANNATH—DEFENDANT—RESPONDENT.

Oudh Rent Act (XXII of 1886), s. 47—"Tenant", meaning of—Enhancement, legal, of rent—Cash rent converted into rent in kind—Succeeding tenant, enhanced rent payable by, amount of, determination of—Grain rent, enhancement in case of.

The word "tenant" in section 47 of the Oudh Rent Act means an unprivileged tenant. [p. 262, col. 1.]

Rama Nand v. Nadir Ali Khan, 1 O. C. 78, referred to.

The grain rent of a tenant admitted to the occupation of any land, the tenancy of which has determined according to the provisions of the Oudh Rent Act, can in no circumstances exceed in value by more than one anna in the rupee the cash rent payable by the tenant immediately preceding him, except in the cases mentioned in sections 49 and 50 of the Act. [p. 261, col. 2; p. 262, col. 1.]

Section 47 of the Oudh Rent Act is intended to protect an unprivileged tenant and not the landlord. [p. 262, col. 2.]

Appeal from the decree of the District Judge, Gonda, dated the 27th February 1914, modifying that of the Assistant Commissioner, Gonda, dated the 18th December 1913.

Babu *Basdeo Lal*, for the Appellants.

Babu *Surendra Nath Roy*, for the Respondent.

JUDGMENT.—These appeals have been referred for the decision of a Bench by an order of the Judicial Commissioner dated 20th November 1914. The plaintiffs-appellants are the lessees of Nandnagar, a village in Gonda belonging to the Balrampur Estate. The respondent in Appeal No. 79 is Jagannath and the respondent in Appeal No. 80 is Lalta. A holding of 41 plots in Nandnagar of an area of 52 *bighas* 2 *biswas* was formerly held by Mahabir Barhai, unprivileged tenant, on a cash rent of Rs. 66-8-3. Mahabir was ejected from this holding, and the holding was given to Jagannath on a grain rent under a counterpart, by the terms of which he was to deliver 5/12ths of the produce as rent. A holding of 56 plots in Nandnagar of an area of 62 *bighas* 3 *biswas* was formerly held by Bhagat, unprivileged tenant, on a cash rent of Rs. 88-9-3. Bhagat was ejected from the holding and the holding was given to Lalta under a counterpart by the terms of which he was to deliver 5/12ths of the produce as rent. There has been a failure to deliver the share of the produce of the plots in question for a certain period on the part of Jagannath and Lalta. They were sued by the plaintiffs-appellants for arrears of rent in the Court of the Assistant Collector having jurisdiction, and decrees were passed against them on the basis of the estimated value in cash of the share of the produce which they had to deliver. They appealed to the District Judge, who decided that they could not be made liable to pay rent at a rate higher than that paid by their predecessors *plus* an enhancement of one anna in the rupee, and the amounts awarded in the Court of first instance were reduced accordingly.

The *thekadars* have come to this Court in second appeal against the decision of the learned District Judge. Under the provisions of section 47 of Act XXII of 1886 the rent of a tenant admitted to the occupation of any land, the tenancy of which has

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determined according to the provisions of that Act, shall not exceed by more than one anna in the rupee the rent payable by the tenant immediately preceding him, except in the cases mentioned in sections 49 and 50. The provisions of sections 49 and 50 have no application to the facts in these appeals. "Rent" is defined in section 3 (5) of the same Act as "the money or the value of the produce of land, payable on account of the use or occupation of land, or on account of any right in land, or on account of the use of water for irrigation." It thus appears that the rent, *i.e.*, the value of the portion of the produce of land payable on account of the use or occupation of land of a tenant admitted to the occupation of any land, the tenancy of which has determined according to the provisions of Act XXII of 1886, shall not exceed by more than one anna in the rupee or $6\frac{1}{4}$ per cent. the rent, *i.e.*, the money payable on account of use or occupation of land payable by the tenant immediately preceding him, after consideration is taken of the facts that the rent is now a grain rent and was formerly a cash rent. The tenancy in the case of both plots has been determined according to the provisions of the Act. The word "tenant" in this section means an unprivileged tenant. See *Rama Nand v. Nadir Ali Khan* (1). The section provides that in no circumstances can an unprivileged tenant succeeding another unprivileged tenant be compelled to pay a rent which amounts on a cash valuation to more than $17/16$ ths of the rent paid by his predecessor. It is argued by the learned Counsel for the appellants that, if this view be accepted, a land-holder would be liable to lose rather than gain by converting a cash rent paid by a previous tenant into a grain rent payable by his successor, inasmuch as while the land-holder cannot demand more than $17/16$ ths of the previous rent at the most, his demand may be reduced to very much less than the previous rent, if his share of produce falls owing to natural causes. It is clearly the case that a land-holder may stand to lose by such conversion. But the fact that he stands to lose cannot affect the determination of the question. The point has to be decided upon the words of

the section and not upon a consideration whether it is good policy for a land-holder to convert a cash rent payable by a previous tenant into a grain rent payable by his successor. It has further been pointed out that, while the latter part of section 47 provides for the converse case, where a grain rent payable by a previous tenant is converted into a cash rent payable by his successor, the section is silent with regard to the case disclosed by the particular facts now before us. The principle laid down in the second portion of the section is the principle which, we decide, should be applied. In the second portion of the section it is provided that, when a grain rent has been payable by a preceding tenant, the cash rent payable by his successor shall not exceed the value of the produce previously payable or $1/16$ th. of the average value of the produce annually paid as rent in the preceding three years, and the reason, why an explicit rule is laid down in the case in which a grain rent was payable by the predecessor and a cash rent is payable by the successor and no explicit rule is laid down in the case of a cash rent payable by the predecessor and a grain rent payable by the successor, appears to be because in the former case an explicit rule is necessary, as no cash standard exists, and in the latter case no explicit rule is necessary, as a cash standard exists. The meaning of the section appears to us clear. It is intended to protect an unprivileged tenant succeeding another unprivileged tenant by laying down a maximum rent and directing that, whatever may be the private arrangements made between the land-holder and the tenant, the tenant shall not be liable to more than that maximum. The land-holder is not protected by the provision of a minimum. He was presumably considered capable of protecting himself.

We, therefore, reject these appeals and uphold the decision of the learned District Judge. The appellants will pay their own costs and those of the respondent in both the cases.

Appeals dismissed.

(1) 1 O. C. 78.

SUBBANARAYANA AIYAR v. MAYA THEVAN.

MADRAS HIGH COURT.

APPEAL AGAINST APPELLATE ORDER No. 64
OF 1914.

July 15, 1915.

Present:—Mr. Justice Oldfield and

Mr. Justice Sadasiva Aiyar.

SUBBANARAYANA AIYAR—PLAINTIFF—
APPELLANT

versus

MAYA THEVAN *alias* MAYANDI
THEVAN AND OTHERS—DEFENDANTS—
RESPONDENTS.

Compromise decree—Terms of razinamah re-produced in decree—Specific provision in decree that terms so far as relate to suit only executable—Executability of decree as regards terms outside scope of suit.

Where a compromise decree, while incorporating *in extenso* the terms of a compromise petition, adopts them and makes them executable only so far as they relate to the suit and where the terms not so adopted do not relate to the suit either directly or indirectly as indicating a *quid pro quo* on which the settlement of the plaint claim was based:

Held, that the terms so omitted to be adopted are not executable with the decree.

Appeal against the order of the District Court of Madura, in Appeal Suit No. 216 of 1913, preferred against that of the District Munsif of Periyakulam, in Execution Petition Revision No. 600 of 1912 in Original Suit No. 79 of 1911.

FACTS.—The parties to a suit entered into a compromise some of the terms of which were beyond the scope of the suit. The compromise petition containing all the terms of the compromise was filed in Court. The decree that was passed by the Court, while incorporating all the terms of the *razinamah*, adopted and made executable only such of the terms of the compromise as related to the suit. An application to execute such of the terms as were not made executable by the decree was dismissed by both the lower Courts. The plaintiff then appealed.

Mr. K. S. Ganapathi Iyer, for the Appellant, contended that all the terms of the compromise having been incorporated in the decree, they were executable in their entirety.

Mr. K. N. Aiyar, for the Respondents, was not called upon.

JUDGMENT.—It is argued that the provisions in the compromise petition were made part of the decree and are, therefore, executable with it. But the decree, though it re-produces the *razinamah in extenso* adopts and makes executable its terms only so far as

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they relate to the suit against defendants. And we cannot find that the terms 7 and 8 relate to it either directly or, as the District Munsif held, indirectly as indicating a *quid pro quo*, on which the settlement of the plaint claim was based. In these circumstances we agree with the learned District Judge and dismiss the appeal against appellate order with costs.

*Appeal dismissed.*OUDH JUDICIAL COMMISSIONER'S
COURT.

MISCELLANEOUS APPLICATION No. 41 OF 1915.

March 22, 1915.

Present:—Mr. Lindsay, J. C., and

Mr. Kanhaiya Lal, A. J. C.

F. BURTON, MANAGER, DELHI AND
LONDON BANK, LTD., LUCKNOW—

APPLICANT

versus

THE Late A. R. JACOBSON, DEPUTY
TRAFFIC MANAGER OUDH AND
ROHILKHAND RAILWAY

—OPPOSITE PARTY.

Succession Act (X of 1865), s. 50—Will, validity of—Attestation clause wanting, effect of.

A document put forward as a Will, and containing no attestation clause, is not a valid Will duly executed in accordance with the provisions of section 50 of the Succession Act. [p. 264, col. 1.]

Mr. St. G. Jackson, for the Applicant.

JUDGMENT.—This is an application presented by Mr. F. Burton, the Manager of the Delhi and London Bank, Limited, Lucknow, for the purpose of obtaining Probate in respect of a document* said to be a Will

*The document referred to was as follows:—

The last Will and testament of Allen Robert Jacobson, at present Deputy Traffic Superintendent, Oudh and Rohilkhand Railway, Lucknow.

1. I hereby appoint the Manager or the acting Manager (in other words, the Head) of the Delhi and London Bank, Limited, Lucknow, as my sole executor.

2. Having assigned to him the entire sum now and hereafter at my credit in the Provident Fund Institution of the Oudh and Rohilkhand Railway, I request that he will out of the said sum pay,—

Firstly, any sum that may at my death be due to Babu Durga Pershad, now of Husainganj, Lucknow, on account of a joint promissory note for Rs. 10,000 (ten thousand rupees) only executed on the 8th May, 1912 by Rai Jai Narain Bahadur, District Traffic

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executed by Mr. Allen Robert Jacobson who died at Lucknow on the 21st November last. The usual citations have issued and no one has appeared to contest the application. Various allegations are made in the petition, one of which contained in paragraph 3 points out that there was no attestation clause to the document which purports to be the Will of which Probate is sought. We have examined this document and on a careful consideration of all the materials before us we are of opinion that we are unable to hold that it is a valid Will which has been duly executed in accordance with the provisions of section 50 of the Indian Succession Act (X of 1865). We have taken the evidence of Mr. Burton and also of Mrs. Jacobson, the widow of the deceased, who have deposed that so far as they are aware there is no other document in existence which could be treated as a Will of the deceased. On our finding, therefore, that the Will has not been duly executed in accordance with the provisions of the section above-named we must find that the deceased Mr. Allen Robert Jacobson died intestate. In paragraph 9 of the petition it was represented that if for any reasons the Court considered it proper to grant Letters of Administration instead of Probate, such Letters might be granted to one or other of various members of the family of the deceased. One of these is Mrs. Alice Mary Jacobson, the widow of the deceased. According to the provisions of section 201 of the Indian Succession Act the widow is entitled to have administration, unless the Court sees cause to exclude her either on the ground of personal disqualification or because she has no interest in the estate of the deceased. We have no reason to suppose that Mrs. Jacobson is disqualified in any way, or that she has no interest in the estate of her deceased husband, and we

are, therefore, of opinion that she is entitled to have Letters of Administration granted to the estate of her deceased husband. We, therefore, order that Letters of Administration do issue accordingly. As regards security we direct that under section 256 of the Indian Succession Act Mrs. Jacobson do furnish a bond with two sureties to enure for the benefit of the Judges of this Court. The amount of the security required will be the value of the entire estate.

Application accepted.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 941 of 1913.

July 14, 1915.

Present:— Mr. Justice Napier.

THOMAS PILLAI AND ANOTHER—

DEFENDANTS NOS. 2 TO 4—PETITIONERS

versus

MUTHURAMAN CHETTY— PLAINTIFF—

RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 115—Limitation Act (IX of 1908), s. 15, Sch. I, Art. 182—Decision of question of limitation under s. 15, if decision of jurisdiction—Objection taken for first time in revision—High Court, power of, to entertain.

The decision of a question of limitation under section 15 of the Indian Limitation Act is not one of jurisdiction and the High Court will not interfere in revision with it. [p. 265, col. 2.]

An objection that a suit for a declaration has been wrong from beginning to end and that proceedings should have been taken thereunder and not under some other decree, cannot be taken for the first time in revision. [p. 265, col. 2.]

Petition, under section 115 of Act V of 1908, praying the High Court to revise the decree of the District Court of Trichinopoly, in Appeal Suit No. 650 of 1912, preferred against that of the Court of the District Munsif of Trichinopoly, in Civil Miscellaneous Petition No. 611 of 1912 (Small Cause Suit No. 53 of 1900 on the file of the District Court of Trichinopoly).

FACTS.—One M obtained a decree in a small cause suit against I and others and in execution of the said decree brought certain immoveable properties to sale and purchased them himself on 24th October 1901, the sale being confirmed on 25th January 1902. He obtained a sale certificate on 29th January 1902. Delivery

Superintendent, Oudh and Rohilkhand Railway, Lucknow, and myself:

Secondly, any other of my legal debts:

And that he will pay the balance, after deducting his expenses as my executor, to my lawful wife Alice Mary Jacobson, now residing at No. 34 Denbigh Road, Ealing West, London, England, to whom I also bequeath all my other property moveable or immoveable.

Witness (Sd.) A. R. Jacobson,
(Sd.) F. H. Budden, Witness 24th June 1912.
Lieut. R. E. (Sd.) Jai Narain,
24-6-1912. 24-6-1912.

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of the properties having been resisted by the present petitioners, M applied for the removal of the obstruction and for the delivery of the property free from the same. This petition was dismissed on 26th November 1902. He then filed a suit for a declaration that the property was liable to be delivered to him free from the resistance or obstruction of the obstructors and was successful not only in the Court of first instance, but also in appeal and in second appeal, the last being disposed of on 26th October 1909. On 23rd August 1912 he again applied for delivery of possession. The obstructors pleaded that the application was barred by limitation. Both the lower Courts held, following *Suppa Reddiar v. Avudai Ammal* (1), that the present application was only to revive the application originally filed by him for delivery of the properties and so was not barred by limitation. The obstructors then preferred this civil revision petition to the High Court under section 115, Civil Procedure Code.

Mr. V. C. Seshachariar, for the Respondent, raised a preliminary objection that the revision was incompetent because (1) there was no question of jurisdiction involved and (2) the decree being a small cause decree no appeal lay to the District Judge against the decision of the District Munsif and he having erroneously entertained the appeal, a second appeal lay to the High Court and not a revision petition and (3) an erroneous decision on a question of law is not revisable. The following decisions were relied on *Amir Hassan Khan v. Sheo Baksh Singh* (2); *Karmam Sama Row alias Venkata Naranappa v. Roddam Vencoba Row* (3) and *Kajira Beeviammal v. Fathma Biviammal* (4).

Mr. T. R. Venkatrama Sastriar, for the Petitioner:—Though, in its inception, the decree was a small cause decree, by its being transferred to the original side for execution, any decision therein became appealable. The whole procedure followed in the suit is irregular. A suit for a mere declaration that the properties are liable to be delivered ought not to have been entertained. That suit should have contained a prayer for

possession and execution should have been taken under that decree. Further the application is barred by limitation.

JUDGMENT.—The point of limitation is one of great difficulty arising out of construction of section 15 of the new Limitation Act. I cannot treat it as a question of jurisdiction. The other point that the whole procedure in the suit for a declaration has been wrong from beginning to end and that the proper suit was one for possession and that execution should have been sought in such a suit was not taken before the lower Courts and I cannot go into it here.

The petition is dismissed with costs.

Petition dismissed.

PRIVY COUNCIL.

APPEALS NOS. 83 AND 84 OF 1912 FROM THE
ALLAHABAD HIGH COURT.

July 13, 1915.

Present:—Lord Shaw, Sir George Farwell,
Sir John Edge and Mr. Ameer Ali.

IN APPEAL NO. 83 OF 1912
GANGA SAHAI—APPELLANT

versus

KESRI AND OTHERS—RESPONDENTS.

IN APPEAL NO. 84 OF 1912

MUNSHI LAL AND OTHERS—APPELLANTS

versus

GANGA SAHAI AND OTHERS—RESPONDENTS.

Civil Procedure Code (Act XIV of 1882), s. 317—Mortgage-decree obtained by two joint mortgagees—Decree executed by only one mortgagee subject to rights of other mortgagee—Mortgaged property purchased in execution sale by executing mortgagee—Purchase whether for benefit of both mortgagees—Hindu Law—Mitakshara—Whole blood's preference to half blood—Preference applies to sapindas of same degree—Paternal uncle of half blood, whether preferable to cousin of whole blood.

Two joint mortgagees of a property sued on their mortgage and obtained a mortgage-decree. Only one of them applied for execution of the decree expressly praying that it may be executed subject to the rights of the other mortgagee. The mortgaged property was accordingly put up to sale and purchased by the executing mortgagee:

Held, (1) that the purchase by the executing mortgagee was not exclusively for himself but for the benefit of both mortgagees, and that, therefore, the other mortgagee was entitled to recover his share of the property; [p. 268, col. 2.]

(2) that the provisions of section 317, Civil Procedure Code, 1882, had no application to the case, inasmuch as they were designed to create some check on the practice of making what were called *benami* purchases at execution sales for the benefit of judgment-debtors, and in no way affected the title

(1) 28 M. 50; 14 M. L. J. 401 (F. B.).

(2) 11 C. 6; 11 I. A. 237; 4 Sar. P. C. J. 559; Rafique and Jackson's P. C. No. 83.

(3) 6 Ind. Cas. 745; (1910) M. W. N. 211.

(4) 24 Ind. Cas. 779; 1 L. W. 230.

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of persons otherwise beneficially interested in the purchase. [p. 267, col. 2.]

Bodh Singh Doodhoooria v. Gunesh Chunder Sen, 12 B. L. R. 317; 19 W. R. 356; 3 Sar. P. C. J. 253, referred to.

Under the Law of *Mitakshara* the preference of the whole blood to the half blood is confined to members of the same class, that is to say, to *sapindas* of the same degree of descent from the common ancestor, and does not extend to persons of different degrees. Therefore a paternal uncle of the half blood excludes from inheritance the cousins although they are the sons of an uncle of the whole blood. [p. 268, col. 2.]

Suba Singh v. Sarfaraz Kunwar, 19 A. 215; A. W. N. (1897), 53 approved.

Consolidated appeals from the judgments and decrees of the Allahabad High Court, dated April 9th, 1910 (reported in 6 Ind. Cas. 364) and April 13th, 1911, respectively, reversing the judgments and decrees of the Subordinate Judge of Farrukhabad, dated December 10th, 1906.

FACTS appear from the judgment.

Messrs. G. E. A. Ross, K. C. and Kemworthy Brown, for Munshi Lall and others, contended that the judgment of the High Court was based on the view expressed in Madan Parijata, which was wrongly regarded as an authority on *Mitakshara*. In Stoke's Hindu Law Books (Introduction, page 7) Madan Parijata was described as being no authority on *Mitakshara*. In Morley's Digest (Introduction) it was stated as not an authority on the Benares School at all.

[MR. AMEER ALI: You want to exclude Madan Parijata as an authority and then to establish your proposition.]

The basis of inheritance according to the *Mitakshara* was propinquity. There was no proper propinquity in the present case as half bloods were not so near as full bloods. In the case of brothers and their sons it was clearly laid down by the *Mitakshara* that a half brother was to succeed in preference to a nephew of full blood. This could not apply to uncles and their sons as it was expressly left undefined by the *Mitakshara*.

[LORD SHAW: Your argument is that all these apply to brothers.]

Those of half blood were remote both in point of propinquity and worship. The *Mayukha* had expressly stated the preference of consins of full blood over half uncles. All authors had drawn upon Manu and the root principle of the Hindu Law was to prefer full blood. At the very most the view of the *Mitak-*

shara regarding brothers was an exception and contrary to the general scheme.

[SIR JOHN EDGE: The *Mitakshara* modifies it according to custom.]

[LORD SHAW: "In the order of their respective fathers" is vital.]

Reference was made to *Mitakshara*, Chapter II, sections 3, 4 and 5 verse 4; Stoke's Hindu Law Books: Saravadhikari's Hindu Law of Inheritance; Morley's Digest, Introduction; Manu, Chapter 9, verses 21 and 217; Sacred Books of the East, Volume II, Part 2; *Suba Singh v. Sarfaraz Kunwar* (1); *Nachiappa Gounden v. Rangasami Gounden* (2); *Sham Singh v. Kishun Sahai* (3); *Ramchandra Martand Waikar v. Vinayak Venkatesh Kothekar* (4); *Vithalrao v. Ramrao* (5).

Mr. Lowndes, on behalf of Ganga Sahai, contended that the purchase made by Ganga Sahai was for his sole benefit and not for or on behalf of the heirs of the said Bahadur Singh and referred to *Kalka Prasad v. Basant Ram* (6).

Messrs. DeGruyther, K. C., and Dube, for Kesri and others, respondents, contended that the whole principle of succession was laid down by *Mitakshara*. If it was governed by the consideration of *sapindaship*, it must apply to brothers.

[MR. AMEER ALI: Is not whole blood more nearly related?]

Once persons of the same class were taken full blood came first. The nearest *sapinda*, full brother succeeded first; no nephew could succeed in preference to brothers. Heirs were to succeed "successively." It was wholly unnecessary for the *Mitakshara* to have mentioned that the same principle governed the succession among "uncles and their sons" as applied to brothers and their sons. Madan Parijata was a commentary on Hindu Law. The rule was that the nearest *sapinda* succeeded.

[LORD SHAW: Uncle should come first.]

Reference was made to Stoke's Hindu Law Books, pages 407, 445 and 446; Mayne's Hindu Law, paragraph 569

- (1) 19 A. 215; A. W. N. (1897) 53.
- (2) 26 Ind. Cas. 757; (1915) M. W. N. 53; 2 L. W. 69; 17 M. L. T. 87; 28 M. L. J. 1.
- (3) 6 C. L. J. 190.
- (4) 25 Ind. Cas. 290; 27 M. L. J. 333; 1 L. W. 831; 10 N. L. B. 112; 16 M. L. T. 447; (1914) M. W. N. 835; 16 Bom. L. R. 863; 12 A. L. J. 1281; 20 C. L. J. 573; 42 C. 384; 18 C. W. N. 1154; 41 I. A. 298.
- (5) 24 B. 317; 2 Bom. L. R. 139.
- (6) 23 A. 340; A. W. N. (1901) 97.

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Mr. Ross, K. C., in reply.

JUDGMENT.

MR. ANEER ALI.—These several consolidated appeals from certain decrees and judgments of the High Court of Allahabad arise out of three suits brought in the Court of the Subordinate Judge of Farrukhabad. The plaintiffs in two of these suits, claiming adversely to each other to be the heirs of one Bahadur Singh, deceased, sought to recover from the appellant, Ganga Sahai, a one-third share of the properties specified in their respective plaints, which he had purchased at a sale held in execution of a decree upon a mortgage to which reference will be made presently. The third suit was brought by Kalka Pershad, one of the plaintiffs in the above suits, to recover from the respondent, Chunni Lal, certain shares in *Mouzah* Malkapur belonging to the estate of Bahadur Singh which had been conveyed to him by one Gulab Koer, Bahadur's step-mother.

Their Lordships propose to deal first with the two suits in which Ganga Sahai was the defendant.

The mortgage-bond referred to above was executed so long ago as the year 1869 by one Jai Chand Chowdhry, in favour of Bahadur Singh and Debi Din, the ancestor of Ganga Sahai, hypothecating two villages named respectively Tahsipur and Bilaspur. One-third of the amount advanced on this transaction admittedly belonged to Bahadur Singh, and the other two-thirds to Debi Din. On default of payment by Jai Chand, a suit was brought in 1891 by Bahadur Singh in conjunction with Bhima Singh and Ganga Sahai, the heirs and representatives of Debi Din (who had died in the meantime). Bahadur Singh died during the pendency of the suit, and his widow, Lachman Koer, was brought on the record in his place. On the 21st November 1891, the usual mortgage-decree under section 88 of the Transfer of Property Act (IV of 1882) was made by the Court. This was followed on the 27th of April 1893 by the final decree under section 89 of the Act.

It appears from the record that Lachman Koer died somewhere in 1894. On the 20th December 1897, Ganga Sahai applied for execution of the mortgage-

decree against the heir and representative of the mortgagor. In his application he expressly reserves the rights of Lachman Koer's heirs. The passage in question is important in view of the contention now raised by him. He states:—

"Bhaman Singh, another decree-holder, has died a natural death. His sons, Mauji Ram and Raj Kunwar, are his heirs; but they do not join in the application hence, under (section) 231 of the Code of Civil Procedure, this decree-holder alone makes this application, and prays that the decree may be executed subject to the rights of the heirs of *Musammât* Lachman Kunwar and Bhaman Singh."

Bhaman Singh is evidently the same person as Bhima Singh.

The mortgaged properties were accordingly put up to sale on the 20th of February 1899, and purchased by Ganga Sahai. The sale appears to have been duly confirmed and two sale certificates were issued to him in respect of Tahsipur and Bilaspur respectively, and he is admittedly now in possession of the properties.

The two sets of plaintiffs, as already stated, claim to be the heirs of Bahadur Singh adversely to each other; but as against the appellant, Ganga Sahai, they seek identical relief. They say that the purchase by Ganga Sahai of the properties in question was not exclusively for himself, but for the benefit of the heirs and representatives of both mortgagees. The Courts in India have upheld their contention. Ganga Sahai has appealed to this Board and takes his stand on the first clause of section 317 of the Civil Procedure Code of 1882, which was in force when the sale took place. That clause provides as follows:—

"No suit shall be maintained against the certified purchaser on the ground that the purchase was made on behalf of any other person, or on behalf of some one through whom such other person claims."

In their Lordships' opinion the provisions of that section have no application to the present case. They were designed to create some check on the practice of making what are called *benami* purchases at execution sales for the benefit of judgment-debtors, and in no way affect the title of persons otherwise beneficially interested in the purchase. An example of this will be

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found in the case of *Bodh Singh Doodhooia v. Ganes Chunder Sen* (7) decided by this Board in 1873.

The Courts in India were perfectly right in refusing to allow Ganga Sahai to perpetrate a fraud against his co-decree-holders under cover of this section. His application for execution was under section 231 of the Code, and it was made subject to their rights. Had he not even embodied this reservation in his petition, the Court executing the decree would have of its own motion protected the interests of the other decree-holders. Their Lordships agree with the Courts in India that the heirs and representatives of Bahadur Singh are entitled to recover from Ganga Sahai a one-third of the properties purchased by him in execution of the joint mortgage-decree.

The question then arises, who among the two sets of plaintiffs are entitled to the inheritance of Bahadur Singh. At the time of his widow's death in 1894, when the succession passed to the collaterals, Rajaram, his uncle by the half blood, was alive; and he claimed the properties in preference to Kalka Pershad and Jian Lall, the sons of a full paternal uncle named Ganga Pershad. Rajaram has since died and is now represented by his sons and grandsons who are plaintiffs in one of the suits and respondents before this Board. Jian Lall has also died, and his son, Munshi Lall, now stands in his place. Kalka Pershad and Munshi Lall were the plaintiffs in the second suit, and they claimed in opposition to Rajaram to be the heirs of Bahadur Singh by virtue of their relationship to him being of the whole blood.

As the question of heirship was involved in all the three suits they appear to have been tried together; and the Court of first instance held in favour of Jian Lall and Kalka Pershad mainly on the authority of a decision of the Allahabad High Court, which it considered had settled the rule of succession in favour of the heirs related by the whole blood. The District Judge affirmed this decree. On appeal, however, to the High Court, the learned Judges explained that in their judgment in *Suba Singh v. Sarfaraz Kunwar* (1), on which the (7) 12 B. L. R. 317; 19 W. R. 356; 3 Sar. P. C. J. 253.

lower Courts had relied, they had laid down no such principle as had been inferred; what they meant to decide was simply this, that under the *Mitakshara* the distinction of whole blood was not confined to the brother and his sons but extends further. And on an examination of the doctrines of the *Mitakshara*, they held in effect that this preference of the whole blood to the half blood applied to *sapindas* of the same degree of descent from the common ancestor, and did not apply to persons of different degrees. They were accordingly of opinion that Rajaram being paternal uncle of the half blood was entitled preferentially to the inheritance of Bahadur Singh to the exclusion of his cousins, although they were the sons of an uncle of the whole blood. They accordingly dismissed the claim of Munshi Lall and Kalka Pershad in their suit against Ganga Sahai and others, as also the claim of Kalka Pershad in his suit against Chuni Lall. They at the same time decreed the claim of Rajaram's representatives against Ganga Sahai. Munshi Lall and the representatives of Kalka Pershad, who died during the pendency of the suit, have appealed to His Majesty in Council from these decrees of the High Court dismissing their claim; and the main contention advanced on their behalf is that, although the *Mitakshara* expressly provides for the succession of the half brother in preference to nephews of the whole blood, there is no such provision in respect of uncles; and further that as it provides for the succession of the grandmother on failure of the father and his descendants it must follow that by the words "the uncles and their sons" Vijnaneswara meant that uncles of the whole blood and their sons should succeed in preference to the issue of another wife of the paternal grandfather. This argument, in their Lordships' opinion, would apply with equal force to the case of half brothers and the sons of brothers of the whole blood. But it is conceded that the author of the *Mitakshara* has expressly declared that brothers of the half blood come before nephews of the whole blood, and in principle they see no reason to differentiate between the brothers of the *propositus* and the brothers of his father. Having regard to the general scheme of the *Mitakshara*, their Lordships think that

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the preference of the whole blood to the half blood is confined to members of the same class or, to use the language of the Judges of the High Court in *Suba Singh v. Sarfaraz Kunwar* (1), to "sapindās of the same degrees of descent from the common ancestor," and that, therefore, on the death of Lachman Koer, Rajaram as uncle of the half blood became entitled to the inheritance of Bahadur Singh to the exclusion of his cousins.

In the result all the appeals will be dismissed. Kesri and the other respondents in Appeal No. 83 of 1912 will have all their costs from the appellant, Ganga Sahai. There will be no order as to costs with regard to the other parties.

And their Lordships will humbly advise His Majesty accordingly.

Appeal dismissed.

Solicitors for the Appellants:—Messrs. Douglas Grant and T. L. Wilson & Co.

Solicitors for the Respondents:—Messrs. Barrow, Rogers & Nevill, T. L. Wilson & Co., T. C. Summerhays & Son and Douglas Grant.

ODDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 98 OF 1912.

April 21, 1915.

Present:—Mr. Stuart, A. J. C.

Musammāt SUGHRA BIBI AND OTHERS—

DEFENDANTS—APPELLANTS

versus

Babu KAMLAPAT RAM—PLAINTIFF—

RESPONDENT.

Pardanashin lady, deed executed by—Protection afforded by law—Burden of proof—Proof, matters of—Independent advice—Attestation of document—Document, execution of, inside parda—Attesting witnesses, what to ascertain before attestation.

In a suit brought upon a deed executed by a *pardanashin* lady the burden of proof rests not with her as attacking, but with the plaintiff as relying upon the deed and he must prove affirmatively and conclusively that it was not only executed by, but was explained to, and really understood by, her acting in the free and independent exercise of her will. It is not necessary, however, to prove affirmatively that she had independent advice at the time of the execution. [p. 271, col. 1.]

Kali Bakhsh Singh v. Ram Gopal Singh, 21 Ind. Cas. 985; 18 C. W. N. 282; 16 O. C. 378; (1914) M. W. N. 112; 12 A. L. J. 115; 15 M. L. T. 130; 36 A. 81, 19 C. L. J. 172; 1 O. L. J. 67; 26 M. L. J. 121; 16 Bom. L. R. 147, referred to.

Where a *pardanashin* lady is unable under custom to appear before male witnesses, the attestation of a document, which by independent testimony is conclusively proved to have been executed by such a lady, is good, if the attesting witnesses present outside the *parda* satisfied themselves before attestation that there was no fraud and that the document had been actually executed by the lady inside the *parda*. [p. 272, col. 1.]

Sarurjigar Begam v. Barada Kant Mitter, 5 Ind. Cas. 539; 37 C. 526; 14 C. W. N. 974, referred to.

Appeal from the decree of the Subordinate Judge, Fyzabad, dated the 29th April 1912.

Syed Ali Muhammad, for the Appellants.

Syed Wazir Hasan and Babu Ramapat Ram, for the Respondent.

JUDGMENT.—*Musammāt Sughra Bibi* executed, on 13th February 1905, a mortgage-deed in favour of Babu Kamlapat Ram. This deed was registered on the same date at the executant's residence at Tanda, Fyzabad District, by Hamid Ahmad, Sub-Registrar of Tanda. The deed was for a total consideration of Rs. 1,164-8-6 made up of the following items. It was stated that the executant has executed a deed dated 3rd July 1903, a deed dated 4th November 1903, a pro-note dated 20th April 1904, a pro-note dated 25th November 1904, a pro-note dated 29th November 1904, and a pro-note dated 10th July 1905, in favour of Babu Balak Ram, father of Babu Kamlapat Ram. The amount due on these two deeds and these four pro-notes is stated to have been Rs. 764-8-6 on the 13th February 1905. By the execution of the deed the amount due on the two previous deeds and the four pro-notes was declared to be satisfied. In addition Rs. 400 were paid in cash to the executant. By the deed in suit a share of 6½ annas in the village of Shadipur was hypothecated. The share had been previously hypothecated in favour of Babu Chandi Prasad and Suraj Bhan by a deed dated 20th March 1900. The existence of this deed of the 20th March 1900 was not disclosed by the executant. Under the terms of the deed in suit, in default of payment of interest, it was open to Babu Kamlapat Ram to obtain possession by foreclosure over the mortgaged share. On the 19th November 1908 Babu Trilok Nath, successor of Babu Chandi Prasad and Suraj Bhan, instituted a suit on the foot

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of the mortgage of 20th March 1900. Babu Kamlapat Ram was joined as a party to that suit in his capacity as puisne mortgagee. On the 19th November 1908 Babu Trilok Nath obtained a decree for Rs. 8,951-4-1 with future interest on the foot of the mortgage of 20th March 1900. On 2nd September 1910 Babu Kamlapat Ram as puisne mortgagee paid into Court Rs. 10,040 in full satisfaction of the decree on the foot of the mortgage of 20th March 1900. He sued subsequently on the 10th September 1910 for possession of the $6\frac{1}{2}$ annas share in default of payment of Rs. 10,040 which he had paid in satisfaction of the decree of 19th November 1908, Rs. 26-12-3 interest on Rs. 10,040, Rs. 2,241-13-6 the amount due on the deed in suit, the total amount being Rs. 12,308-9-9.

Musammât Sughra Bibi in her written statement admitted the execution of the deed of 13th February 1905, but stated that she executed the deed in ignorance of its conditions, that she had received Rs. 400 only, and that she had not been under the impression that she was executing a deed of mortgage, but had believed that she was executing a simple money bond. She pleaded that in the circumstances Babu Kamlapat Ram had obtained no right as a puisne mortgagee, that he had no right to redeem the prior mortgage and that even if it were decided that she had executed the deed of the 13th February 1905 with full knowledge of the contents and had received the consideration detailed in the body of the deed, the conditions of it with regard to the obtaining of possession could not be enforced against her as they were hard and unconscionable.

The learned Subordinate Judge found that *Musammât* Sughra Bibi had executed the deed of 13th February 1905 with full knowledge of its contents, that at the time that she executed the deed she was capable of conducting her own affairs and of entering into a valid contract, that she did enter into a valid contract, and that she was bound by the terms of the deed. He further held that the conditions were not hard or unconscionable, that they were legally enforceable against the property, that Babu Kamlapat Ram had paid off Rs. 10,040 to satisfy the decree of 19th

November 1908 as puisne mortgagee, and that he was entitled to possession of the $6\frac{1}{2}$ annas share in default of payment of Rs. 12,308-9-9 and Rs. 637-10-0 costs.

Against this decree *Musammât* Sughra Bibi filed this appeal. The *first* ground is to the effect that she was incapable of understanding the nature of the deed at the time of executing owing to her physical and mental incapacity. The *second* ground is that she believed that she was executing a simple bond for Rs. 400 and not a deed of mortgage. The *third* ground is that she received Rs. 400 as consideration of the deed. The *fourth* ground is that Babu Kamlapat Ram was not entitled to pay off the decree of 19th November 1908, and the *fifth* that the Court should, in event of the other points being decided against her, bring the mortgaged property to sale instead of permitting possession to be given to the plaintiff-respondent. It is to be noted that in these grounds of appeal no plea is taken to the effect that the terms of the deed are hard or unconscionable.

Since this appeal was filed *Musammât* Sughra Bibi has died and has been succeeded by Nihal-ud-din and *Musammât* Zainab Bibi. Nihal-ud-din is represented by Mr. Ali Muhammad who has argued the appeal on his behalf. Zainab Bibi is represented by Halim-ud-din Ashraf, general agent, who stated on 12th April 1915 at the time of the hearing of the appeal that Zainab Bibi did not wish to prosecute the appeal and withdrew from it. He prayed that in the circumstances Zainab Bibi might be exempted from payment of the costs of this appeal. Mr. Wazir Hasan on behalf of the plaintiff-respondent agreed to the exemption of Zainab Bibi from liability for the costs of the appeal on the understanding that Nihal-ud-din should be considered as the sole appellant in event of failure.

The main argument directed to us by Mr. Ali Muhammad was to the effect that *Musammât* Sughra Bibi at the time that she executed the deed of 13th February 1905 was a very old and infirm woman who had lost her hearing and had largely lost her sight, that she was a *purdanashin* lady who did not understand business matters, and that the evidence, properly weighed, showed that she had signed the

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deed without comprehension of its contents, and in absolute ignorance of what she was committing herself to by acceptance of its conditions. As this deed was executed by a *pardanashin* lady, the executant is entitled to the protection of the law to the extent that the burden of proof rests not with her as attacking, but with the plaintiff as relying upon the deed, and it is necessary to prove affirmatively and conclusively that the deed was not only executed by, but was explained to, and really understood by, the executant acting in the free and independent exercise of her will. This proposition has been laid down in many cases and has been finally affirmed in the decision of their Lordships of the Privy Council in *Kali Bakhsh Singh v. Ram Gopal Singh* (1). There is, however, no necessity, as is stated in that decision, to prove affirmatively that such a *pardanashin* lady had independent advice at the time that she executed the deed, and upon a review of all the facts, including the nature of the thing done and the training and the habit of the mind of the executant as well as the proximate circumstances affecting the execution, the conclusion is reached that the obtaining of independent advice would not have made any difference in the result. The Court must decide that the deed should stand. *Musammam* Sughra Bibi gave evidence upon commission in this case. We have gone through the whole of the evidence which she has given. She was examined on behalf of the plaintiff and was subjected to a long examination-in-chief much of which might have been usefully omitted. We are of opinion after examining the evidence and having heard the arguments of the learned Counsel for the appellant upon it, that at the period when the lady made her statement on commission, that is to say, more than seven years after the deed was executed she was, although hard of hearing and of advanced age, perfectly intelligent and capable of understanding business matters. She showed occasional temper owing to the length of examination-in-chief to which she was subjected, and the nature of some of the

questions which were put to her, and made sharp replies on occasions, when she objected to questions. She showed considerable capacity to fence with questions and in addition supplied in the course of her deposition many other reasons for the finding at which the learned Subordinate Judge arrived to the effect that she was still a woman of business habits whose intellect had remained unimpaired in spite of advancing years. At the time that she made her deposition, her sight was irretrievably injured by cataract, but there is nothing to show that at the time that she executed the deed she had difficulty in using her eyes, and the circumstance that she was able to sign the deed in her own hand clearly and plainly would rather show that in 1905 her eye-sight had not been seriously affected. Thus we find that even in 1912 she was a woman of business habits who thoroughly understood what she was doing, and that her capacity to transact her own affairs could not have been less at the time that the deed was executed.

The evidence of the scribe Bindaraban (P. W. No. 4) is to the effect that he had drafted many deeds previously on behalf of the lady. She does not seem to have been capable of reading the deeds herself though she could sign her name in Hindi. His usual practice was to read the deeds after they had been drafted to her. On the occasion of the execution of the deed in question the draft was given to him and he faired it out. He read over the deed to her, a *parda* dividing them. She made no comment with regard to its contents. After the deed had been executed she admittedly signed it.

The above evidence is reliable in our opinion. It proves clearly and satisfactorily that she understood the conditions and the effect of the deed and that it was not signed under duress but by the free and independent exercise of her will. It has been proved that she had executed the two previous deeds and the four pro-notes to which reference is made in the body of the deed and which were declared satisfied by its execution, that the documents and pro-notes were returned to her, and that she received in addition Rs. 400

(1) 21 Ind. Cas. 985; 36 A. 81 (P. C.); 18 C. W. N. 282; 16 O. C. 378; (1914) M. W. N. 112; 12 A. L. J. 115; 15 M. L. T. 130; 19 O. L. J. 172; 1 O. L. J. 67; 26 M. L. J. 121; 16 Bom. L. R. 147.

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in cash at the time of execution. The transaction was a reasonable transaction for any person to enter into. The training and habit of mind of Sughra Bibi were sufficient to enable her to enter into such a transaction without independent advice from any one, and if independent advice had been given to her, there is no reason why she should not have been advised by a competent and unbiased person to execute the deed in suit. The terms were not hard or unconscionable. The rate of interest was not high, and as she was a woman of property, it was well within her power, had she so desired, to pay off the deed and to avoid the consequence of foreclosure. It has been argued that, inasmuch as the attesting witnesses did not actually see the lady sign the deed owing to the fact that a *parda* intervened between them and her, their attestation is bad in law. It was laid down by a Bench of the Calcutta High Court in *Sarurjigar Begam v. Baroda Kant Mitter* (2) that where according to the custom of India, *pardanashin* ladies are unable to appear before male witnesses, a document which, by independent testimony, is conclusively proved to have been executed by a *pardanashin* lady, may reasonably be deemed to have been attested by witnesses who were present outside the *parda*, and who before attestation satisfied themselves that there was no fraud, and that the document had been actually executed by the lady screened off from their gaze. Here the deed is proved to have been executed by *Musammat Sughra Bibi*. There was no fraud, and the witnesses were in a position to know that the document had been executed by her. Thus the circumstance that a *parda* intervened between the attesting witnesses and *Sughra Bibi* affords no reason for invalidating the deed in question. We, therefore, find that *Musammat Sughra Bibi* had full physical and mental capacity at the time when she executed the deed in suit, that she understood its contents, that she did not believe that she was executing a simple bond for Rs. 400, but that she knew that the consideration stated in the deed was good and good to her knowledge and that, therefore, the deed was effective against her property hypothecated thereby. *Kamlapat Ram* was palpably entitled

as *paisne* mortgagee to satisfy the decree of 19th November 1908 and to add the amount which he paid for the satisfaction of that decree to the amount due to him under the suit. We find that he did satisfy the decree for the amount stated in his plaint and that the amount due in the decree under appeal has been correctly calculated. We, therefore, find that under the terms of the deed *Kamlapat Ram* is entitled to possession of the property mortgaged. There is no reason why we should alter the decree into a decree for sale.

The appeal, therefore, fails on every point and we dismiss it accordingly. *Nihal-ud-din* will pay his own costs of his appeal and those of *Babu Kamlapat Ram*. *Zainab Bibi* is exempted from liability to payment of costs.

Appeal dismissed.

MADRAS HIGH COURT.

CIVIL SUIT No. 250 OF 1914.

March 29, 1915.

Present:—Mr. Justice Kumaraswami Sastri.

P. S. SHADAGOPA NAIDU AND ANOTHER—

PLAINTIFFS

versus

P. S. THIRUMALASWAMI NAIDU—

DEFENDANT.

Succession Act (X of 1865), s. 137—Unprobated Will, if defendant can rely upon—Bequest of property by Hindu father to son—Character of property taken by son—Ancestral or self-acquired—Suit for partition on behalf of minor—Proof of malversation not necessary.

A Will though not probated may be used by a defendant in order to contest the plaintiff's suit. [p. 274, col. 1.]

Janaki v. Dhanu Lal, 14 M. 454, referred to.

Carlapatti Chinna Cunniah v. Cota Wammalivaraiah, 3 Ind. Cas. 475; 33 M. 91, followed.

Lakshamma v. Ratnamma, 21 Ind. Cas. 698; 25 M. L. J. 556; 38 M. 474, not followed.

Basuanta Kumar Chuckerbutty v. Gopal Chunder Das, 26 Ind. Cas. 21; 18 C. W. N. 1126; *Achyutananda Das v. Jagannath Das*, 27 Ind. Cas. 739; 21 C. L. J. 96, referred to.

Where a Hindu father makes a bequest of his property to his son, in coming to a conclusion whether the property is taken absolutely or with the incidents of ancestral property, the terms of the Will have to be ascertained as indicating the intention of the testator and if there are no words indicating a contrary intention, the natural inference is that the father intended his son to take the property as ancestral property. [p. 275, col. 1.]

(2) 5 Ind. Cas. 539; 37 C. 526; 14 C. W. N. 974.

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Nagalingam Pillai v. Ramachandra Tevar, 24 M. 429; 11 M. L. J. 210, followed.

A minor member of an undivided Hindu family can file a suit for partition if there are circumstances which show that it would be for his interest to separate his share, and it is not necessary to prove malversation on the part of the adult members. [p. 275, col. 2.]

Mahadev Balvant v. Lakshman Balvant, 19 B. 99, followed.

Where a Hindu father sets up a hostile title and denies the rights of his minor sons to any share of the joint family properties and is living apart from his wife with a concubine, it is the duty of the Court to safeguard the interests of the minor sons by declaring their rights and giving effect to such a declaration. [p. 275, col. 2.]

Kamakshi Ammal v. Chidambara Reddi, 3 M. H. C. R. 94; *Thangam Pillai v. Suppa Pillai*, 12 M. 401, referred to.

Mr. C. P. Ramaswami Iyer, for the Plaintiffs.

Mr. T. Ethiraja Mudaliar, for the Defendant.

JUDGMENT.—This is a suit filed by the minor plaintiffs through their next friend for an account of the joint family properties belonging to themselves and their father, the defendant, for a partition of the properties and for delivery to them of their share of the properties.

The plaint sets out that the plaintiffs (who are the sons of the defendant) and the defendant are members of an undivided Hindu family possessed of the joint family properties mentioned in the plaint and that they are each entitled to 3rd share therein. The plaintiffs pray for a partition on the ground that the defendant is leading a reckless and immoral life, that he is living in the house of some prostitute or other after having driven his wife out of the house, that he is addicted to drink and that he has not been attending to his business. It is also alleged that he has been threatening to alienate the properties to prejudice the plaintiffs and is denying their rights to the properties, alleging that they are his own absolute properties—bequeathed under the Will of his father.

The defendant filed a written statement denying the allegation in the plaint as to his conduct and character and pleading that of the properties mentioned in the plaint the business of Duff & Co. was bequeathed to him absolutely under the Will of his father, that house No. 1/17 and 2/17 mentioned in the plaint was bequeathed to his mother for

life and to him absolutely after her death, that the village mentioned in the plaint was purchased by him after the death of his father for Rs. 8,000, that he paid Rs. 4,000 on account of principal and Rs. 1,000 on account of interest to the vendor, that he improved the property purchased by building a house in the village at a cost of Rs. 1,000. He denies that he has driven his wife out of the house and states that she was not behaving properly towards him and was leaving his house frequently without sufficient reason and that in January 1914, she left his house without his permission and has since then refused to come back to his house though asked to do so. As regards the allegation in the plaint as to his living in the house of some prostitute or other he states that owing to the conduct of his wife who was also a sickly woman, he has for sometime been keeping a woman who is living in No. 3/7, Venkatachela Achari Street, Komaleswarapurpet, Madras, which is connected with house No. 17, Chandrabhan Street, referred to in the plaint as its third compartment. He states that the woman is occupying the house free of rent and that he is paying her only Rs. 15 a month.

The following issues were settled:—

(1) Is it in the interest of the minors that a partition should be effected?

(2) Did the defendant get the business of Duff & Co. under the Will of his father and if so, is it not partible?

(3) What are the joint properties available for partition?

(4) To what relief are plaintiffs entitled?

While the plaintiffs state that the properties mentioned in the plaint are joint family properties, the defendant claims them as his self-acquisitions. There are three items of properties mentioned in the plaint, viz.:

(1) House and ground No. 1/17 and 2/17, Chandrabhan Street, Komaleswarapurpet,

(2) Stock-in-trade, outstandings, goodwill, etc., of the business of Duff & Co., and

(3) Village of Thirunermalai near Pallavaram.

So far as the first two items are concerned, it is admitted that the properties belonged to the grandfather of the plaintiffs. As regards item (3) it is admitted that the property was purchased after the death of the defendant's

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father by the defendant. It was conceded by the defendant's Vakil at the trial that if items Nos. 1 and 2 are found to be the joint family properties of the plaintiffs and defendant, item No. 3 which was acquired in part with the aid of income from No. 2 would also be joint family property. So far as items Nos. 1 and 2 are concerned it is alleged that the properties were bequeathed to the defendant under a Will which is marked as Exhibit I. This Will has been proved by P. W. No. 1, Perumal Naidu, who is a retired Sub-Assistant Surgeon and is one of the attesting witnesses to the Will. Probate has not been taken out for this Will and the question is whether the Will can be admitted in evidence on behalf of the defendant. On this question I am of opinion that the balance of authorities in Madras is in favour of the view that a Will, though not probated, may be used by a defendant in order to contest the plaintiff's suit. In *Janaki v. Dhanu Lal* (1) it was held that, although executors cannot establish any right without taking Probate, the existence of a Will cannot be ignored for all purposes whatsoever, and that it is open to the defendant to contest the plaintiff's right by setting up and proving a Will of which Probate was not taken. This case was followed in *Carlapatti Chinna Cunniiah v. Cota Wammalivariah* (2), where it was held that a defendant was not precluded by section 187 of the Succession Act from setting up an unprobated Will in answer to a plaintiff's claim and *Janaki v. Dhanu Lal* (1) was relied on. Reference has been made by the plaintiff's Vakil to *Lakshamma v. Ratnamma* (3), where it was held that section 187 of the Succession Act barred not only the executor or legatee from claiming under an unprobated Will, but also a stranger who seeks to use the Will as a *jus tertii*, for the purpose of his defence. *Janaki v. Dhanu Lal* (1) and *Carlapatti Chinna Cunniiah v. Cota Wammalivariah* (2) are not referred to in the course of the judgment and their Lordships disposed of the question by stating that no authorities have been cited or reasons suggested for the distinction drawn between a plaintiff seeking to

prove his unprobated Will and the defendant using the Will as a defence to plaintiff's section. Reference has also been made by the plaintiffs' Vakil to the cases reported as *Basanta Kumar Chuckerbutty v. Gopal Chunder Das* (4) and *Achyytananda Das v. Jagannath Das* (5). In the former case it was observed that a Will uncovered by Probate or Letters of Administration cannot be used to prove that anybody named therein has any title to the testator's estate but that there was no absolute prohibition to use it for any other purpose. In the latter case Justice Mookerjee observes as follows:—"That section (section 187 of the Succession Act) merely provides that no right as executor or legatee can be established in any Court of Justice, unless a Court of competent jurisdiction shall have granted a Probate of the Will under which the right is claimed or shall have granted Letters of Administration.....; this does not debar the use of the Will in evidence for a purpose other than the establishment of a right as executor or legatee." These cases do not support the extreme view taken in the case of *Lakshamma v. Ratnamma* (3). I am of opinion that I am bound by the reported decisions as *Janaki v. Dhanu Lal* (1) and *Carlapatti Chinna Cunniiah v. Cota Wammalivariah* (2), which have not been referred to or overruled in *Lakshamma v. Ratnamma* (3). The Will, therefore, is admissible in evidence although it is not probated.

As it is contended by the plaintiffs that the Will even though admissible does not confer any absolute property on the defendant but vests the property in him as joint family property, it is necessary to consider the terms of the Will. Reading the Will as a whole, it seems to me that the scheme of the Will is in favour of the view that the testator intended his sons to take property as joint family property. In paragraph 2 of the Will he sets out the properties he possessed of. In paragraph 3 he gives certain immoveable properties to his daughters. Paragraph 4 which deals with the business of Duff & Co. is as follows:—

"The (Duff & Co.) business, item (a) mentioned in paragraph 2 above, shall after

(1) 14 M. 454.

(2) 3 Ind. Cas. 475; 33 M. 91.

(3) 21 Ind. Cas. 698; 25 M. L. J. 556; 38 M. 474.

(4) 26 Ind. Cas. 21; 18 C. W. N. 1136.

(5) 27 Ind. Cas. 739; 21 C. L. J. 96.

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my life-time be taken by my eldest son Chi. P. S. Tirumalai Naidu for his share with absolute rights and with powers of gift and sale, conducted carefully and enjoyed." The use of the words 'his share' suggests clearly to my mind that it was taken by his sons as his share of the property of his father. Paragraph 6 gives his sons certain immoveable properties including house No. 1/27 and 2/27, Chandrabhan street, mentioned in the plaint subject to the life-interest of his wife. The most important paragraph is No. 7 which runs as follows:—"If any of my sons die issueless leaving only a widow, the properties comprised in his or their share shall immediately be taken by surviving sons or their male heirs in equal shares and enjoyed and suitable maintenance provided to their widow or widows." It is clear from the above paragraph that the testator intended his sons to take the property as members of a joint and undivided Hindu family with the rights of survivorship *inter se*. In coming to a conclusion as to whether the properties are taken absolutely or with the incidents of ancestral property, the terms of the Will have to be ascertained as indicating the intention of the testator, and if there are no words indicating a contrary intention, the natural inference is that the father intended his sons to take the property as ancestral property. The principles which are to govern a case like the present have been clearly set out in *Nagalingam Pillai v. Ramachandra Tevar* (6) where their Lordships observe as follows:—"As the father is at liberty to make any disposition he pleases or to leave his self-acquired property to descend as ancestral property, so when making any disposition in favour of his son he is at liberty to preserve for the property the quality of ancestral property. Whether in any given case the property was intended to pass to the son as ancestral property or as self-acquired property must be a question of intention turning on the construction of the instrument of gift. Following the principles laid down in *Mohamed Shumsool Hoodu v. Shewukram* (7), I think that if there are no words indicating the contrary intention, the natural inference should be that the father intended his sons to take his property as their ances-

tral estate." I am of opinion that the defendant under the terms of his father's Will took the properties as joint family properties and that the plaintiffs have an interest therein.

I shall now deal with the issues *seriatim*:—

First Issue:— It is now settled law that a minor plaintiff can file a suit for partition if there are circumstances which show that it would be for his interest to separate his share and that it is not necessary to prove malversation on the part of the adult members. In *Mahadev Balvant v. Lakshman Balvant* (8), Mr. Ranade observes as follows:

"It is true some of the earlier decisions required proof of malversation or mismanagement, but the later decisions have laid down both a positive and a negative test, namely, that no suit by a minor co-parcener..... should be allowed, unless his interests are... likely (1) to be advanced thereby, or (2) protected from danger."

The question is whether in the present case it is in the interests of the minors to effect a partition, and I have no hesitation in coming to the conclusion that it is. The defendant has set up a hostile title and has denied the rights of the minor plaintiffs to any share of the properties and while this is found against it is the duty of the Court to safeguard the interests of the minors by declaring their rights and giving effect to such a declaration. In *Kamakshi Ammal v. Chidambara Reddi* (9), it was held that a minor plaintiff is entitled without proof or anything more to have a decree for partition as against an adult co-parcener who denies the minor's rights to the properties and sets up an independent and hostile claim. A similar view was taken in *Thangam Pillai v. Suppa Pillai* (10). In addition to these there is the admitted fact that the defendant is keeping a concubine who is living in a part of the house although it bears a different number. It is unnecessary in this suit to consider whether he has driven out his wife or whether she left him voluntarily as she is not a party to the suit; but the fact remains that the defendant (father of the plaintiffs) has denied the title of his sons

(6) 24 M. 429; 11 M. L. J. 210.

(7) 2 I. A. 7; 22 W. R. 409; 14 B. L. R. 226.

(8) 19 B. 99.

(9) 3 M. H. C. R. 94.

(10) 12 M. 491.

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and he is now living apart from his wife with a concubine. I think these circumstances are quite sufficient to show that the interests of the plaintiffs would be jeopardized if their rights are not declared and the 1st defendant prevented from dealing with their rights. I find the 1st issue in plaintiffs' favour.

Second Issue:—I have already given my reasons for holding that the business of Duff & Co. is not the absolute property of the defendant but is partible.

Third Issue:—It is not shown that there are any properties available for partition other than those mentioned in the plaint.

Fourth Issue:—There will be a decree declaring that the plaintiffs are each entitled to $\frac{1}{3}$ rd share in the properties mentioned in the plaint. As regards item No. 1 their rights to partition can only arise after the death of their grandmother and so at present there would only be a declaration made. As regards items Nos. 2 and 3 the plaintiffs will be entitled to $\frac{1}{3}$ rd share each subject to their liability to pay the debt due to K. Rangiah which was incurred on account of the purchase of item No. 2.

Then the next question is whether I ought in this suit to declare a partition by metes and bounds so far as the village is concerned and to wind up the business of Duff & Co., and give the plaintiffs $\frac{1}{3}$ rd share each in these properties. The plaintiffs have not adduced any evidence of malversation and the plaintiffs' Vakil states that there is no objection to the plaintiffs' rights being declared and their status divided and the defendant appointed as guardian of their person and property. I think this course would, while protecting the plaintiffs adequately, prevent any unnecessary disturbance or disruption in the family. I, therefore, appoint the defendant to be the guardian of the person and properties of the minor plaintiffs and declare that they are members of a divided family from the date of this decree. The defendant will file in Court a balance-sheet every year showing the profits and losses of the business of Duff & Co. As regards the income of properties, I do not think it necessary for the present to make any special order as the plaintiffs are under the protection of the defendant and he will be meeting all their expenses.

A decree will be drawn up in the following terms:—

(1) declaring that the plaintiffs and defendant are members of a divided family from the date of the decree, plaintiffs being entitled to $\frac{1}{3}$ rd share each in the properties mentioned in the plaint;

(2) appointing the defendant as guardian of their person and property without any power of alienation of the immoveable properties without the consent of the Court; and

(3) requiring the defendant to file in Court a balance-sheet every year of the business of Duff & Co., and giving him liberty to appropriate the income of the properties towards the maintenance of himself and the other members of the family until further orders of the Court without any necessity to file any accounts of such expenditure.

As regards the costs of the suit, I am of opinion that the defendant should pay the costs of the plaintiffs as he has substantially failed on all the points set up by him.

Order accordingly.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

REVENUE PETITION No. 162 of 1914-15

OF PARTABGARH DISTRICT.

March 18, 1915.

Present:—Mr. Holms, S. M.

BHAGWAT—PLAINTIFF—APPELLANT

versus

RAI KRISHNA PAL SINGH—DEFENDANT

—RESPONDENT.

Perpetual lessee—Adverse possession, qualified—Rent, uniform rate of, payment of, effect of.

The mere fact that a lessee has remained in cultivatory possession of the land for over 12 years and all along paid the same amount of rent as entered in the lease, does not give him a right to hold in perpetuity by virtue of adverse possession. [p. 277, col. 1.]

Appeal from the decree of the Additional Commissioner, Fyzabad, dated the 29th October 1914, reversing that of the Assistant Collector, Partabgarh, dated the 15th April 1914.

Chaudhri Ram Bharose Lal, for the Appellant.

JUDGMENT.—The only point urged before me is that, as the appellant has remained in cultivating possession of the land in suit for over 12 years and has paid rent at the rate entered in the perpetual

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lease of 1899 to present respondent, that he must be considered to be perpetual lessee by right of 12 years' adverse possession. The appellant's Pleader has cited three rulings before me, all of which come from other Provinces and in all of which a proprietary or under-proprietary title was in issue. It appears that appellant was tenant of some of the plots in suit from before the time of the lease, and there is nothing to show that he had ever set up any definite title to hold in permanency under the lease. The mere fact that the landholder allowed him to remain on, paying the same rent as entered in the lease, is not sufficient to give the tenant a right to hold on in permanency under this lease. Appellant can cite no ruling of this Province in favour of his contention so far as a tenant is concerned.

Appeal dismissed with costs.

Appeal dismissed.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEALS NOS. 2406 AND 2704 OF 1914.

June 15, 1915.

Present:—Mr. Justice N. Chatterjea and Mr. Justice Roe.

DINA NATH SARMA CHOWDHURY AND OTHERS—PLAINTIFFS—APPELLANTS

*versus*SARAN RAM DEB *alias* RAM SARAN DEB—DEFENDANT—RESPONDENT.

Rent, suit for—Bengal Landlord and Tenant Procedure Act (VIII of 1869 B. C.), s. 102, scope of—Appeal, when maintainable—Bengal Tenancy Act (VIII of 1885), s. 153, scope of—Amount of rent payable, question as to.

An appeal under section 102 of Act VIII of 1869 (B. C.) lies only in cases in which a question of right to enhance or vary the rent of a *raiyat* or tenant or any question relating to a title to land or to some interest in land as between parties having conflicting claims thereto has been determined by the judgment.

No appeal lies under section 102 in cases in which merely a question as to the amount of rent payable is involved.

Huro Pershad Chuckerbutty v. Sreedam Chunder Chowdhry, 20 W. R. 15; *Hurish Chunder Chuckerbutty v. Sreemutty Huree Bewah*, 20 W. R. 16; *Nurubdessur Pershad Roy v. Sheikh Jungola*, 24 W. R. 49 and *Satghur v. Majidan*, 15 C. 107, referred to.

Section 153 of the Bengal Tenancy Act provides for an appeal in cases where there is a decision on a question of the amount of rent annually payable by a tenant. These words do not occur in section 102

of Act VIII of 1869; and therefore no second appeal lies in the case governed by section 102.

Appeal against the decree of the Sub-Judge, Sylhet, dated the 16th May 1911, modifying that of the Munsif, 4th Court, of Habiganj, dated the 30th January, 1911.

Babus D. N. Chakravarti and Kali Kinkar Chakravarti, for the Appellants.

Babu Hemendra Nath Das, for the Respondent.

JUDGMENT.—This appeal arises out of a suit for rent valued at less than Rs. 100. A preliminary objection has been taken to the hearing of the appeal on the ground that no second appeal lies in this case, the only question being as to the amount of rent payable. The case comes from Sylhet and is consequently governed by Act VIII of 1869 (B. C.). An appeal under section 102 of that Act lies only in cases in which a question of right to enhance or vary the rent of a *raiyat* or tenant or any question relating to a title to land or to some interest in land as between parties having conflicting claims thereto has been determined by the judgment. In several cases it has been held that no appeal lies under that section in cases in which merely a question as to the amount of rent payable is involved. See the cases of *Huro Pershad Chuckerbutty v. Sreedam Chunder Chowdhry* (1), *Hurish Chunder Chuckerbutty v. Sreemutty Huree Bewah* (2), *Nurubdessur Pershad Roy v. Sheikh Jungola* (3). See also the case of *Satghuri v. Majidan* (4). Section 153 of the Bengal Tenancy Act (VIII of 1885) provides for an appeal in cases where there is a decision on a question of the amount of rent annually payable by a tenant. These words do not occur in section 100 of Act VIII of 1869. We are accordingly of opinion that no second appeal lies in this case. The appeal must, therefore, be dismissed with costs.

This judgment will govern the other appeal (Second Appeal No. 2704 of 1911) which is also dismissed with costs.

Appeals dismissed.

(1) 20 W. R. 15.

(2) 20 W. R. 16.

(3) 24 W. R. 49.

(4) 15 C. 107.

BASANT SINGH v. BURMA RAILWAYS, CO., LTD.

LOWER BURMA CHIEF COURT.

SPECIAL SECOND CIVIL APPEAL No. 54 OF 1914.

July 23, 1915.

Present:—Sir Charles Fox, Kt., Chief Judge.

BASANT SINGH—APPELLANT

versus

BURMA RAILWAYS, CO., LTD., AND

ANOTHER—RESPONDENTS.

Transfer of Property Act (IV of 1882), ss. 130, 131
—*Actionable claim—Transfer—Notice.*

Though there be a valid transfer of a debt between its transferor and transferee, the person bound to pay the debt is not bound by the transfer unless he receives an express notice in writing conforming to the provisions of section 131 of the Transfer of Property Act from the transferor, or, if the transferor refuses to sign the notice, from the transferee stating the name and address of the transferee. [p. 278, col. 2.]

The notice must be given to the person concerned or to his agent authorised to receive such notices. [p. 278, col. 2.]

Mr. Dantra, for the Appellant.

Mr. Ormiston, for Respondent No. 1.

Mr. Connell, for Respondent No. 2.

JUDGMENT.—The first defendant in the case was a contractor who did some work for the 2nd defendant, the Burma Railways Coy. Ltd., on the Henzada Kyaingin Railway under the superintendence of the 3rd defendant, G. Roberts, who was the Company's District Engineer. Moneys became due to Chanda Singh by the Company in respect of such work. By a document dated the 7th July 1910, Chanda Singh assigned to the plaintiff all moneys which were and would become due to him by the Company in connection with the contracts. On the 1st of December 1910, the plaintiff sent the document to the 3rd defendant as District Engineer with a letter asking him to pay all moneys due to the first defendant to him (the plaintiff).

The 3rd defendant, Roberts, endorsed on this letter "the deed cannot be recognized in accordance with the rules on the subject". Roberts said that he verbally told the plaintiff to take the deed to the Company's auditor who is the officer who disburses moneys. The plaintiff did not do this. He says that he was told that the bills for work done by Chanda Singh would be made out in his name, and he left the document with Roberts. Subsequently he heard that the money due had been paid to Chanda Singh, so he went again to Roberts and was told that the money due had been paid to Chanda Singh. The money had in fact been paid partly to Chanda Singh and partly into

the Small Cause Court, Rangoon, under attachments from it. The plaintiff received the document back from the District Engineer on the 14th January 1911, as shown by the receipt produced from the Engineer's office. The plaintiff sues the Company and Roberts for the moneys which he claims should have been paid to him.

The questions in the case are whether the notice given to the District Engineer was a sufficient notice, and whether the Company became liable to pay the plaintiff in consequence of it. There is no case against the 3rd defendant. The debt due to Chanda Singh was an actionable claim as defined in the Transfer of Property Act. Chapter VIII of the Act states the law as regards transfer of such claims. The document effected a valid transfer of the debt as between Chanda Singh and the plaintiff, but the Company were not bound by it unless it received express notice of it in writing conforming to the provisions of section 131 of the Act. The notice required by that section is a notice in writing signed by the transferor—in this case Chanda Singh—or his agent duly authorized in that behalf, or, in case the transferor refuses to sign, by the transferee or by his agent, and the notice must state the name and address of the transferee. The notice given was not a notice by the transferor, and nothing was put before the Company or one of its duly authorized agents to show that the transferor had refused to sign a notice, consequently under the proviso to sub-section (1) of section 130 the Company was not debarred from treating the money as still payable to Chanda Singh.

Further, a notice to the District Engineer was not a sufficient notice to the Company, in the absence of any evidence to show that a District Engineer is an agent of the Company authorized to receive notices of transfers of debts by those to whom it owes money. The public may not be bound by the Company's office or other rules as to whom notices should be given, but when the validity of a notice can be secured by addressing it to the Company itself at its head office in Burma, parties have only themselves to blame if they adopt any other course and then find that the officer to whom they address notices is not an officer authorized by the Company to deal with such matters.

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The appeal is dismissed with costs—one set only, Chanda Singh not having appeared, and it not having been necessary for the defendant Roberts to appear otherwise than jointly with the Company.

Appeal dismissed.

ODDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 306 OF 1913.

March 23, 1915.

Present:—Mr. Lindsay, J. C.

MANKARAN SINGH—DEFENDANT—

APPELLANT

versus

BAIJNATH SINGH—PLAINTIFF

AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 66—Court-sale, property purchased at—Joint Hindu family, one member of, property purchased by—Benami purchase—Second appeal—Evidence, weight or value of.

A property purchased at a Court-sale by one member of a joint Hindu family in his own name can be established to be the joint family property purchased with joint funds, for section 66, Civil Procedure Code, does not apply to such a case but only to ordinary *benami* purchases. [p. 279, col. 2.]

Bodh Singh Doodhooia v. Gunesb Chunder Sen, 12 B. L. R. 317 (P. C.); 19 W. R. 356; 3 Sar. P. C. J. 253 and *Hari Singh v. Sher Singh*, 2 Ind. Cas. 210; 6 A. L. J. 174; 31 A. 282, referred to.

The weight or value of evidence is not a subject for discussion in second appeal. [p. 230, col. 1.]

Appeal from the decree of the Additional Judge, Lucknow, dated the 28th April 1913, upholding that of the Subordinate Judge, Bara Banki, dated the 13th December 1912.

Mr. A. P. Sen, for the Appellant.

Mr. Muhammad Wasim, holding brief of Pandit Gokaran Nath Misra, for Respondent No. 1.

JUDGMENT.—This appeal has sprung out of a suit for partition to which the appellant, Mankaran Singh, was a party.

The only matter in dispute here is whether one of the items of property partitioned of which was sought, is joint family property, or property which had been acquired by the appellant's father, Ram Bharose, on his own account. The Courts below have found that

this property, an area known as *Patti Ram Das*, is properly belonging to the joint family.

The finding is one of fact and is binding upon this Court in second appeal unless it can be shown that in coming to it the lower Appellate Court has been guilty of an error of law.

Mr. Sen who supported the appeal argued that the finding was bad in law, inasmuch as it ignores the principle laid down in section 66 of the Code of Civil Procedure (*cf.* section 317 of the old Code) according to which no suit can be maintained against the certified auction-purchaser on the ground that the purchase was made *benami*. It was contended that because Ram Bharose acquired this *patti* by purchase at a public auction in 1877 and received a certificate from the Court declaring his title, it was not open to the plaintiff in this partition suit to raise a case that the purchase was on behalf of the family.

The appellant's learned Counsel admitted that the ruling reported as *Hari Singh v. Sher Singh* (1) was against his contention, but was inclined to contest the correctness of the ruling under the impression that there was no other authority for the view of the Allahabad Court.

It appears, however, that the matter has been settled long ago by the Privy Council in *Bodh Singh Doodhooia v. Gunesb Chunder Sen* (2), in which, speaking of the provisions of the cognate section of the then Code of Civil Procedure, their Lordships observed that they applied to ordinary *benami* purchases at execution sales but did not affect purchases of property by one member of a joint Hindu family in his own name but with joint funds.

It is clear, therefore, that section 66 of the Code of Civil Procedure was no obstacle in the way of the plaintiff's claim to have this item of property treated as joint family property.

The only other argument advanced was to the effect that if in the circumstances the burden of proving that the property had been acquired by Ram Bharose with funds belonging to himself lay upon the appellant,

(1) 2 Ind. Cas. 210; 6 A. L. J. 174; 31 A. 282.

(2) 12 B. L. R. 317 (P. C.); 19 W. R. 356; 3 Sar. P. C. J. 253.

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it had been duly discharged. This, however, is not a contention which can be raised in second appeal for the weight or value of evidence is not a subject for discussion in such cases. There is evidence upon which the lower Court could find that this item of property was joint property.

The appeal is dismissed with costs.

Appeal dismissed.

MADRAS HIGH COURT.

CIVIL MISCELLANEOUS SECOND APPEAL No. 41
OF 1914.

July 20, 1915.

Present:—Mr. Justice Oldfield and

Mr. Justice Sadasiva Aiyar.

MUHAMMAD HUSAIN AND ANOTHER—

DEFENDANTS NOS. 6 AND 7—APPELLANTS

versus

MUTHU CHETTIAR—PLAINTIFF No. 2—

RESPONDENT.

Mortgage-decree—Attachment of mortgaged properties, whether affects character of decree—Admission.

A decree which is in substance a mortgage-decree for sale, though somewhat inartistically drawn up, does not lose its character as such merely because the mortgaged properties were attached before their sale in execution, nor does the attachment amount to an admission that the decree is not a mortgage-decree for sale but only a money-decree. [p. 281, cols. 1 & 2.]

Anna Pillai v. Thangathammal, 20 M. 78; *Lal Behary Singh v. Habibur Rahman*, 26 C. 166; 3 C. W. N. 8; *Fazil Howladar v. Krishna Bundhoo Roy*, 25 C. 580; 2 C. W. N. 118; *Jogemaya Dassi v. Thackomoni Dassi*, 24 C. 473; *Ramasami Naik v. Ramasami Chetti*, 17 M. L. J. 201; 2 M. L. T. 167; 30 M. 255; *Magniram v. Mehdi Hoosein Khan*, 31 C. 95; 8 C. W. N. 30, referred to.

Civil miscellaneous second appeal against the decree of the Court of the Subordinate Judge of Kumbakonam, in Appeal Suit No. 757 of 1913, preferred against that of the District Munsif of Valangiman, in Execution Appeal No. 106 of 1913 (Original Suit No. 385 of 1894).

Mr. T. R. Venkatarama Sastri, for the Appellants.

Mr. C. Krishnamachariar, for the Respondents.

JUDGMENT.

OLDFIELD, J.—I have felt some hesitation in adopting the liberal construction of the decree before us for which the respondent

contends, because he has already on one occasion executed it by attachment inconsistently with its alleged mortgage character and is now after great delay contending for that character in order to evade the bar of limitation, to which, considered as an ordinary money-decree, it would be subject.

In the cases cited for the respondent, *Anna Pillai v. Thangathammal* (1) and *Lal Behary Singh v. Habibur Rahman* (2), the mortgage character of decrees which were not in formal conformity with the requirements of the Transfer of Property Act, was relied on by judgment-debtors and the former was statedly decided with reference to the novelty of the provisions in the Transfer of Property Act as to the form of decrees. But in *Fazil Howladar v. Krishna Bundhoo Roy* (3) the mortgage character of the decree was relied on by the decree-holder and effect was given to it; and *Jogemaya Dassi v. Thackomoni Dassi* (4), in which the nature of the decree was considered incidentally, contains nothing adverse to the right of the decree-holder as such to take advantage of its mortgage character although he had, as he has done in the case before us, already proceeded by attachment. As regards respondent's attachment it was in fact of the properties, on which the decree-debt was secured and ended in their sale without objection from the appellants; and it has not been shown that any plea of estoppel or *res judicata* as to the nature of the decree can be founded on it. Though the present application is made under Order XXXIV, rule 6, of the Code of Civil Procedure, almost eight years after the decree was passed, it is within three years of the sale of the secured property in 1912. In these circumstances I feel justified in following the authorities cited and in dismissing the appeal against appellate order with costs.

SADASIVA AIYAR, J.—The questions arising for decision in this appeal are as follows:—

(1) Was the decree of the 23rd June 1896 in favour of the respondent a mortgage-decree for sale of the properties

(1) 20 M. 78.

(2) 26 C. 166; 3 C. W. N. 8.

(3) 25 C. 580; 2 C. W. N. 118.

(4) 24 C. 473.

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of the 2nd defendant which properties the plaintiffs prayed in their plaint should be sold for the recovery of the sum of Rs. 500 interest and costs claimed in the plaint in the suit?

(2) If the above first question is answered in the affirmative did the decree-holders lose their legal right to obtain a supplemental personal decree for the balance against the 2nd defendant, (the balance due under the decree after crediting the sums realized by the sale of the mortgaged properties) by reason of the decree-holders having had the mortgaged properties attached before bringing them to sale in execution?

As regards the first question, the decree of 1896 has, no doubt, been drawn up very irregularly. Having regard, however, to the remedy claimed in the plaint in the suit (of 894) and having regard to the judgment in that suit of 1834 which I have perused, I have no reasonable doubt that the 2nd defendant's properties which were offered as security by the said defendant to the plaintiff and which were detailed in the schedule attached to the plaint of 1894, were intended by the decree in the suit to be sold in execution of that decree and that the decree should be construed as a decree for such sale. [See *Ramasami Naik v. Ramasami Chetti* (5) and *Magniram v. Mehdi Hoosein Khan* (6) as to the construction of decrees.] In the case of *Anna Pillai v. Thangathammal* (1) a decree, very similar in terms, was construed as a mortgage-decree for sale. No doubt, that decree was passed in November 1882 soon after the Transfer of Property Act came into force. But a similar decree passed in 1896 (the year of the decree under construction in this case) was again construed by the Calcutta High Court in *Lal Behary Singh v. Habibur Rahman* (2) as a decree for sale. I would, therefore, agree with the lower Courts as regards the construction of the decree in question.

Coming to the second point, the decree-holders were, no doubt, entitled to bring the mortgaged properties to sale in execution of the decree without an attachment. The decree-holders, however, had the properties

attached through Court in execution before they brought them to sale. Having regard to the erroneous practice which went on in many of the *mofussil* Courts for several years after the Transfer of Property Act came into force, of having even mortgaged properties attached in execution of a decree for sale, I do not think that the decree-holders' conduct should be construed as an admission on their part that the decree was not a mortgage-decree for sale but only a money-decree. The terms of the execution petition which prayed for the attachment are not before us. Even taking their above conduct as an admission of the decree-holders, the said admission is not conclusive against them as an estoppel, it not being alleged or shown that the 2nd defendant and his legal representatives were misled or injured in any way by the said unnecessary proceedings of the decree-holders.

In the result, I would also dismiss the appeal with costs.

Appeal dismissed.

ODH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 326 OF 1913.

April 20, 1915.

Present:—Mr. Lindsay, J. C.

Mirza MUHAMMAD AHMAD SHAH—
DEFENDANT—APPELLANT

versus

Saiyed MUHAMMAD TAQI AND ANOTHER—
PLAINTIFFS, AND OTHERS—DEFENDANTS
—RESPONDENTS.

Trees, transaction regarding—Transfer, nature of—Moveable or immoveable property—Timber, standing—Registration Act (XVI of 1908), s. 2 (6) and (9).

Where there is a transaction regarding trees in connection with which an instrument of transfer has been executed, the character of the transaction has to be looked at in order to determine whether the trees referred to are moveable or immoveable property. [p. 282, col. 2; p. 283, col. 1.]

Mangal Sen v. Musammatt Naoli, 9 Ind. Cas. 478; dissented from.

Sukry Kurdeppa v. Goondakull Nagireddi 6 M. H. C. R. 71 at p. 73 and *Ali Bakhsh v. Ghurai*, 28 Ind. Cas. 180; 2 O. L. J. 97; 18 O. C. 122, referred to.

Thus, where a *nim* tree is mortgaged without any intention of its being severed from the land and used as timber, as a result of the mortgage the tree is an

(5) 17 M. L. J. 201; 2 M. L. T. 167; 30 M. 255.

(6) 31 C. 95; 8 C. W. N. 30.

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immoveable, and not a moveable, property as defined by the Registration Act. [p. 283, col. 1.]

Appeal from the decree of the Additional Judge, Lucknow, dated the 23rd April 1913, reversing that of the Additional Subordinate Judge, Lucknow, dated the 31st July 1912.

Babu Basdeo Lal and Pandit Brij Narain Chakbast, for the Appellant.

Pandit Gokaran Nath Misra, for Respondents Nos. 1 and 2.

Babu Salig Ram, for Respondent No. 3.

JUDGMENT.—The sole question for consideration in this second appeal is whether or not the mortgage-deed in suit was registered in accordance with law. The suit was one for sale of the mortgaged property and one of the pleas raised by way of defence was that the mortgage could not be enforced, inasmuch as the deed had not been validly registered. This contention found favour with the Court of first instance, which dismissed the suit. In appeal the Additional Judge of Lucknow held that there had been good registration of the document and that the plaintiffs were, therefore, entitled to succeed. The document in dispute was executed on the 10th of December 1897 to secure a loan of Rs. 1,000 and the property which was hypothecated consisted of an 8-anna share in a village called Bhulia which is situated in the District of Sitapur and of a *nim* tree situated in *Mohall-i Mansurnagar* in the city of Lucknow. The deed was registered at Lucknow.

There was some dispute with regard to the second item of the mortgaged property just mentioned. The plaintiffs contended that the plot of land on which this *nim* tree stood was also hypothecated under the mortgage. The Court below seems to have been of a different opinion and after a careful examination of the mortgage-deed I am satisfied that no land attached to this particular *nim* tree was intended to be mortgaged. On the language of the deed I am satisfied that the intention was only to mortgage the *nim* tree. Under section 28 of the Registration Act every document mentioned in section 17, sub-section 1, clauses (a), (b), (c) and (d), and section 18, clauses (a), (b) and (c), must be presented for registration in the office of a Sub-Registrar within

whose sub-district the whole or some portion of the property to which such document relates is situated. All documents which fall under the above description must be documents relating to immoveable property. The argument which is put forward here was that, as the *nim* tree situated in Lucknow was not immoveable but moveable property, and, as admittedly the 8-anna share which was hypothecated was situated in the District of Sitapur, the Sub-Registrar of Lucknow had no jurisdiction to register the deed. In support of this contention reliance is placed upon the definition of the expression "moveable property" contained in section 2, clause (9), of the Registration Act. It is said that a *nim* tree by itself is moveable property within the meaning of this definition, and the ground on which this interpretation is put forward is that a *nim* tree must be taken to be standing timber. I have had occasion in a case recently decided to discuss the interpretation of this definition of the expression "moveable property" as used in the Registration Act. See my judgment in Second Civil Appeal No. 421 of 1912 [*Ali Bakhsh v. Ghurai* (1)]. That was a case relating to a deed of gift which purported to pass the property in certain trees. The deed was not registered and the question for decision was whether the deed being unregistered could operate to transfer any title to the other party. In dealing with that case both the Courts below had treated the trees referred to in the document as moveable property within the meaning of section 2, clause (9), of the Registration Act, and for that purpose they had relied upon a ruling of the Allahabad High Court reported as *Mangal Sen v. Musammam Naoli* (2). It had been held there that trees were for the purposes of the Registration Act moveable property. I expressed the opinion to which I still adhere that standing trees and standing timber are not convertible terms and I referred to a judgment of the Madras High Court reported as *Sukry Kurdeppa v. Goondakull Nagireddi* (3). According to that judgment where there is a transaction regarding

(1) 28 Ind. Cas. 180; 2 O. L. J. 97; 13 O. C. 122.

(2) 9 Ind. Cas. 478.

(3) 6 M. H. C. R. 71 at p. 73.

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trees in connection with which an instrument of transfer has been executed, the character of the transaction has to be looked at in order to determine whether or not the trees referred to are standing timber and, therefore, moveable property, or, whether they are to be deemed to be immoveable property. If for example there is no intention that the trees should be severed and used as timber, the transaction would be treated as one relating to immoveable property. Applying this principle to the present case, it seems to me quite clear that it was not the intention of the parties to this mortgage-deed to treat the *nim* tree situated in Lucknow as moveable property. It was never contemplated that as a result of the mortgage transaction the tree should be severed from the land and used as timber. I have no doubt, therefore, the proper view is that for the purposes of this transaction the tree in question was immoveable property and not moveable property within the meaning of the definition of those terms contained in the Registration Act. This view being accepted, the whole discussion as to the validity of the registration of the document in this case comes to an end. If the tree was, as I hold it to be, immoveable property, then there can be no doubt that under section 28 of the Registration Act the Sub-Registrar of Lucknow had jurisdiction to register it. This, I may observe, was not the ground upon which the lower Appellate Court supported the registration of the deed in question. It is not necessary for me, however, to enter into a discussion of the reasons given by the Judge of the Court below in support of his opinion. For the reasons I have already stated I hold it to be clearly established that the deed was registered in accordance with law.

The appeal, therefore, fails and is dismissed with costs.

Appeal dismissed.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEALS NOS. 50 AND 52 OF 1912.

May 27, 1914.

Present:—Justice Sir Asutosh Mookerjee, Kt., and Mr. Justice Beachcroft.

RAJ KUMAR SARKAR—PLAINTIFF—
APPELLANT

versus

FAIZUDDI TARAFDAR AND OTHERS—

DEFENDANTS—RESPONDENTS.

Bengal Tenancy Act (VIII of 1885), s. 29—Enhancement of rent—Rent assessed on excess land and new land taken—Consolidated rent fixed, if enhancement.

Where rent is assessed for excess land in possession of a tenant as also for new lands taken by him, and one consolidated rent is assessed for all the lands in his possession, there is in essence a new holding created and no question arises as to the enhancement of rent payable by the tenant and section 29 of the Bengal Tenancy Act has no application to such a case. [p. 284, col. 2.]

Where, therefore, five *bighas* of new lands were added to the original seven *bighas* and, a consolidated rent was settled by a contract, a new holding was created by the contract and the new rental was not an enhancement of the original rental. [p. 285, col. 1.]

Appeals against the decision of the Subordinate Judge of Khulna, affirming that of the Munsif of Bagerhat, dated the 28th February 1910.

Babu Surendra Madhub Mallick, for the Appellant.

Babu Sarat Chandra Ghose, for the Respondents.

JUDGMENT.—These appeals are directed against two appellate decrees of the Subordinate Judge made in a suit for arrears of rent. The plaintiff seeks to recover rent from the tenant defendants at the rate of Rs. 38 a year on the strength of a *kabulyat* executed on the 27th March 1898. The defendants contend that the *kabulyat* was obtained under circumstances which make it inoperative, and, that at any rate, it is void because it enhances the rent contrary to the provisions of section 29 of the Bengal Tenancy Act. The Courts below have overruled the objection that the *kabulyat* was executed by the tenant defendants under coercion. The Courts have also concurrently held that the *kabulyat* was in contravention of section 29 of the Bengal Tenancy Act, but they have taken divergent views upon the question of the extent of the relief to which the plaintiff is entitled. The primary Court gave the plaintiff a decree on the footing that the defendants were liable to pay rent at the

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rate of Rs. 29. Against this decree, both the plaintiff and the defendants appealed. The Subordinate Judge has dismissed the appeal of the plaintiff and allowed the appeal of the defendants, with the result that he has held that the defendants are liable to pay rent only at the rate of Rs. 20 a year. The question in controversy consequently is, whether the *kabulyat*, which is the foundation of the suit, is binding upon the defendants.

It appears that the predecessor of the defendants executed a *kabulyat* in favour of the plaintiff on the 13th May 1885 in respect of 7 *bighas* of land. The total rent was fixed at Rs. 15; but the different kinds of lands were assessed at different rates namely, 4 *bighas* at Rs. 3 per *bigha* and 3 *bighas* at Re. 1 per *bigha*. The *kabulyat* further recited that 4 *bighas* out of the 7 *bighas* were included within the *khamar* lands of the landlord's and would be surrendered whenever required by the landlord. In 1898, the landlord took steps for resumption of these 4 *bighas*. It was found at the same time that the tenants were in occupation of one *bigha* of land in excess of what was comprised in the *kabulyat*. The tenants also expressly desired to take settlement of an additional 4 *bighas* of land not included in the original *kabulyat*. Under these circumstances, the *kabulyat* of the 27th March 1898 was executed. The aggregate rent was fixed at Rs. 38 for 12 *bighas*; but the parties agreed that the whole of this sum was not to be payable at once; the rent was, consequently, made progressive, beginning with Rs. 22 a year in 1304 and reaching the maximum of Rs. 38 a year in 1309. The details of the calculation by which the rent was assessed were also set out in the *kabulyat*, and the rates for the land originally comprised in the holding, for the excess land and for the new land taken by the tenants were specified. It so happens that the figure mentioned for the original 7 *bighas*, exceeds by more than two annas in the rupee the sum previously payable as rent. Under these circumstances it is argued that the *kabulyat* was in contravention of section 29 of the Bengal Tenancy Act. In our opinion, there is no force in this contention.

Section 29 provides that the money-rent of an occupancy *raiyyat* may be enhanced by

contract, subject to the condition that the rent must not be enhanced so as to exceed by more than two annas in the rupee the rent previously payable by the *raiyyat*. This clearly implies that the land held by the occupancy *raiyyat* remains unchanged; the only variation is in the amount of money-rent paid by him in respect of the land comprised in his holding. Where, as here, the rent is assessed for excess land as also for new lands taken by the tenant, and one consolidated rent is assessed for all the lands, there is in essence a new holding created and no question arises as to the enhancement of rent payable by the tenant. It has been argued, however, on behalf of the respondents that this view is opposed to the decision of this Court in the cases of *Kristodhone Ghose v. Brojo Gobindo Roy* (1) and *Mothura Mohun Lahiri v. Mati Sarkar* (2). The first of these cases is of no assistance to the respondents. The only principle enunciated in that decision was, that where the rent of an occupancy *raiyyat* has been enhanced by more than two annas in the rupee, the entire contract is void and it is not open to the landlord to ask for a decree up to the extent of two annas in the rupee. There is, however, an observation in the case of *Mothura Mohun Lahiri v. Mati Sarkar* (2) which apparently favours the contention of the respondent. The question arose in that case, whether rent had been increased by reason of an increase in the area of the holding. This Court remanded the case for determination of this question of fact, and then went on to add that supposing it be found that the said rent was partly enhanced rent and partly increased rent, the plaintiff would not be entitled to recover the increased rent, for the contract as evidence by the *kabulyat* could not be divided into parts, one part referable to a valid transaction and the other part to an invalid transaction. In support of this view reference was made to the case of *Kristodhone Ghose v. Brojo Gobindo Roy* (1). But the decision last mentioned has no bearing upon the question raised. It may be pointed out that if one consolidated rent has been fixed for the new holding, no question arises as to the division of the contract into two parts, one referable

(1) 24 C. 895; 1 C. W. N. 442.

(2) 25 C. 781.

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to a valid transaction and the other to an invalid transaction. It has been urged, however, that the view we take may render possible an evasion of the provisions of section 29 by the addition of a nominal quantity of land to the original holding. There is no ground for this apprehension. Whether there has been, in substance, a new holding created, in supersession of the original holding, is a question which must be answered with reference to the circumstances of the individual case; the matter is one of substance, not of form; the Court must determine whether a new holding has been created though it may include the land of the original holding, or whether the parties had recourse to a colourable device to evade the provisions of section 29. If the Court comes to the conclusion, that a new holding has been constituted by the substantial addition of new lands to those of the original holding, section 29 has no application to the new consolidated rental. In the case before us, five *bighas* of new lands were added to the original seven *bighas*, and a consolidated rent was settled by the contract of the 27th March 1898. A new holding was clearly created by that instrument and the new rental is plainly not an enhancement of the original rental: *Satish Chundra Giri v. Kabiruddin Mallick* (3). We are not prepared to accept the view of the Subordinate Judge that the new rental was vitiated by section 29, and that the tenants were liable to pay only at the original rate; nor can we adopt the course taken by the Court of first instance, namely, assess the rent at the original rate in respect of the original lands and at the rate settled by the parties in respect of the excess and of the new lands taken by the tenants; to do so would be clearly to make a new contract for the parties.

The result is that these appeals are allowed; the decrees of the Subordinate Judge set aside and decrees made in favour of the plaintiff for his share of the rent on the footing that rent is payable at the contract rate of Rs. 38 a year. The plaintiff is entitled to his costs in all the Courts in both the appeals. The hearing fee in this Court will be allowed only in one of the appeals.

Appeals allowed.

(3) 26 C. 233.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 191 OF 1914.

February 5, 1915.

Present:—Mr. Stuart, A. J. C.

Srimati GIRIBALA DEVI—PLAINTIFF—
APPELLANT

versus

CHANDIKA SINGH AND OTHERS—

DEFENDANTS—RESPONDENTS.

Pre-emption—Contract, whether can create right of pre-emption in Oudh—Construction of document—Transfer prohibited to be made to any other than one specified person, effect of.

A right of pre-emption in Oudh can be created by a contract. [p. 286, col. 1.]

Where a clause in a deed prohibits transfer of property to any person other than the one mentioned in the deed, a right of pre-emption is created by that clause in favour of such latter person, and his only remedy is to enforce this right. [p. 286, col. 1.]

Bimal Jati v. Biranja Kuar, 22 A. 238; A. W. N. (1900) 49, referred to.

Appeal from the decree of the Additional Judge, Lucknow, dated the 11th February 1914, upholding that of the Munsif, North Lucknow, dated the 11th September 1913.

Mirza Sami Ullah Beg and Syed Ali Muhammad, for the Appellant.

Chaudhri Ram -Bharose Lal, for the Respondents.

JUDGMENT.—I cannot interpret the clause upon which the appellant relies as having the effect of conferring a right other than that of pre-emption. It is true that the clause purports to prohibit a transfer to any person other than the vendee under the deed and does not in express terms confer a right of pre-emption. But in effect a right of pre-emption is given, for, if the land in question were offered to the vendee at a fair market-rate and the vendee refused to accept it, it would not be possible for the vendee, after such refusal, to restrain the vendor from transferring the land to another person. A similar view was taken by Strachey, C. J., and Banerji, J., in *Bimal Jati v. Biranja Kuar* (1). There they construed a clause which prohibited transfer to any person except one, as a clause conferring a right of pre-emption upon that person. It has been argued that a right of pre-emption cannot be created by a contract in Oudh in view of the provisions of the Statute Law. There is nothing in the

(1) 22 A. 238; A. W. N. (1900) 49.

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Statute Law which prohibits the creation of a right of pre-emption in Oudh by a contract. Thus the appellant's remedy was to enforce an alleged right of pre-emption. She had no other remedy. Whether a right of pre-emption remained with her as a successor of the original vendee is a question into which I need not go for the purpose of the decision of this appeal, as it is very clear that any right to which she may have had title to enforce a right of pre-emption was barred under the provisions of the law of limitation at the time when the suit was brought. Her suit must fail, as at the time when she brought it the only relief to which she could be possibly entitled was time-barred.

I, therefore, dismiss the appeal. The appellant will pay her own costs and those of the contesting respondents.

Appeal dismissed.

MADRAS HIGH COURT.

APPEALS AGAINST ORDERS NOS. AND 24, 25, 29 TO 32 OF 1914.

April 30, 1915.

Present:—Sir John Wallis, Kt., Chief Justice, and Mr. Justice Tyabji.

In re THE SWADESHI STEAM NAVIGATION Co., LTD.

S. V. NALLAPERUMAL PILLAI

AND OTHERS—APPELLANTS

versus

S. D. KRISHNA AIYANGAR AND ANOTHER
—RESPONDENTS.

Companies Act (VI of 1882), s. 68—Charge in favour of officer of Company—Registration necessary—Company—Debenture—Floating charge—Default made by Company but business carried on—Charge created after default, validity of—Crystallisation of floating charge, when takes place.

A debenture deed after charging all the assets of a Company by way of a floating charge and providing that notwithstanding such charge the Company shall have power to carry on business and deal with the assets of the Company until default shall have been made for six calendar months in the payment of the principal amount, provided that from and after the happening of such default the liberty and authority hereinbefore given (to carry on business) shall forthwith cease and determine and the charge created by this debenture shall and may be immediately enforceable: Default in payment of the principal amount was made but the Company

carried on business and created certain charges after the date of default.

Held, (1) that the Company's right to carry on business did not come to an end automatically on the happening of the default but continued until the debenture holder intervened to show his desire that it should cease, as by applying for a Receiver; [p. 287, col. 1.]

(2) that the charges created by the Company after default were not void; [p. 287, col. 2.]

(3) that the floating security remained dormant and could not become fixed or crystallised until the Company ceased to be a going concern or until the debenture-holder intervened. [p. 287, col. 2.]

A charge created in favour of the officers of a Company cannot be availed of if it is not registered as required by section 68 of the Indian Companies Act (VI of 1882). [p. 289, col. 1.]

Appeals against the orders of the District Court of Tinnevely, dated the 22nd of December 1913, in Execution Petitions Nos. 39, 42, 39, 39, 39, 42 of 1913 respectively, in Original Suit No. 307 of 1911.

Mr. S. Srinivasa Aiyangar (with him Messrs. K. Srinivasa Iyengar and R. Narayana-swami Iyer), for the Appellant.

Mr. T. Narasimha Aiyangar (with him Mr. C. Padmanabha Iyengar), for the Respondents.

JUDGMENT.

WALLIS, C. J.—These are appeals from an order of the District Judge of Tinnevely in Original Suit No. 307 of 1911, in the matter of the winding-up of the Swadeshi Steam Navigation Company, Limited. By an order of the 27th April 1912 made in the winding-up the District Judge had held that the charges created by a resolution of the Directors in favour of claimants 23 and 16, the Secretary and Manager of the office of the Company, were not rendered invalid by the provisions of the explanation to section 68 of the Indian Companies Act, 1882, and that they did not amount to a fraudulent preference. The claimants then put in the petitions now under appeal for payment out of the assets of the amounts of their charges when the debenture-holders of the Company, whose rights as secured creditors had not been considered in the previous application, appeared and opposed the applications on the ground that their floating security had become fixed or crystallised and had attached on the assets of the Company before the creation of these charges. The District Judge having overruled

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the objections the debenture-holders have appealed and have raised three contentions in support of their case.

In the *first* place, they rely on the express provision of the debenture-deed, which, after charging all the assets of the Company by way of floating charge and providing that notwithstanding such charge the Company should have power to carry on business and deal with the assets of the Company until default should have been made for six calendar months in the payment of the principal amount which, admittedly happened, provided that from and after the happening of such default the liberty and authority hereinbefore given (to carry on business) shall forthwith cease and determine and the charge created by this debenture shall and may be immediately enforceable.

In this connection, it must be borne in mind that the right of the Company to create a charge of this kind is incident to its right to carry on business, and it is quite clear that no such charge can be created after the Company had actually stopped business or after the debenture-holder had intervened under the powers reserved to him to stop the business by obtaining the appointment of a Receiver or petitioning for the winding-up of the Company. The difficulty arises when, as in the present case, the Company has been allowed to go on carrying on business and creating charges, after the happening of any of the events which determined its right to carry on business. In cases of this kind the Courts have been disposed to hold, at any rate when the language of the deed admits of it, that the right to carry on business is not determined automatically by the happening of one of the events indicated, but continues until the debenture-holder intervenes to show his desire that it should cease, as by applying for a Receiver. In *Government Stock Investment and other Securities Company v. Manila Railway Co., Ltd.* (1) Lindley, L. J., pointed out the hardship and injustice that must arise to third parties by the debenture-holders allowing the business to go on after the happening of the specified

event and then turning round and treating all the transactions as void under the debenture deed, and held that such a result was so unreasonable and undesirable that in the absence of an express provision to that effect it ought not to be held to have been in contemplation of the parties. On appeal the House of Lords in *Government Stock and other Securities Investment Company v. Manila Railway Co., Ltd.* (2) took the same view and Lord Macnaughten laid down generally that it was the essence of a floating security that it should remain dormant until the undertaking charged ceases to be a going concern or until the person in whose favour the charge is created intervenes.

There was no difficulty in applying that doctrine to the facts of that case, but there is more difficulty when, as in the debenture in *Edward Nelson and Company Ltd. v. Faber & Co.* (3), which is in terms identical with the debenture here except in a particular which does not seem very material, it is expressly provided that on the happening of a specified event the liberty and authority of the Company to carry on business shall forthwith cease and the charge created by the debenture shall and may be immediately enforceable. In this case, it would almost seem as if these words had been expressly inserted to take the case out of the decision in *Government Stock and other Securities Investment Company v. Manila Railway Co., Ltd.* (2) and to determine the Company's authority to carry on business automatically without any intervention of the debenture-holders. The Courts, however, lean strongly against such a contention, and Joyce, J., has rejected it in *Edward Nelson & Co. v. Faber & Co.* (3), a decision which is not appealed against, has been since cited without comment in some cases and in most text-books, though it is omitted from the last edition of Buckley on Companies. In a still later case, *Evans v. Rival Granite Quarries Co., Ltd.* (4), Fletcher

(2) (1897) A. C. 81; 66 L. J. Ch. 102; 75 L. T. 553; 45 W. R. 353.

(3) (1903) 2 K. B. 367; 72 L. J. K. B. 771; 89 L. T. 21; 10 Manson 427.

(4) (1910) 2 K. B. 979; 79 L. J. K. B. 970; 54 S. J. 580; 26 T. L. R. 509.

(1) (1895) 2 Ch. D. 551; 64 L. J. Ch. 740.

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Moulton, L. J., after referring to the leading cases as to the incidents of a floating security of this kind, observed that in all of the cases the Courts realized that it was impossible to come to any other conclusion than that it was intended to leave the Company free to carry on its business until the time arrived when debenture-holders enforced their security upon the Company's assets and undertaking. And the learned Lord Justice went on to say, not without reference, I cannot help thinking to *Edward Nelson's* case (3) which had been cited in the argument that, though in the earlier cases the actual words of a particular document may have influenced the Courts, it early became clear to the Judges that this did not depend on the special language used but upon the essence and nature of a security of this kind. On the other hand, Lord Justice Buckley in the same case, seems still to have relied on the language of the document and speaking of the various ways in which crystallization may happen and the security become fixed, he said: "A Receiver may be appointed, or the Company may go into liquidation and the Liquidator be appointed, or any event may happen which is defined as bringing to an end the license to the Company to carry on business."

In this state of the authorities I hesitate to differ from the decision of Joyce, J., reinforced as it is by the observations of Fletcher Moulton, L. J., although it is not strictly binding on me.

As regards the *second* point, the appellants do not seem to have relied in the lower Court on the fact that the Company had stopped business before the granting of the charges and the evidence taken by the District Judge in the earlier case sufficiently shows that it had not.

The *third* point is that the charges having been created in favour of officers of the Company—one of them is Secretary and the other had been appointed by resolution Manager of the Company's office—and not having been registered as required by section 68 of the Indian Companies Act of 1882, were not available to the claimants within the meaning of the explanation of that section. This objection was taken by the Liquidator in the earlier case and was overruled by the District Judge, now Mr. Justice Oldfield.

It was again expressly taken in the lower Court in this case but was apparently not argued in view of Mr. Oldfield's decision at an earlier stage. It is not expressly mentioned in the grounds of appeal to us, but as the facts are such as to bring the case *prima facie* within the terms of the statutory provision, we think that we ought to enforce the provisions of the section if they are applicable. The Companies Act of 1862 whilst providing penalties for failure to register mortgages and charges did not provide that unregistered mortgages and charges should be void, but then there were decisions that it would be inequitable to allow officers of the Company to enforce such charges when created in favour of themselves. The late Sir George Jessel criticised these decisions in several cases, pointing out that they imposed an additional penalty not warranted by the Statute and his view was finally upheld in 1887 by the House of Lords in *Wright v. Horton* (5). At the time when the Indian Companies Act of 1882 was being drafted and passed into law, the other view still prevailed and the Legislature endeavoured to give effect to it as nearly as possible in the words used in the decided cases. In *Patent Bread Machinery Company, In re Valpy and Chaplin, Ex parte* (6), Lord Justice James, after observing that the mortgage was not void for want of registration went on:—"But as it is the duty of the officers of the Company to see that every charge specifically affecting property of the Company is registered, I am of opinion that no Director, Manager, or other officer of the Company, can avail himself of a charge which is not registered," and he applied the doctrine to a person who had acted as Solicitor of the Company. The same language was used by the Court of Appeal in *South Durham Iron Company, In re, Smith's* case (7), where Sir George Jessel interpreted the decisions as meaning that a Director, Manager or officer cannot avail himself of the security. These are all cases in which the officer had taken a charge in respect of advance made by him to the Company and not for arrears of salary due to him.

(5) (1887) 12 A. C. 371; 56 L. J. Ch. 873; 56 L. T. 782; 36 W. R. 17; 52 J. P. 179.

(6) (1872) 7 Ch. App. 289; 26 L. T. 228; 20 W. R. 347.

(7) (1879) 11 Ch. D. 579; 48 L. J. Ch. 480; 40 L. T. 572; 27 W. R. 845.

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The explanation to section 68, which appears to be intended to reproduce the ruling of Lord Justice James, in *Patent Bread Machinery Co., In re, Talpy & Chaplin, Ex parte* (6), as far as possible in his own language, is as follows:—"Omission to register under this section a mortgage or charge does not render it invalid, but the officers of the Company cannot avail themselves as such of a mortgage or charge specifically affecting the property of the Company and not so registered." The words "as such" present some difficulty if they mean as "officers of the Company." It is difficult to see what is meant by the officers of the Company availing themselves of a mortgage or charge, unless it be that they cannot take such mortgages or charges when they are officers of the Company, which is what was laid down in the cases referred to. It is I think, clear, that the Legislature was anxious to reproduce not only the substance but as far as possible the very language of the decisions and that this must be accepted as the meaning of the explanation.

The only other point is whether both the claimants were officers of the Company. The Secretary admitted he was; the other claimant denies that he was an officer of the Company within the meaning of the section and although he would *prima facie* appear to be such yet, as he appears to rely on special facts which he has not had an opportunity of proving, we have decided to call for a finding as to whether he was an officer of the Company within the meaning of the section when he obtained the charges. Fresh evidence may be taken.

The finding should be submitted in one month after the re-opening of the lower Court after the midsummer vacation. Seven days will be allowed for filing objections.

The appeals against orders Nos. 24 and 29 to 31 of 1914 are allowed as against the 23rd claimant with costs.

TYABJI, J.—I agree.

Appeals allowed.

OUDEH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 26 OF 1913.

March 23, 1915.

Present:—Mr. Lindsay, J. C., and

Mr. Kanhaiya Lal, A. J. C.

Mir SYED HUSAIN—DEFENDANT—
APPELLANT

versus

THE BANK OF UPPER INDIA, LTD.,
LUCKNOW—PLAINTIFF AND ANOTHER—
DEFENDANT—RESPONDENTS.

Mortgagor, power of, to deal with mortgaged property subsequent to mortgage—Alienation of mortgaged property, mortgagor's right as to—Assignee of mortgaged property, position of—Lease granted by mortgagor after mortgage, validity of—Covenant against alienation, invalidity of—Personal liability between mortgagor and mortgagee—Lessee of mortgaged property, right of—Equity of redemption, interest in, acquisition of—Redemption—Long term lease granted after mortgage, how far enforceable—Declaration in modified form, grant of, power of Court as to—Transferee pendente lite, whether bound by result of litigation—Court, power of.

A mortgagor cannot by any dealings with the mortgaged property subsequent to the date of the mortgage affect the rights of the mortgagee under the contract, subject to the condition that the mortgagor's power of alienation is not restricted. The assignee of the mortgaged property can, of course, take only subject to the incumbrance, and, if the property is sold or foreclosed by the mortgagee in proceedings properly taken for the purpose, the interest which the mortgagor may have created subsequent to the mortgage may be destroyed. [p. 291, col. 1.]

A lease granted by a mortgagor after the execution of the mortgage-deed, absolutely prohibiting alienation by him, cannot be declared to be void and inoperative as against the mortgagee, merely on the ground that it has been executed in contravention of the covenant against alienation, inasmuch as such covenants create only a personal liability between the mortgagor and the mortgagee. And the lessee acquires an interest in the equity of redemption and can claim to redeem upon that footing. [p. 290, col. 1; p. 291, col. 1.]

Radha Pershad Misser v. Monohur Das, 6 C 317; 7 C. L. R. 293 and *Trimbak Jivaji Deshamukha v. Sukharam Gopal*, 16 B. 599, referred to.

Qurban Ali v. Raghubar Dayal, 16 Ind. Cas. 476; 15 O. C. 139; *Macleod v. Kissan Vithal Singh*, 30 B. 250; 6 Bom. L. R. 996 and *Madan Mohan Singh v. Raj Kishori Kumari*, 17 Ind. Cas. 1; 17 C. L. J. 384, distinguished.

The grant of a long term lease, say for twenty years, by the mortgagor, subsequent to the mortgage, is a transaction prejudicial to the saleable value of the mortgage security and injurious to the interest of the mortgagee. However, the lease cannot on that account be declared to be totally void but holds good in every respect except as to the long period. [p. 292, col. 1.]

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Where the plaintiff sues for a declaration that a long term lease is void and inoperative as against him, the Court can grant a declaration in a modified form to the effect that the lease is not absolutely void and inoperative, but only in so far as the long term is concerned. [p. 292, col. 1.]

A Court can bind a transferee *pendente lite* by the result of the litigation, even though his name be not on the record, if the fact of the transfer is admitted before the Court during the progress of the litigation. [p. 292, col. 2.]

Appeal from the decree of the Subordinate Judge, Bahraich, dated the 11th December 1912.

Syed Wazir Hasan, for the Appellant.

Mr. B. N. Banerji and Babu Jiban Krishna Banerji, for Respondent No. 1.

JUDGMENT.—The facts of this case, so far as it is necessary to state them for the purpose of disposing of this appeal, are as follows:

One Saiyad Haider Medhi mortgaged 11 villages to the Bank of Upper India, Limited, by two mortgages dated respectively the 20th June and the 30th November 1903. The mortgages were simple and having been put in suit, decrees for sale were obtained upon them in the year 1910.

According to the plaint (paragraph 4), when the Bank in or about November 1911 began to proceed with execution of the decrees so obtained, it came to its notice that subsequent to the dates of the mortgages the mortgagor had executed various leases of items of the mortgaged property. The particular lease with which we are concerned here is one granted in August 1908 to the defendant-appellant, Mir Saiyad Husain. That was a lease of certain lands, called *khalsa* land, comprised in one of the mortgaged villages called Rudain, for a term of twenty years, the rent reserved being Rs. 3,166 per annum. The lease was in reality a *thela* or farm of the right to collect rents.

In both the mortgages executed in favour of the plaintiff Bank there were covenants by the mortgagor that he could not, during the period of the mortgage, alienate by sale, mortgage, gift, farm, lease, or otherwise, the mortgaged property or any portion of it, nor anticipate, nor alienate, the income thereof on any ground whatever.

The present suit was brought by the Bank

to obtain a declaration that the lease in question is void and inoperative against the plaintiff's deeds of mortgage and decree for sale, that the village of Rudain is liable to be sold in execution of the mortgage-decrees free from any title or incumbrance created by the said lease and that the lease might be cancelled.

The grounds upon which these reliefs were sought were (1) that the transaction by way of lease was in violation of the covenant against alienation above referred to and (2) that the value of the mortgage security had been thereby impaired, inasmuch as intending purchasers would be discouraged from bidding at the sale on finding that a portion of the property was held on a long term lease at a favourable rent. Various defences were raised, but the only plea we need notice here is one to the effect that the plaintiff was not entitled to the declaration sought. The lower Court has decreed the claim and declared that the mortgaged property can be sold free from any interest created by the lease in question.

The learned Subordinate Judge seems to have been a little uncertain with regard to the validity of the covenant against alienation contained in the mortgage-deeds which he thought might be "open to question;" he was at the same time of opinion that they were executed for the benefit of the mortgagee to the extent of his interest and could, therefore, be enforced by the mortgagee not only against the mortgagor but against all persons claiming under him.

The law as to the operation of these covenants against alienation is well settled in India: the authorities show that such covenants create only a personal liability as between the mortgagor and the mortgagee. In the case reported as *Radha Pershad Misser v. Monohur Das* (1), it was held that such a covenant did not invalidate a *zar-i-peshgi* lease subsequently granted. Again in *Trimbak Jivaji Deshamukha v. Sakharum Gopal* (2), it was held that a proviso in a deed of mortgage absolutely prohibiting alienation by the mortgagor could not be given effect to, inasmuch as it deprived the mortgagor of a right which is an essential incident of the estate which he has in the land

(1) 6 C. 317; 7 C. L. R. 293. 8

(2) 16 B. 599.

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by virtue of his equity of redemption. It is clear, therefore, that in the present suit the plaintiff Bank was not entitled to claim that the lease in dispute was invalid merely upon the ground that it had been executed in contravention of a covenant against alienation entered into by the mortgagor.

The principle is that the mortgagor cannot by any dealings with the mortgaged property subsequent to the date of the mortgage affect the rights of the mortgagee under the contract, subject to the condition that the mortgagor's power of alienation is not restricted. The assignee of mortgaged property can, of course, take only subject to the incumbrance and if the property is sold or foreclosed by the mortgagee in proceedings properly taken for the purpose, the interest which the mortgagor may have created subsequent to the mortgage may be destroyed.

In the present case if we hold, as we must, that the lease is not invalid because of the contract against alienation, it follows that the lessee, the appellant here, has acquired an interest in the equity of redemption and can claim to redeem upon that footing. And it further follows that if the decree of the Court below is allowed to stand the appellant will necessarily be deprived of his right to redeem. This aspect of the case has not been fully considered by the learned Subordinate Judge. At one portion of his judgment after referring to the ruling in *Radha Pershad Misser v. Monohur Das* (1), mentioned above, he says that if the defendant-appellant here considered that his position was analogous to that of the holder of the *zar-i-peshgi* lessee in the Calcutta case, he should have offered to redeem the plaintiff's mortgages as the plaintiff by his present suit had given him an opportunity to redeem. This latter remark can hardly be justified in view of the position taken up by the plaintiff Bank; for the case for the plaintiff is that the lease is void and that the lessee has acquired no interest whatever in the mortgaged property. It is difficult to see how in these circumstances it can be said that the plaintiff has given the defendant an opportunity to redeem in this suit.

The fact is that the suits brought by the Bank were defective inasmuch as the ownership of the equity of redemption was not fully represented in them by having the

lessees impleaded as defendants. It is said that the Bank had no knowledge of these leases. That may be, but the fact remains that the lessee here not having been a party to either of the suits is not bound by the decrees and his right of redemption can still be exercised either as against the mortgagee before sale or as against the auction-purchaser after the sale.

We are, therefore, of opinion that the declaration granted by the Court below is one to which the plaintiff was not entitled. The learned Counsel for the respondent has referred in argument to two cases, one of which is reported as *Qurban Ali v. Raghubar Dayal* (3) where the decision of the Bombay High Court in *Macleod v. Kissan Vithal Singh* (4) was cited with approval. That was a different case from the one we are now considering. There the contest was between a mortgagee who was suing for possession on the terms of his mortgage and certain lessees holding under leases executed by the mortgagor after the date of the mortgage. It was held, and rightly held, that the mortgagee's right to get possession could not be affected by the subsequent dealings of the mortgagor with the mortgaged property. The question of the right of the lessees to redeem did not arise, nor was the right affected by delivery of possession to the mortgagee.

The other case cited is the one reported as *Madan Mohan Singh v. Raj Kishori Kumari* (5), in which following the law laid down in certain English cases it was held that a mortgagor in possession may make a lease conformable to usage in the ordinary course of management, that he might, for instance, create a tenancy from year to year in the case of agricultural lands or from month to month in the case of houses, but that he might not grant a lease on unusual terms or alter the character of the land or authorise its being used in a manner or for a purpose different from the mode in which he himself had used it before he granted the mortgage.

Acting upon this view the learned Judge of the Calcutta High Court held that the

(3) 16 Ind. Cas. 476; 15 O. C. 239.

(4) 6 Bom. L. R. 996; 30 B. 250.

(5) 17 Ind. Cas. 1; 117 C. L. J. 384.

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lessees in that case, who were relying upon leases granted by the mortgagor between the date of the mortgage and the date of the suit which was brought upon it, could only resist the claim of the plaintiff-auction-purchaser for possession by showing that the leases obtained by them were granted on the usual terms in the ordinary course of management. There again the order which was passed did not, in any way, affect the rights of the lessees to sue for redemption, and there was no such declaration as has been given here, namely, that the leases were altogether void and inoperative as against the mortgagee.

As the lessee in the present case was no party to the suit for sale, his right to redeem is unaffected and is not to be got rid of by a declaration such as the lower Court has given.

The most the mortgagee can claim is that his rights as such, whether under the mortgage or the decree obtained upon it, shall not be prejudiced by the subsequent action of the mortgagor. The right here is to bring the mortgaged property to sale in order to satisfy the mortgage-debt, and we think it must be allowed that the grant of a long term lease such as we find here must be deemed to be a transaction prejudicial to the saleable value of the mortgage security and injurious to the interest of the mortgagee.

We cannot yield to the argument that the suit was premature and that there was no cause of action for this suit for declaration.

We think the proper course is to substitute for the declaration granted by the lower Court a declaration to the effect that neither the mortgagee nor the auction-purchaser shall be bound by the period of the lease, *i. e.*, 20 years, but that the lessee shall be deemed to be a tenant merely from year to year and liable to ejectment on that footing, subject always to his right to redeem if he chooses to exercise it before his tenancy is brought to an end.

With this modification in the decree of the Court below we dismiss the appeal, each party to pay his own costs in this Court.

We note here that the learned Counsel for the respondent Bank informed us during the course of the arguments that the Bank

had disposed of its interest in the larger of the two decrees to one Lala Hari Kishan Das, who has not been made a party to the appeal. It is admitted that this transfer has been made *pendente lite* and as no application had been made by the transferee to be made a party, we did not consider it necessary to adjourn the hearing. The fact that this transfer had been made might well have been communicated to the Court at an earlier stage, but in view of the admission above-mentioned the transferee is bound by the result of these proceedings notwithstanding the fact that his name does not appear upon the record.

Appeal partly allowed.

ODDH JUDICIAL COMMISSIONER'S COURT.

RENT APPEALS NOS. 25 TO 36 OF 1913.

April 16, 1914.

Present:—Mr. Lindsay, J. C., and

Mr. Kanhaiya Lal, A. J. C.

HABIB ULLAH SHAH—PLAINTIFF—

APPELLANT

versus

BAKHT BALI SINGH—DEFENDANT—

RESPONDENT.

Appellate Court, judgment of—Civil Procedure Code (Act V of 1908), O. XLI, r. 31—Evidence to be discussed in support of conclusions—Lessor's right of re-entry—Re-entry by force, not justifiable—Lease, condition as to forcible re-entry in, void—Forcible re-entry explained—Police report—Relevancy—Admissibility in evidence—Evidence Act (I of 1872), s. 11—Subordinate Court, duty of—High Court, decisions of, to be followed and not to be commented upon by Courts subordinate to it.

It is the duty of an Appellate Court to refer to the evidence produced in a case and to adduce from it reasons in support of its conclusions as required by Order XLI, rule 31, Civil Procedure Code; all the more so, when it reverses a decision of a lower Court embodied in a somewhat lengthy judgment. [p. 293, col. 2.]

A lessor cannot justify a re-entry by force under cover of a clause in the lease reserving to him a right of re-entry with or without resort to the Courts in case of breach of all or any of the conditions mentioned in the lease, inasmuch as a condition justifying an entry by force is void as being against law or public policy. [p. 294 col. 1.]

Habibullah Shah v. Surji, 15 Ind. Cas. 857; 15 O. C. 295, referred to.

In cases where forcible re-entry by the lessor is set up by the lessee, the fact that a report complaining of the use of force or intimidation was

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made to the Police soon after the occurrence is a relevant fact under section 11 of the Evidence Act and admissible in evidence. [p. 294, col. 2.]

The Judge of a Subordinate Court, however brilliant and well-trained a lawyer he may be, is not entitled to refuse to follow the decision of the High Court to which his Court is subordinate; still less is he entitled to sit in judgment upon the decision of such a High Court and declare it to be erroneous. [p. 295, cols. 1 & 2.]

Emperor v. Deni, 2 A. L. J. 498; A. W. N. (1905) 184; 2 Cr. L. J. 395; 28 A. 62, referred to.

Appeal from the decree of the District Judge, Gonda, dated the 28th February 1913, reversing that of the Assistant Collector, Bahraich, dated the 29th October 1912.

Mr. St. George Jackson, for the Appellant.

Mr. John Jackson, for the Respondent.

JUDGMENT.—These twelve appeals have arisen out of twelve suits for arrears of rent brought against tenants of two villages, Sivapur and Pipriya, comprised in the *taluqa* of Mallanpur.

The suits were laid in the Court of an Assistant Collector in the Bahraich District and the plaintiff, who is the appellant here, was Habib Ullah Shah, a *thekadar* who held a lease of these villages from the *taluqdar* for a period of seven years, *viz.*, 1313-1319 *Fasli*.

Some of the suits related to the year 1316 *Fasli* only, others to the years 1317 and 1318 *Fasli*, while five of them were for arrears alleged to be due for the years 1316 to 1318 *Fasli*.

As regards the years prior to 1318 *Fasli* the defence of the tenants appears to have been that the rents for those years had been paid.

With respect to the claims for the year 1318 *Fasli*, the plea taken was that the rents for that year had been paid to the *taluqdar*. It was stated that the right of the lessee to receive the rents had determined before the *rabi* crop of that year by reason of a breach on his part of a covenant contained in the lease. It was asserted that the lessor, availing himself of the provisions of the covenant, had ousted the lessee and resumed collecting possession.

The Assistant Collector found that there had been no breach of covenant entailing a forfeiture of the lease and that if there

had been a re-entry by a *taluqdar*, it was unlawful and of no effect to extinguish the rights of the lessee. He decreed the claims in full. The tenants appealed to the District Judge. He differed in opinion from the Assistant Collector with regard to the matters just mentioned, allowed all the appeals and directed that all the suits should be dismissed. We are invited now in second appeal to reverse the decision of the lower Appellate Court for various reasons set out in the memoranda of appeal. On the other hand the contention for the respondents is that on the findings of fact arrived at by the learned Judge the appeals must be dismissed.

Unfortunately while the Judge has put on record an expression of his opinion as to the several matters of fact which call for determination, he has failed to discuss the evidence on the record (of which there is abundance) and to adduce reasons for the opinions of fact which he has recorded. He has devoted a not inconsiderable portion of his judgment to a discussion of his own in previous cases of a cognate character between this same appellant, Habib Ullah Shah, and certain other tenants and has been concerned to make out that a judgment of this Court by which his decision was revised is erroneous.

Whether or not the evidence in those previous cases was the same as in the cases we are now considering, we do not know nor need we inquire, but at any rate it was the duty of the Judge to refer to the evidence in these present suits and to adduce from it reasons in support of his conclusions, all the more so as he was about to reverse the decision of the first Court embodied in a somewhat lengthy judgment.

The law which governs the principal matter in issue, namely, the right of the plaintiff to receive the rents for the year 1318 *Fasli*, is plain enough and indeed we have no reason to suppose that the learned Judge was under any misapprehension as to what the law is. There was a written contract of lease between the appellant and the *taluqdar*. There were various express conditions contained in the instrument with a clause, (Clause XI) providing for a forfeiture in case of breach of all or any of them. This

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clause purported to reserve to the lessor a right of re-entry with or without resort to the Courts. In other words, the lessor was to be the sole arbiter as to whether or not there was any breach of covenant and he reserved a right of re-entry as and when he chose.

Now it is quite clear both upon principle and authority that a lessor cannot justify a re-entry by force under cover of a clause of this kind. This was laid down in the decision reported as *Habibullah Shah v. Surji* (1), a decision which, in our opinion, contains a correct exposition of the law.

One of the leading cases in this matter is the case of *Edwick v. Hawkes* (2), in which it was held that any condition justifying a forcible re-entry by the lessor in the case of a breach of covenant was void as being in violation of the Statute (Act 5 Rich. 2, Stat. 1, c. 8) which in England forbids "an entry 'with a strong hand,' that is to say 'coming with a multitude of people or any excessive number of persons,' to quote the language of Fry, J. The entry according to the words of the Act must be 'in peaceable and easy manner.'"

The law is already the same in India (*Cf.*, for example, the provisions of section 14b of the Code of Criminal Procedure) and a condition justifying an entry by force is void in this country, either on the ground that it is in breach of the Statute or on the ground that it is opposed to public policy as being calculated to lead to a breach of the public peace.

In the present case, therefore, it had to be determined whether or not the lessee's right to receive the rents had become extinguished by reason of a breach of covenant and a subsequent re-entry by the lessor in an easy and peaceable manner. So far as the question of breach of covenant is concerned, all we have in the judgment of the Court below is a statement to the effect that in the previous suits it had been held that the lessee had broken the covenant by getting into arrears with his rent. Nothing is said regard-

ing the evidence on record relating to this particular fact.

Again with respect to the question of re-entry the Judge relies upon his decision in the earlier cases. He states that there was a re-entry and he adds that there is not an iota of evidence on record to show that force was used. He refers to a notice said to have been given on behalf of the lessor to the lessee intimating his intention to enforce the forfeiture, and says that the re-entry took place after the period of 10 days fixed by the notice had expired. There is no clear statement of the acts by which re-entry was effected. And as regards the question of peaceable or forcible re-entry all we have is that there is no evidence to show force was used. We may observe here that we cannot agree with the learned Judge when he says that the fact that a report was made to the Police on behalf of the lessee that the servants of the Mallanpur Estate had overawed his agent at the time of making appraisement, was inadmissible in evidence. If the case was that a forcible re-entry was made on behalf of the lessor upon this particular occasion, then the fact that the report complaining of the use of force or intimidation was made soon after the occurrence was a relevant fact under section 11 of the Evidence Act and admissible in evidence.

The Judge's conclusion as to what took place, namely, that the lessee and his men stood by afraid to resist by force the peaceable entry which was being made by the agents of the *taluqdar* may be correct, but he has not referred to any evidence supporting that conclusion.

We find ourselves unable, therefore, to dispose of these appeals upon the findings of fact as framed by the Court below and we must, therefore, remit the following issues for determination upon the evidence already upon record, reminding the learned Judge that with reference to the provisions of Order XLI, rule 31, of the Code of Civil Procedure, it is necessary for him to give reasons for his findings :—

1. Was the lessee, Habib Ullah Shah, guilty of breach of any of the covenants contained in his lease?

2. If so, did the breach committed confer upon the lessor a right of re-entry?

(1) 15 Ind. Cas. 857; 15 O. O. 295.

(2) 18 Ch. D. 199; 50 L. J. Ch. 577; 45 L. T. 168; 29 W. R. 914.

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3. If so, did the lessor in fact re-enter and when?

4. Was the re-entry made peaceably or by force?

5. If the re-entry was effected peaceably did the defendant's tenants, therefore, pay their rents in good faith to the lessor (*taluqdar*)?

As regards what constitutes a forcible re-entry, we may refer here to a passage from Hawkin's Pleas of the Crown which is referred to with approval by Fry, J., in the case of *Edwick v. Hawkes* (2), above cited: "It is to be observed that whenever a man, either by his behaviour or speech, at the time of his entry gives those who are in possession of the tenements which he claims just cause to fear that he will do them some bodily hurt if they will not give way to him, his entry is esteemed forcible whether he cause such a terror by carrying with him such an unusual number of servants, or by arming himself in such a manner, as plainly intimates a design to back his pretensions by force, or by actually threatening to kill, maim or beat those who shall continue in possession, or by giving out such speeches as plainly imply a purpose of using force against those who shall make any resistance, as if one say that he will keep his possession in spite of all men."

The return of the findings will be made within six weeks from the receipt by the Judge of this order of remand and ten days, to count from the date of findings, will be allowed to the parties to file objections to them in Court.

In conclusion we feel it our duty to pass some observations on that portion of the lower Court's judgment in which a decision of a Judge of this Court has been characterized as "quite erroneous."

If, as was remarked by a Bench of the Allahabad High Court in the case of *Emperor v. Deni* (3), the Judge of the Subordinate Court, however brilliant and well-trained a lawyer he may be, is not entitled to refuse to follow the decision of the High Court to which his Court is subordinate, still less is he entitled to sit in judgment upon the

decision of such a High Court and declare it to be erroneous. We can only suppose that the learned Judge was betrayed into so expressing himself on the impulse of the moment and we feel sure that a re-perusal in calmer mood of what he had written would have persuaded him to consciousness of the fact that he was not being as mindful as he should be of the obligation of a Court of inferior jurisdiction to treat the decision of superior Court with proper deference.

We direct the passage in the judgment commencing with the words "with all due respect" and ending with the words "had made a forceable entry" be expunged from the record.

Issues remitted.

ODDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 63 OF 1913.

April 19, 1915.

Present:—Mr. Stuart, A. J. C.

Pandit SHEODAT PRASAD AND OTHERS—

PLAINTIFFS—APPELLANTS

versus

Lala SURAJ BALI AND OTHERS—DEFENDANTS

—RESPONDENTS.

Oudh Law—Sites of houses in inhabited area of village, title to—Zemindar's property—Tenant's right—Waiver of title to sites of houses—Construction of document—Financial Commissioner's Letter No. 5107, dated 7th August 1868—Mohalla of city, land within, not necessarily portion of city—Transfers by riyaya of house-sites—Adverse title, setting up of—Cause of action—Objections by zemindar, transfer by tenant without effect of—Khasra abadi, interpretation of.

Under the ordinary law prevailing in Oudh, the sites in the inhabited area of a village are the property of the zemindar, and a tenant has no right in those sites in absence of evidence. [p. 297, col. 1.]

The waiver of all title to the sites of houses referred to in the Financial Commissioner's order contained in Letter No. 5107, dated 7th August 1868, was only with regard to the inhabited area within the mohallas of the Lucknow City and not with regard to the inhabited area of the villages situate within the Municipal limits of the city. [p. 297, col. 2.]

The mere fact that a land is within Municipal limits does not show that it must be treated as a portion of the city and the zemindar has no right in the sites of houses on that land. [p. 298, col. 2.]

(3) 2 A. L. J. 458; A. W. N. (1905) 184; 2 Cr. L. J. 395; 28 A. 62.

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Secretary of State for India in Council v. Babu Tarini Prasanno Roy, 9 O. C. 249, referred to.

No inference can be drawn from the fact that the *riaya* made transfers of sites of houses, to the effect that they set up a title to proprietary possession, or that any cause of action arose owing to such transfers upon which the *zemindar* was bound to sue for setting aside of the transfers under the penalty of losing his proprietary title; and the fact that the transfers were made without objection by the *zemindar*, does not give the *riaya* any title to the sites. [p. 298, cols. 1 & 2.]

Where in a *khassra abadi*, containing no column in which the name of the proprietors should be entered, such name appears in the remarks column as against some plots, it cannot be concluded that those plots only belong to the proprietor and the remaining to the occupants as proprietors. [p. 299, col. 1.]

Appeal against the order of the District Judge, Lucknow, dated the 24th April 1913.

Pandit Gokaran Nath Misra, for the Appellants.

Babu Bisheshwar Nath, for Respondents Nos. 1 and 2.

JUDGMENT.—In the case out of which the appeal arises, the Local Government has taken up for a public purpose certain land within the limits of the Lucknow Municipality. This land is covered with buildings. Compensation for the building materials has been awarded to certain persons and compensation for the sites has been awarded to the same persons. No objection has been taken as to the amount of compensation awarded, and no suggestion is made that the compensation on account of the materials of the houses has been awarded to persons other than the persons entitled to receive it. But the appellants raised before the District Judge the plea that they were the owners of the sites of the buildings, that the persons to whom the compensation for the sites was awarded were mere licensees and that the compensation for the sites should have been awarded to them as owners. The learned District Judge decided against this plea and the present appeal has been made against that portion of his decision.

The land in question is situated in a part of the Lucknow City which is known as *Mouza Kundri*. This area of Kundri is not a *mohalla*, although it is within Municipal limits, is densely covered with houses, and is indistinguishable on its general appearance from a portion of the city proper. But the papers were prepared for this area at the time of Settlement as though it were a village and not a portion of the city. I have before

me a *khassra abadi* for a *mohalla* in the City of Lucknow and this *khassra abadi* contains particulars of a very detailed nature which are not entered in the *khassra abadi* of villages.

The *khassra abadi* of Kundri is the ordinary *khassra abadi* of a village. I find that in the Regular Settlement of Lucknow the final authority heard claims to proprietary title to the village of Kundri made by several persons. The history of the village given in the *wajib-ul-arz* which was prepared at the time is to the effect that the village had formerly belonged to *zemindars* but that the whole area known as Kundri had been confiscated by Saadat Ali Khan who was King of Oudh from 1798 to 1814. At the time of the annexation this village was the *nazul* property of the King and as such passed to the British Crown. Certain claims were advanced to its proprietary title, but these claims were rejected and the village as a whole was declared to be *nazul* property. The essential portion of the Settlement decree is: "It is clearly useless to go into this case. The alleged village is in the heart of the city and only 15 *bighas* are cultivated. It is very clear that since 1184 *Fasli* anyhow the village has been treated as State property, and neither Chubeela nor Ram Narain have had proprietary possession within limits. To apply Ruling No. 3 in favour of a man who has no claim to proprietary title, is in the opinion of this Court always wrong, and in this case would cause confusion with respect to Municipal claims. I, therefore, decree proprietary title in Kundri to Government and dismiss the only adverse claim advanced, that of Ram Narain Kaeth."

The decree is dated the 2nd of August 1864.

It is clear from it that as far back as 1864 Kundri was within Municipal limits, and was to all intents and purposes a portion of the city. Nevertheless the Settlement authorities treated it as a village. A *wajib-ul-arz* was prepared and in this *wajib-ul-arz* there is nothing said as to the rights of subordinate holders. Nothing is said as to the rights of *riaya* to own the sites of their houses. There is no clause prohibiting transfer of licensees' right by *riaya*.

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On the 16th June 1888 Sir Auckland Colvin, Lieutenant-Governor of the North-Western Provinces and Chief Commissioner of Oudh, made a grant of this village to Risaldar Major Isri Prasad, Sirdar Bahadur, C. I. E., and by this grant he conferred on him the full proprietary right, title and possession of the village of Kundri. The appellants are the descendants of Risaldar Major Isri Prasad. It is clear that by this grant the Crown transferred to the Risaldar Major all rights which it possessed itself in the village of Kundri. Under the ordinary law prevailing in Oudh, the sites in the inhabited area of a village are the property of the *zemindar*, and a tenant has no right in the site in an inhabited area in absence of evidence. It is possible for him to be decreed such a right if he is able to establish a case in support of it, but I am unable to find that any tenant has ever been decreed title to a site in the inhabited area of Kundri. The Settlement Record shows that certain groves have been decreed to third parties as their absolute property, but there is nothing to show that sites of houses were decreed to tenants. The claims of the persons who have received compensation in respect of these sites acquired, would have been best supported by proof that each one has obtained title individually to the site for which he has obtained compensation. No attempt has been made to prove such title.

The learned Counsel for the respondents suggests that in the year 1868 Government waived all title to the sites of houses within Lucknow Municipal limits, with the exception of certain sites which had already been claimed as *nazul* or which were at that time unoccupied by buildings, and that this general waiver of title covers the cases of his clients. This waiver is stated to have been contained in a certain order of the Financial Commissioner conveyed in a Letter No. 5107, dated the 7th August 1868. No attempt has been made in this case to prove the contents of the letter. But I have been referred to page 111, Appendix I, of the Lucknow Settlement Report of 1873, where in paragraph 8 reference is made to the letter. I do not find that there is anything in this paragraph to support the respondents' case. Appendix

I contains a short history of the survey of the Lucknow City. I find that a survey was made of that portion of the city consisting of *mohallas*. Records and maps were prepared in accordance with that survey, and the records were embodied in 162 volumes, each consisting of a *khassra* and a map of the *mohalla* or in certain cases of two *mohallas* which were numbered as one. But this survey, it is to be noted, was only a survey of such portions of Lucknow City as were known as *mohallas*. This is clear from paragraph 10. Outside the area of these *mohallas*, but within Municipal limits, there was a large number of villages. It is explained in paragraph 10 that no such survey was made of those villages, as it was considered that the advantages gained from such a survey would not justify the expenses that would have been entailed, and as those villages had been surveyed by the Settlement Department for fiscal purposes. The nature of the survey made of those villages was as follows:—

The cultivated and culturable lands were demarcated and plotted, but the inhabited area was only roughly plotted and no detailed survey was made with regard to the inhabited area. Paragraph 13 shows that Kundri was one of those villages. I have not, as I have stated, a copy of the Financial Commissioner's order of the 7th August 1868 before me. But as I read the Report, I find that the waiver of rights referred to in that letter was only with regard to the inhabited area within the *mohallas* and not with regard to the inhabited area within the villages. Thus no conclusion can be drawn in favour of the respondents' suggestion from the circumstance that such a waiver was made. It would appear that Government, while waiving its rights within the *mohallas*, did not annul the *zemindar's* rights within the villages, and in cases where Government itself was a *zemindar* in the villages, it did not waive its own rights as *zemindar*. The respondents are thus left to prove their title. The area of Kundri is, as I have found, a village and ordinarily the inhabited area would belong to the *zemindar*. The King of Oudh was formerly *zemindar*. He was succeeded by the British Government and the British Government was succeeded by the predecessor of the pre-

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sent appellants. The circumstance that the village is within the Municipal area, and that to the eye of an ordinary observer it would not differ from a *mohalla*, are immaterial. The learned District Judge considered that, as the land was within Municipal limits, it must be treated as a portion of the city, and that the *zemindar* would have no rights in the sites of houses. The attention of the learned District Judge was clearly not called to the decision of Mr. Chamier in *Secretary of State for India in Council v. Babu Tarini Prasanno Roy* (1), in which an exactly similar question was raised with regard to the ownership of a site within the Municipal limits of Lucknow City forming a portion of the village of Khalispur, a village which is mentioned in paragraph 13 of Appendix I of the Lucknow Settlement Report to which I have already referred. Both Kundri and Khalispur are mentioned in that paragraph. The effect of the order of the Financial Commissioner of 7th August 1868 is discussed in that judgment and it appears that the actual order was before the Court in that case. It was held in that case not only that the Financial Commissioner's docket of August the 7th, 1868, could not be treated as a renunciation of the rights of Government in the inhabited area of Khalispur, but that the occupant of a site in Lucknow City within the area of Khalispur had no claim to proprietary title in the site. It is further set up that a large number of transfers of houses and sites have taken place in Kundri. The circumstances in which these transfers were made have not been proved. The respondents satisfied themselves with putting in copies of deeds of transfers, a method of proof which cannot ordinarily shed much light upon the actual facts, as the contents of such deeds seldom disclose the actual history of the transfers. Accepting these documents at their highest value, they show nothing more than that Government in the first instance and the transferee in the second instance took no exception to licensees transferring their rights as licensees. No inference can be drawn from the fact that such transfers were made, to the effect either that *riaya* set up a title to proprietary possession, or that any cause of

action arose owing to such transfers upon which it was incumbent on the *zemindar* to sue to have the transfers set aside under the penalty of losing his proprietary title. The fact that the licensees transferred without objection by the proprietor their title as licensees would give them no title to the sites and no claim to recover compensation from Government in the event of compulsory acquisition of the land for public purposes.

The last point that remains on which stress has been laid by the learned District Judge is with reference to the method in which the entries in the *khasra abadi* have been written. The *khasra abadi* contains no column in which the name of the proprietor of the plots should be entered, and the obvious reason for the omission of a column would appear to be that in an ordinary village, as the inhabited area belongs to the proprietor, it is not necessary to enter the fact that such is the case. In the remarks column, in which all Courts must have noticed that much extraneous and unnecessary matter is frequently entered by the subordinates who prepare such papers, I find a few plots entered as *nazul* property. In most cases where the plots are entered in the remarks column as *nazul* property, they are unoccupied by any tenant and the meaning of the entry would apparently be that the Crown is both the proprietor and the occupier of the plot. In certain cases, however, the name of some person is entered as occupier. In some of the latter cases the meaning would appear to be that the name so entered is the name of the former occupant, although the plot was unoccupied and the Crown was in constructive possession. In other cases it would appear that the plot had formerly been unoccupied and in the constructive possession of the Crown, but that it had been temporarily leased to a small shop-keeper. Ordinarily it would seem that old occupants of sites in the Kundri inhabited area whose occupation was of long standing paid no ground rent for the use and occupation of the land. But in cases in which there were no occupants, the Crown may have charged ground rent to persons occupying for a temporary period. It is not absolutely clear what these

(1) 9 O. C. 249.

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entries mean. But the conclusion drawn by the learned District Judge to the effect that, because certain plots are entered as *nazul*, it must be assumed that those plots only belong to the Crown as proprietor, and that the remaining plots belong to the occupiers as proprietors, is not a conclusion which I can accept.

Thus it is established that the appellants as *zemindars* of Kundri are entitled to proprietary rights in all sites in the inhabited area in absence of evidence that proprietary title in those sites has been acquired by other persons. In this case there is nothing to show that proprietary title with regard to the sites, the compensation for which is now in dispute, has been acquired by any other person.

The appeal, therefore, succeeds. I decree this appeal and direct that the compensation in question be awarded to the appellants. The respondents will pay their own costs and those of the appellants in all Courts.

Appeal allowed.

PRIVY COUNCIL.

APPEAL FROM THE ALLAHABAD HIGH COURT.

July 13, 1915.

Present:—Viscount Haldane, Lord Shaw,
Sir George Farwell, Sir John Edge
and Mr. Ameer Ali.

Musammāt BILAS KUNWAR—
APPELLANT

versus

DESRAJ RANJIT SINGH AND OTHERS—
RESPONDENTS.

Benami transactions—English Law, resemblance with—Relationship—Criterion—Practice—Document, effect of non-production of—Evidence Act (I of 1872), s. 116—Estoppel between landlord and tenant.

A *benami* transaction is a dealing common to Hindus and Musalmans in India. It is quite unobjectionable and has a curious resemblance to the doctrine of English Law that the trust of the legal estate results to the man who pays the purchase-money, and this again follows the analogy of Common Law that where a feoffment is made without consideration the use results to the feoffee. The exception in English Law by way of advancement in favour of wife or child does not apply in India, but the relationship is a circumstance which is taken into consideration in India in determining whether the transaction is *benami* or not. The criterion in

these cases in India is to consider from what source the money comes with which the purchase-money is paid. [p. 302, cols. 1 & 2.]

Doe d Knight v. Smythe, (1815) 4 M. & S. 347; 105 E. R. 862; 16 R. R. 486 and *Bayley v. Bradley*, (1848) 5 C. B. 396 at p. 400; 16 L. J. O. P. 206; 135 E. R. 93? 75 R. R. 764, referred to.

A *taluqdar*, who had two Hindu wives and a Musalman mistress, purchased a bungalow, the sale-deed being made out and registered in the name of his mistress. The purchase-money he raised by a mortgage on his own property and he had the sole use and enjoyment of the bungalow for himself and his wives during his own life. The wives used it by his permission for a religious purpose for a month at a time, while the mistress was never in it during this period. In fact the bungalow was quite useless to her for any personal use, and it was wholly inappropriate as a provision for her. The sale-deed, however, was in her possession:

Held, that the purchase was a *benami* transaction and that the mistress had no title to the bungalow. [p. 302, col. 2.]

It is open to a litigant to refrain from producing any documents that he considers irrelevant; if the other litigant is dissatisfied it is for him to apply for an affidavit of documents, and he can obtain inspection and production of all that appears to him in such affidavit to be relevant and proper. If he fails to do so neither he nor the Court at his suggestion is entitled to draw any inference as to the contents of any such documents. [p. 303, col. 1.]

It is for the litigant who desires to rely on the contents of documents to put them in evidence in the usual and proper way; if he fails to do so no inference in his favour can be drawn as to the contents thereof. [p. 303, col. 1.]

A tenant who has been let into possession cannot deny his landlord's title however defective it may be as long as he has not openly restored possession by surrender to his landlord. [p. 303, col. 1.]

Appeal from the judgment and decree of the Allahabad, High Court, dated the 10th May 1910, reversing those of the Small Cause Court Judge, exercising the powers of a Sub-Judge, Allahabad, dated the 26th August 1908.

FACTS.—One Rai Bisheshar Bakhsh Singh was a *taluqdar* of Oudh with an annual income of Rs. 60,000. He had two Hindu wives, Balraj Koer and Bilas Koer, one of whom bore him a daughter only. By his Muhammadan mistress, Jagmar Bibi, he had two sons, Zahir-ul-Hasan and Zahur-ul-Hasan. In 1887 he bought a bungalow, 1 Stanley Road, Allahabad, in the name of Jagmar Bibi for Rs. 9,000, whose name was recorded as owner in the Municipal registers and who always paid the ground rent in respect thereof and received such profits as accrued. In 1888 he acquired for his sons possession of a village as mortgagees. He died in 1890. During his life-time his *mukhtars* and other servants

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looked after the bungalow and the same arrangement continued after his death. In 1900, Dr. Desraj Ranjit Singh went into occupation of the bungalow and in 1905 bought the same from Jagmar and her sons. The senior widow, Balraj Koer, instituted a suit for the recovery of the possession of the bungalow. The Subordinate Judge decreed the suit in favour of the plaintiff, but on appeal the same was reversed. Mr. Roshan Lall, Barrister-at-law's statement that the *taluqdar* had stated to him that the bungalow was bought for Jagmar on whose behalf it was let into him, and the possession of the title-deeds by Jagmar, were relied upon to support her title. The appellant, whose name was substituted on the death of Balraj Koer, her co-widow, then obtained leave to appeal to the Judicial Committee of the Privy Council in due course.

Sir *E. Richards*, K. C., and Mr. *G. E. A. Ross*, K. C., for the Appellant, contended that there were two questions involved in this appeal: (1) *benami* transaction and (2) estoppel. By section 116 of the Indian Evidence Act the respondents, who had obtained possession of the bungalow as tenants from the appellant and to whom they paid rent regularly, were estopped from denying the appellant's title unless and until they had given up the possession thereof and then re-took possession of the same. The transaction was really *benami* according to the habit of the people of India, who often buy properties in the name of others. The bungalow was bought for the use of the *taluqdar* and his Hindu wives to be used for *kalapbas* at Allahabad. It was of no use whatever to Jagmar who lived at a great distance from the place, nor was it any good from the point of view of income as it was very little indeed and sometimes none at all. In all purchases in a joint Hindu family the presumption was that they were acquired for the benefit of all, although they might have been bought in the name of one only. As to the non-production of the general account books, it was not the duty of the appellant to do so. She did not rely upon them at all. If the respondents wished them produced they ought to have given notice thereof, and if they were not produced, then evidence to prove the contents thereof might then have been given. There could be no presumption in favour of the respondents on this account.

Reference was made to Smith's Leading Cases, Volume II, page 831, 11th Edition; *Doe d Knight v. Smythe* (1); *Bayley v. Broadley* (2); *Doe d Johnson v. Baytup* (3); Transfer of Property Act, 1882, section 108 (8).

Messrs *De Gruyther*, K. C., and *Bhagwan Din Dube*, for the Respondents, contended that neither the Hindu nor the Muhammadan Law had any bearing on the question. The real transaction was that it was bought for Jagmar.

[LORD HALDANE: The whole question is whether it was *benami*. This depends on the habit of the country as to who would be entitled to the beneficial interest.]

There was no special law on this point in India.

[SIR JOHN EDGE: The whole question is whether he bought it for himself or for the woman.]

That was really the question.

[LORD HALDANE: If the property is bought with the money of some one, is not the burden of proving title by presumption of certain law thrown upon that one in whose name it was bought?]

There were two witnesses who stated that the bungalow was bought for the benefit of Jagmag. One of them was an old servant of some 43 years' standing. The income from the bungalow always went to Jagmag. As the *taluqdar* was in debt, he bought it in order to make further provision for his mistress who would not be entitled to anything after his death.

[LORD SHAW: It did not occur to them then. It appears that the lady's lawyers hit upon the idea of explaining the transaction by stating that he was in debt.]

Either it was *benami* or not.

[SIR JOHN EDGE: You have no evidence to support it.]

There was not the slightest proof that it was. There was no reason why it should not be regarded as a gift. As he had no children, except a daughter by Bilas, his wives and two boys by Jagmar, it was perfectly reasonable that he bought it for them. Jagmar executed in 1888 a power-of-attorney which was produced for inspection of the

(1) (1815) 4 M. & S. 347; 105 E. R. 862; 16 R. R. 436.

(2) (1848) 5 C. B. 396 at p. 403; 16 L. J. C. P. 206; 136 E. R. 932; 75 R. R. 764.

(3) (1835) 3 A. & E. 183; 4 N. & M. 837; 1 H. & W. 270; 4 L. J. K. B. 263; 111 E. R. 384.

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lower Court and it related to property in question.

[LORD SHAW: There is the deed in existence executed by her and shown in Court.]

He had ample time to change his mind if he wished to.

[LORD HALDANE: You say that the story that it never got into her possession is untrue.]

[LORD SHAW: On question of title it is relevant to show (1) delivery and (2) deed being kept in the catalogue of estate deeds.]

Debi said it was not in the catalogue. As Jagmag lived in Partabgarh and had only two servants to manage her only village since 1876, the house was looked after by the *taluqdar's* servants. The statement of Roshan Lall in support of Jagmar's claim was undisputed. Jagmar could not offer any objection to the use of the house by the *taluqdar*. She was invited to the shaving ceremony and the widows were on good terms with her. If the *taluqdar* did not change his mind the natural state of things would be that it was bought for her benefit. During the life-time of Balraj it was never treated as part of the estate.

[LORD HALDANE: I would like to see the account.]

There was no presumption at all.

[SIR GEORGE FARWELL: Where is the money from?]

There was no evidence that money was supplied by mistake and that this sum came from the estate. Every single case of *benami* transaction turned upon facts of its own and could not be applied to another. It was always in transactions of money-lending and it was always an inference of fact and not of law. There were presumptions, but only in cases of claims by sons in a Hindu family and then the source had to be looked at [*Dhurm Das Pandey v. Musammāt Shama Soondari Dibiah* (4)].

[LORD SHAW: Money came from the deceased and the benefit must go to him. Can not you overturn the presumption?]

See *Uman Parshad v. Gandharp Singh* (5) by Lord Hobhouse, (Lord Haldane: page 135). Profits from the bungalow after the *taluqdar's* death were never put

along with the estate income. The appellant had produced accounts of certain kinds only.

Mr. Dube, following, stated that Roshan Lall in asking for *shukrana* had only followed the custom in India where according to common practice Barristers get *shukrana*.

[SIR JOHN EDGE: You are giving no information which is relevant.]

Intention of the purchaser governs such transaction [*Chundernath Roy v. Ramjoy Mozoomdar* (6) and *Thakro v. Ganga Prasad* (7).]

[LORD HALDANE: We know that.]

[MR. AMEER ALI: What evidence is there that she was all along in possession?]

The case should be decided on broad principles. Rupees 9,000 was not too much for the mistress.

[LORD HALDANE: All circumstances are to be taken into account.]

Mr. De Guryther: She retained possession of the bungalow after the death; the *taluqdar* wanted to make a present of it to her.

Sir E. Richards in reply.

[LORD SHAW: There is no possible excuse for not proving the books and showing that Rs. 10,000 was borrowed for property in Allahabad.]

JUDGMENT.

SIR GEORGE FARWELL.—This is an appeal from a judgment and decree, dated 10th May 1910, of the High Court at Allahabad, which reversed a judgment and decree, dated 26th August 1908, of the Judge of the Small Causes Court of Allahabad exercising the powers of a Subordinate Judge.

Rai Bisheshar Bakhsh Singh was a *taluqdar* of Oudh; he was a man of some wealth, a Rajput of good position; he had two Rajput wives but no son; he had, however, one daughter by one of the wives. He had also a Muhammadan mistress named Jagmar Bibi, by whom he had two sons, and for whom he had made provision on a fairly liberal scale, and had given full possession thereof in 1876 and in 1888. On 9th June 1887, the *taluqdar* purchased for Rs. 9,000 the bungalow in dispute in this action; he raised the purchase-money by a mortgage on his own property and paid for it, and had the sole

(6) 15 W. R. 7; 6 B. L. R. 303 (P. C.).

(7) 15 I. A. 29; 10 A. 197; 5 Sar. P. C. J. 133.

(4) 3 M. I. A. 229; 6 W. R. (P. C.) 43; 1 Suth. P. C. J. 147; 1 Sar. P. C. J. 271; 18 E. R. 434.

(5) 14 I. A. 127 at p. 129; 15 C. 20; 11 Ind. Jur. 474; 5 Sar. P. C. J. 71; Rafique and Jackson's P. C. No. 93.

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use and enjoyment of it for himself and his wives during his own life, but the deed of sale was made out and registered in Jagmar's name. The *taluqdar* spent money on the house, built a well and walls and kept a gardener in occupation, he and his wives lived there, and the mother of one of his wives lived and died there. His wives used the bungalow by his permission for *kalapbas*—i.e., to live at the bank of the Ganges for religious purposes for a month at a time; the purchase seems to have been made for the purpose of the *kalapbas*. Jagmar Bibi was never in the bungalow during this period; she would, of course, as a Muhammadan mistress, have no part or lot in the Hindu religious observances of Rajput wives, and it is inconceivable that she could have associated in any way in the bungalow with them.

The bungalow was useless to her for any personal use, and it was wholly inappropriate as a provision for her, if the *taluqdar* ever had any intention or idea of making a further provision for her; the net income was very small—in some years the out-goings exceeded the income. There is no evidence of any intention to give the bungalow to Jagmar as a provision for her or otherwise beyond the bare fact of the registration in her name; it is not clear how or when she got possession of the title-deed; it may be that it was in the *taluqdar's* possession at his death, and at some subsequent period. As the deed was made out in her name there is no importance in this. Down to the *taluqdar's* death the natural inference is that the purchase was a *benami* transaction; a dealing common to Hindus and Muhammadans alike, and much in use in India; it is quite unobjectionable and has a curious resemblance to the doctrine of our English Law that the trust of the legal estate results to the man who pays the purchase-money, and this again follows the analogy of our Common Law that where a feoffment is made without consideration the use results to the feoffor. The exception in our law by way of advancement in favour of wife or child does not apply in India, [*Gopeekrist Gosain v. Gungapersaud Gosain* (9)], but the relationship is a circumstance which is taken into consideration in India in determining

whether the transaction is *benami* or not. The general rule in India in the absence of all other relevant circumstances is thus stated by Lord Campbell in *Dhurm Das Pandey v. Musammât Shama Soonadri Dibiah* (4): "The criterion in these cases in India is to consider from what source the money comes with which the purchase-money is paid."

On the 31st August 1890 the *taluqdar* died, and by an agreement of 21st March 1894 between his two widows the possession and management on behalf of both was given to one of them, *viz.*, Thakurain Balraj Kunwar, and she has throughout managed the property in question. Whether any acts or omissions by any of the parties after the death of the *taluqdar* could affect the nature of the *benami* transaction as it stood at his death it is unnecessary to consider, for their Lordships are of opinion that nothing has been given in evidence which could have any effect at all on the transactions as *benami*. The evidence given by Jagmar is quite untrustworthy and she has not even called her sons whom she purports to vouch as actors on her behalf: the trial Judge does not place any confidence in Roshan Lall's evidence, and his conduct certainly is open to comment. On the facts as accepted by their Lordships as the result of the evidence, all rates, rents and taxes and repairs and the ground-rent of the bungalow have been paid by the Thakurain. She has had possession of the premises by her servant, Bhairon, and has let them to various tenants from 1891 down to the commencement of this action, the last tenant being Dr. Ranjit Singh, to whom the plaintiff let and gave possession in 1890 and to whom also she gave notice to quit on 13th October 1905.

On these facts their Lordships are of opinion that the transaction was and remains throughout *benami*. They are unable to agree with the opinion expressed by the High Court; they find no ground on which to treat a purchase by the *taluqdar* of such a property as this bungalow in the name of his Muhammadan mistress in a manner differing from that on which a similar purchase by a Hindu in the name of a complete stranger would be treated, nor is there any ground for asserting that the probabilities of the case are in favour of an intention by the *taluqdar* to benefit his

(8) 6 M. I. A. 53; 4 W. R. (P. C.) 46; 1 Sar. P. C. J. 493; 19 Eng. Rep. 20.

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mistress; for the reasons stated above the exact contrary appears to their Lordships to be the case. The High Court Judges "attach great significance" to the non-production of the books showing the accounts of the general estate, and appear to draw an inference therefrom adverse to the plaintiff's claim; any such inference is, in their Lordships' opinion, unwarranted. These books do not necessarily form any part of the plaintiff's case; it is, of course, possible that some entries might have appeared therein relating to the bungalow. But it is open to a litigant to refrain from producing any documents that he considers irrelevant; if the other litigant is dissatisfied it is for him to apply for an affidavit of documents, and he can obtain inspection and production of all that appears to him in such affidavit to be relevant and proper. If he fails so to do, neither he nor the Court at his suggestion is entitled to draw any inference as to the contents of any such documents. There is no ground for any inference, such as is made in the High Court that the books if produced would have shown rent credited to Jagmar or set off against some claim against her. They related to a different property, and the possibility of entries relating to the bungalow being therein is very remote, but even if it had been greater, the Court was not entitled to draw any such inferences. It is for the litigant who desires to rely on the contents of documents to put them in evidence in the usual and proper way, if he fails to do so no inference in his favour can be drawn as to the contents thereof.

The other point in the case is one of estoppel. The property was let by the plaintiff to the defendant Ranjit Singh: he was let into possession by the plaintiff's gardener Bhairon, on her behalf and by her direction, and he regularly paid rent to her and applied to her to do all the necessary repairs; he has never given up possession to her although he duly received notice to quit, and he has denied her title. Section 116 of the Indian Evidence Act is perfectly clear on the point, and rests on the principle well established by many English cases, that a tenant who has been let into possession cannot deny his landlord's title, however defective it may be, so long as he has not openly restored possession by surrender to

his landlord. The Subordinate Judge was clearly right on this point. The High Court appears to have been under some misapprehension, and Counsel for the respondents have not attempted to support their judgment on this point. Their Lordships are of opinion, and will humbly advise His Majesty, that the decree of the High Court should be reversed and that of the trial Judge should be restored, and that the respondents should pay all the costs here and below.

Decree reversed.

Solicitors for the Appellant: Messrs. T. L. Wilson & Co.

Solicitors for the Respondents: Messrs. Ranken Ford, Ford & Chester.

PRIVY COUNCIL.

APPEAL FROM THE BOMBAY HIGH COURT.

June 3, 1915.

Present:—Lord Atkinson, Sir George Farwell, Sir John Edge and Mr. Ameer Ali.

THE SECRETARY OF STATE FOR INDIA
IN COUNCIL—APPELLANT

versus

BAI RAJBAL—RESPONDENT.

"Kasbati," meaning of—Kasbatis of Ahmedabad status of—Cession of territory, effect of, on rights of kasbatis—Burden of proof—Act of State—Annexation of territory—Municipal Courts—Jurisdiction—Legal right—Act of grace—Landlord and tenant—Lease for a term—Renewal—Ahmedabad Taluqdars Act (VI of 1862), s. 6, whether applies to kasbatis—Bombay Land Revenue Code (Act V of 1879), ss. 68, 73—Lessee—Term of lease.

The term "kasbatis" or "kasbatees" was used in the District of Ahmedabad, Gujarat, to designate dwellers in towns, whose lands were cultivated not directly by themselves but by *ryots*, to whom they let them, receiving therefor a rent in cash or in kind. They were, in addition, invested with certain powers of Government over their villages, including the management of village affairs. [p. 206, cols. 1 & 2.]

The relation in which the *kasbatis* of Ahmedabad District stood to their native sovereigns before the cession of their territory and the legal rights they enjoyed under them, are, save in one respect, entirely irrelevant in determining their rights and relation to the new sovereign after the cession, inasmuch as after the cession of territory to a new sovereign when it comes to be a question of legal rights the contract with the new sovereign is conclusive and the rights against the old sovereign avail nothing. They could not carry in under the new *regime* the legal rights, if any, which they might have enjoyed under the old. The only legal enforceable rights they could have as against their new sovereign, were those, and only those, which the new sovereign by agreement express or implied, or by legislation chose to confer upon them. This implied agreement might

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be proved by circumstantial evidence, such as the mode of dealing with them which the new sovereign adopted, his recognition of their old rights, and express or implied election to respect them and be bound by them. [p. 308, cols. 1 & 2.]

The annexation of territory is an act of State, and any obligation assumed under a treaty either to the ceding sovereign or to individuals is not one which Municipal Courts are authorised to enforce. [p. 309, col. 1.]

Secretary of State for India v. Kamachee Boye Sahaba, 7 M. I. A. 476; 13 Moo. P. C. 22; 4 W. R. (P. C.) 42; 7 W. R. P. C. (Eng.) 722; 1 Suth. P. C. J. 373; 1 Sar. P. C. J. 984; 19 B. R. 388; 15 E. R. 9; 132 R. R. 7; *Cook v. Sprigg*, (1899) A. C. 572; 68 L. J. P. C. 144; 81 L. T. 281; 15 T. L. R. 515, relied upon.

The *kasbatis* may have been absolute owners of their villages and yet the consideration of their ante-cession rights is beside the point, save so far as it can be shown that the Bombay Government consented to their continuing to enjoy those rights under its own regime. [p. 309, col. 1.]

The burden of proving that the Bombay Government did so consent to any, and if so, to what extent, rests upon the *kasbatis*. [p. 309, col. 1.]

The mere repetition by the Government of acts of grace cannot *per se* create legal rights to their continuance. [p. 309, col. 2.]

Prima facie a lease for a term does not import any right to a renewal of it, on the contrary, it *prima facie* implies that the lessee's right to the premises demised ends with the term. [p. 313, col. 1.]

Section 6 of the Ahmedabad Taluqdars Act (VI of 1862) does not apply to the *kasbatis* of that district inasmuch as they never were *talugdars* in the true sense, they did not lose their ancient rights of ownership of their land by taking leases, and therefore did not suffer the injustice which the statute was designed to remedy. [p. 315, col. 1.]

Sections 68 and 73 of the Bombay Land Revenue Code (V of 1879) plainly mean that a lessee, whether a true "*talugdar*", or a "*thakur*" "*mehvassie*" "*kasbati*" or "*naik*" is bound by the terms of his lease, one of which is that he shall only occupy for the term of years for which a lease for years is granted, and *prima facie* no longer. [p. 315, col. 2.]

Status of the *kasbatis* of Ahmedabad District and the precise relation in which they stood to the Bombay Government at the cession of their territory considered. [pp. 306 to 309.]

Consolidated appeals from preliminary and final decrees of the Bombay High Court, dated respectively April 16th, 1909, and April 11th, 1911, modifying a decree passed by the District Judge of Ahmedabad, dated November 30th, 1907.

FACTS are fully stated in the High Court judgment, reported in 11 Ind. Cas. 948.

Sir E. Richards, K. C., and Mr. Lowndes, for the Secretary of State for India in Council, contended that the tenure of the village of Charodi by the plaintiffs and their predecessors-in-title since 1823 and their rights therein had been of a lease-hold nature only

and the plaintiffs had no right of ownership in the said village. It was not open to the Courts to ascertain the intention of the parties to the various *pattas* by the wide range of investigation adopted by them. The predecessors-in-title of the plaintiffs having accepted the *pattas* on certain terms and having continued in possession thereon, the plaintiffs were estopped from denying the title of the defendant. The Government should not be held as bound to recognise as holder of the village in question so entitled any person save (a) a male or female *casabatec* who should be a lineal descendant in the paternal side of the original grantee of the said village under the *patta* of 1823, or (b) the widow of a previous recognised holder. The *patta* of 1823 was not forthcoming, but it was for a term of seven years at a rental of Rs. 100. In 1833 a new *patta* was granted for a further period of seven years and so it was in 1837, but neither the copy nor the original thereof was forthcoming. In 1845 the Collector intended to raise the rent, but the *casabatees* protested, stating that the arrangement with Mr. Williamson was a permanent one. But their objection was overruled and the new *patta* was for seven years at a slightly increased rent. There was no *patta* between 1851 and 1860 and between 1866 and 1870. In 1874 on the failure of the issue of the *casabatees* of the villages of Lea and Keela, they were resumed by the Government. The predecessors-in-title of plaintiffs claimed them as the nearest collateral heirs, but the Government refused to listen to their prayer. They then instituted a suit in the District Court of Ahmedabad and produced a *sanad* of the Mogul Emperor dated 1693 as the root of the title of the ancestor whose property was claimed. The *sanad* was held to be a forgery and the claim dismissed. No appeal was preferred against it. In 1879 a lease was granted and signed by the plaintiff's predecessors-in-title but the defendant did not wish to rely upon it inasmuch as the signature was contended not to have been appended "out of their free will and pleasure." All these leases were for a fixed period and there was no mention of the fact that the Government was bound to renew the leases. The Government never recognised this contention. The Act VI of 1862 and Act VI of 1883 were meant to apply to *talug-*

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dars, and not to the *casbatees* who were not *talugdars* in the proper sense of the term. But the Crown Liabilities Act of 1888 did not permit an action to be brought against the sovereign in respect of obligations assumed under a treaty either to living a sovereign or to an individual and the Municipal Courts could not enforce the same. What was the nature of the tenure before the occupation by the British or the arrangement with the Gaekwar could not entitle the respondents to sue.

Reference was made to *Collector of Trichinopoly v. Lekkamani* (1); *Waghela Rajsanji v. Sheikh Masludin* (2); *Collector of Ahmedabad v. Samal Das Bechar Das* (3); *Cook v. Sprigg* (4); *Secretary of State for India v. Kamachee Boye Sahaba* (5).

Mr. DeGruyther, K. C., with him Mr. Parikh, for the Respondents, contended that the history of the Settlement of 1823 led to no other conclusion than that the village left to plaintiffs' ancestors was intended to be kept by them permanently, thought it was open to the Government to raise the *jama*. The *patta* of 1823, so far as it contained any words capable of a different meaning, was a nullity. Mr. Cruikshank in 1825 and Mr. Rogers in 1851 classed the plaintiffs' ancestors as *talugdars* and so did numerous other officers. Even the President in Council in 1862 referred to them as *talugdars*. The incidents of the tenure were those of a *talugdari* one. The plaintiffs' ancestors' lands descended from father to son and the *jama* was a percentage of the assessment. Mr. Peile said that the *casbatees* were allowed 30 per cent. The owners also mortgaged their lands and decrees were obtained against them as if they were private property. The Government never registered the lands as *khalsa*. They were entered as *casbatee* to distinguish them from *grassia*, and not because they were not held on a *talugdari* tenure. The plaintiffs had been in possession since

1823 and the onus of showing that he could eject lay on the defendant, which he had not discharged. As these villages were *talugdari*, Bombay Act VI of 1862 was applicable to them and Bombay Act VI of 1888 was expressly so. The respondent was entitled to hold the land free from any conditions other than imposed by the said Statutes which rendered them useless. Elphinstone's Minutes clearly showed that the period of seven years was fixed in the interest of the *casbatees* to protect them from the hands of oppressing Collectors, and not to limit their tenure. It was only meant to give them time during which *jama* could not be raised. The *casbatees* held their land for military service and so like the *grassias* and the *mehwassies* held them permanently. The *casbatees* were not lease-holders as understood in the English Law, but had a right to hold it permanently at a rent liable to revision. The object of Act VI of 1862 was to recognise the *talugdars* as owners of their land. The *casbatees* were owners as they were *talugdars*.

Reference was made to *Waghela Rajsanji v. Sheikh Masludin* (2); *Collector of Trichinopoly v. Lekkamani* (1); *Administrator-General of Bengal v. Premal Mullick* (6); Bengal Regulation XVII of 1827, section 7.

Sir E. Richards, in reply, referred to Act VI of 1808, section 33 (8); Act V of 1879, sections 73, 68 and 34, and Act VI of 1888, section 34.

JUDGMENT.

LORD ATKINSON.—These are consolidated appeals from preliminary and final decrees of the High Court of Judicature of Bombay, dated respectively the 16th of April 1909, and 11th of April 1911, modifying a decree of the District Judge of Ahmedabad, dated the 30th of November 1907, in Suit No. 7 of 1898 in his Court.

The question in issue in the action for an injunction, out of which these appeals have arisen, is whether the plaintiff, like her male ancestors, is not entitled to the continued possession, management, and enjoyment of a certain village called Charodi, about 2,200 acres in extent, situated in the *Pargana Viramgam*, in the District of Ahmedabad in

(6) 22 I. A. 107; 22 C. 788.

(1) 1 I. A. 282 at p. 305; 21 W. R. 358; 14 B. L. R. 115.

(2) 14 I. A. 89 at p. 91; 11 B. 551.

(3) 9 B. H. C. R. 205 at p. 211.

(4) (1899) A. C. 572; 68 L. J. P. C. 144; 81 L. T. 281; 15 T. L. R. 515.

(5) 13 Moo. P. C. 22; 4 W. R. (P. C.) 42; 7 M. I. A. 476; 7 W. R. (Eng.) 722; 1 Suth. P. C. J. 373; 1 Sar. P. C. J. 684; 19 E. R. 388; 15 E. R. 9; 132 R. R. 7.

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she Province of Gujarat. In her plaint she bases her right on her absolute ownership of this village. In argument before this Board and in the judgments of the Courts below her right has been also based apparently upon the following title, namely this, that though her ancestors took from time to time several leases of this village from the Bombay Government, each for a term of years, they were not, as the appellant contends, mere lessees bound to give up to their lessors at the end of each term the possession of the demised village; but were legally entitled, as each lease terminated, to have a new lease granted to the last lessee or his representative. Either title, if possessed by her, would enable her to succeed in this action. In order to arrive at a conclusion on the issue thus in dispute between the parties it is necessary to examine briefly the history of this District of Ahmedabad before its cession by the Gaekwar, with the concurrence of the Peishwa, to the British Government in the year 1817, and to examine more in detail the dealings of the Bombay Government after that date with a certain class of its inhabitants, Muhammadans in religion, said to have originally come from Delhi under the Great Mogul, and styled indifferently *casbatees* and *kasbatis*, and especially their dealings with the ancestors of the respondent, who belonged to that class, touching this village of Charodi.

The ancestor of the respondent in possession of this village at the time of this cession was one Jehangirbhai *alias* Bapuji. One Fatumyia, his grandson, died in the year 1891 childless, leaving him surviving his widow, Nandbai, one of the plaintiffs in the action, who has died during the course of the litigation. One Bapuji, the brother of Fatumyia, died some years ago, leaving his son, Bapabhai, his only issue him surviving, and Bapabhai himself died in the year 1893, leaving his daughter, Bai Rajbai, the other plaintiff, his only child him surviving. This lady, who subsequently married and was left a widow, has thus become the sole surviving descendant of the member of the *kasbatis* class who was in possession of this village of Charodi at the date of the aforesaid cession. The term *kasbatis*, it is not disputed, was used to

designate dwellers in towns whose lands were cultivated not directly by themselves but by *ryots*, to whom they let them, receiving therefor a rent in cash or in kind. They were, in addition, apparently invested with certain powers of government over their villages, including the management of village affairs. At the time of the cession the *kasbatis* were possessed of 17 villages within the *pargana*, of which Charodi was one. The settlement of the territories ceded was, not practically undertaken till the year 1822-1823.

In the interval an accredited public official of the Company was put in charge, duly authorised to investigate the local conditions, and make suggestions and recommendations for the carrying through of this work. In the conduct of this business and in discharge of these duties, he made reports to his superiors in which he sketched the history of the *kasbatis*, the *grassias*, and other classes or families amongst the inhabitants, and purported to describe the rights they had theretofore respectively acquired as against the ceding sovereign, the Gaekwar, to the land of which they were in possession, and the villages over which they exercised some primitive powers of management and control. Some of these reports have been received in evidence apparently without objection. On two of them, sent by Mr. Williamson, described as the Assistant Collector in charge, the first bearing date the 3rd of August 1822, to the Secretary of the Government of Bombay, and the second bearing date the 28th of May 1823, referring to the first, to the Collector of Ahmedabad, much reliance has, naturally, been placed. In the first he reports, amongst other things, that there were 17 villages in the Viramgam *Pargana*, held for a considerable number of years by several families of *casbatees* or *kasbatis* under a peculiar kind of tenure; that their possession had been frequently interrupted, and had not, therefore, been sufficiently continuous to found prescriptive rights; that as soldiers of some property, family, and character, they had acquired a partial influence in the affairs of the *pargana*, and often had obtained from the local managers leases of villages on favourable terms, in the granting of which nothing further had

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been intended than that the villages should remain in their temporary charge; that after the grant of the farm of Ahmedabad by the Peishwa to the Gaekwar, the *kasbatis* had enjoyed the produce of some of these villages for 25 or 30 years on a revenue which was increased or lowered according to the pleasure of the local managers; that in 1804 they were dispossessed of these latter by one Babaji Appaji, a manager of the Peishwa, who demanded a higher *jumma* than the *kasbatis* would consent to pay, but were restored to possession ten years later. At thus by a train of circumstances of an undefined nature that it was difficult to describe them, the class had a sort of claim to the villages of which they were found in possession when the country was delivered to the Bombay Government; that since the authority of that Government had been established at Ahmedabad, Revenue Settlements had been made with them, except where they refused to pay an adequate *jumma*, "but being men of ignorance or bad circumstances and of very indolent habits," they were altogether incompetent to conduct village concerns; that their villages were of vast extent and capable of much improvement; that they were well aware of the precarious tenure by which they held their villages (as they were merely what might be called lease-holders), and that he had every reason to believe they would be well satisfied with an arrangement which would secure to them permanent possession of a portion of their villages.

Mr. Williamson then proposed for the consideration of the Government a plan to this effect: to give to each *casbatee* one, or according to the circumstances and claim of the particular person, two, of the smaller villages on a *jumma* less than that which they had hitherto paid, thereby keeping up their name and respectability as landowners, and enabling them to devote their whole attention to cultivating and improving their properties, while the small amount of revenue levied on the villages remaining in their hands would compensate them for the loss of those surrendered to the Government.

This plan was not approved of by the Government. On the contrary, the Govern-

ment Secretary wrote to the assistant in charge of the Collectorate of Ahmedabad (presumably this same Mr. Williamson, as he so described himself) a letter bearing date the 22nd of November 1822, acknowledging the receipt of the latter's letter of the 3rd of August previous, and informing him that though the plan he suggested might be agreeable to the *casbatees*, the Governor in Council doubted whether it would afford any permanent relief; that it was considered that a more desirable arrangement would be to give to the *casbatees* pensions, to be fixed by the Government, for a life or a number of lives, but that if these latter should be unwilling to accept pensions Mr. Williamson's plan should be adopted. The *casbatees* refused to accept pensions, but Mr. Williamson's plan, though adopted in part, was not adopted in its entirety. One of its provisions of vital bearing on the present controversy was not adhered to. He had suggested that the *kasbatis* should be secured in permanent possession of such of their seventeen villages as should be left to them, whereas on the 28th of May 1823 he wrote to the Collector of Ahmedabad informing him that he (Williamson) "had concluded an arrangement with the *casbatees* of Viramgam by which they are to retain, during the pleasure of the Government, nine of the villages found under their management when the *parganna* fell into our possession." He proceeded to point out that by this arrangement the interference of the *casbatees* would be removed from eight of their villages, the produce of which was valued at Rs. 13,800, while that of those remaining with them was only valued at Rs. 5,300 but that the *jumma* in respect of these latter was so small, namely, Rs. 1,925, that there would remain for their maintenance Rs. 3,375, a sum differing but little from that of Rs. 3,820 which, according to his calculation, was all that would have been available for their maintenance had they continued in possession of their seventeen villages. Then follows this passage:—

"The lease being granted for seven years affords the *casbatees* an opportunity of availing themselves of these capabilities (*i. e.*, the capabilities of their villages of improvement). The condition of the villages and the rules

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respecting leases laid down by Government guided me in fixing the term."

On the 23rd of June 1813 the Secretary of the Government of Bombay wrote to the Collector of Ahmedabad informing him that the Governor in Council approved of Mr. Williamson having made an "agreement with the *kasbates* by which they are to retain during the pleasure of Government nine of the villages found under their management when the *pergunna* fell into our possession."

The expression "at the pleasure of Government" is not very happily chosen. Since leases for terms of seven years were to be given to the *kasbats*, it obviously could not have meant that they were to hold these nine villages merely as tenants-at-will of the Government. What it must, in their Lordships' view, have meant in this connection was that they should receive at once leases for a term of seven years, and that after the termination of these leases the Government would be free to deal with them as it pleased, to renew their leases or to permit them to continue in possession without leases, or to dispossess them altogether, as the Government might in its discretion think fit. If that be so, then there could not have been on the part of the Government a more emphatic assertion of their resolve that the lessees should not have any legal right, as against it, to a renewal of their leases or the permanent possession of their villages.

Before dealing with the action which the Government of Bombay took in reference to this village of Charodi on receipt of these reports, it is essential to consider what was the precise relation in which the *kasbats* stood to the Bombay Government the moment the cession of their territory took effect, and what were the legal rights enforceable in the tribunals of their new sovereign of which they were thereafter possessed. The relation in which they stood to their native sovereigns before this cession, and the legal rights they enjoyed under them, are, save in one respect, entirely irrelevant matters. They could not carry in under the new *regime* the legal rights, if any, which they might have enjoyed under the old. The only legal enforceable rights they could have as against their new sovereign were those, and

only those, which that new sovereign, by agreement expressed or implied, or by legislation, chose to confer upon them. Of course this implied agreement might be proved by circumstantial evidence, such as the mode of dealing with them which the new sovereign adopted, his recognition of their old rights, and express or implied election to respect them and be bound by them, and it is only for the purpose of determining whether and to what extent the new sovereign has recognised these ante-cession rights of the *kasbats*, and has elected or agreed to be bound by them, that the consideration of the existence, nature, or extent of these rights become relevant subjects for inquiry in this case. This principle is well established, though it scarcely seems to have been kept steadily in view in the lower Courts in the present case. It is only necessary to refer to two authorities on the point, namely, the case of *Secretary of State for India v. Kama-chee Boye Sahaba* (5) decided in the year 1859. and *Cook v. Sprigg* (4) decided in the year 1899.

In the first this Board had to deal with the action of the East India Company in seizing, in exercise of their sovereign power, in trust for the British Government, the Raj of Tanjore, and the whole property of the deceased Rajah, as an escheat on the ground that, by reason of the failure of the male heirs of the latter, the dignity of the Raj was extinct, and that the property of the Rajah had thereby lapsed to the British Government. Lord Kingsdown, delivering the judgment of the Board, is, at page 540, reported to have expressed himself thus:—

"The result, in their Lordships' opinion, is, that the property now claimed by the respondent has been seized by the British Government, acting as a sovereign power, through its delegate, the East India Company; and that the act so done, with its consequences, is an act of State over which the Supreme Court of Madras has no jurisdiction. Of the propriety or justice of that act, neither the Court below nor the Judicial Committee have the means of forming, or the right of expressing, if they had formed, any opinion. It may have been just or unjust, politic or impolitic, beneficial or injurious, taken as a whole, to those whose interests are affected. These are considerations into which their Lordships

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cannot enter. It is sufficient to say that, even if a wrong has been done, it is a wrong for which no Municipal Court of Justice can afford a remedy."

Now, in that case the act complained of was of a tortious character.

In the second case the Judicial Committee had to deal with a concession given by the ceding sovereign, the paramount Chief of Pongoland. The appellants sought to enforce in a Court of Law their rights under this concession against the English Government, to which the territory over which the concession had been given was ceded by this Chief. The decision in the first-mentioned case was followed, the above quoted passage from the judgment of Lord Kingsdown approved of, and it was held that the annexation of territory was an act of State, and that any obligation assumed under a treaty either to the ceding sovereign or to individuals is not one which Municipal Courts are authorised to enforce. As far, therefore, as the legal rights of the *kasbatis*, enforceable against the Indian Government in Indian Courts, are concerned, the above-mentioned cession of territory must be taken as a new point of departure. Mr. Williamson's conclusions as to the positions, rights, and interests of the *kasbatis* may have been quite erroneous. The *kasbatis* may have been absolute owners of their villages, as the respondent contends, and yet the consideration of their ante-cession rights is beside the point save so far as it can be shown that the Bombay Government consented to their continuing to enjoy those rights under its own regime.

In their Lordships' view, putting aside legislation for the moment, the burden of proving that the Bombay Government did so consent to any, and if so, to what extent, rests in this case, upon the respondent. The *kasbatis* were not in a position in 1822 to reject Williamson's proposal, however they might have disliked it, or to stand upon their ancient rights. Those rights had for all the purposes of litigation ceased to exist, and the only choice, in point of law, left to them was to accept his terms or be dispossessed. There is nothing, therefore, to support the contention that they never would have accepted Williamson's terms had the permanent possession of their villages not been promised to them. It

may well be that the Bombay Government did not intend to disturb them, and even intended, if all things went well, to grant to them, as acts of grace, new leases as the old leases expired, and it may also well be that the *kasbatis* fully believed and trusted that this would be done, as indeed for many years it was done. From these facts, if they existed, moral obligations (with which this Board is not concerned) may arise, but the mere repetition of such acts of grace cannot *per se* create legal right to their continuance.

Though notice was served on the two plaintiffs to produce all documents in their possession touching the issues raised in the suit, no *patta* or *kabulyat* executed in 1823 was produced or given in evidence, but two Government records of that year were produced as secondary evidence of the contents of a *patta* then granted to the *kasbatis* then in possession of the nine villages retained by them, including this village of Charodi. According to these records a *patta* of the village was then given to Bapabhai, the father of Fatumyia, for a term of seven years, at a *jamabandi* of Rs. 100 with a covenant by the lessee that he should not sell or mortgage the village, or give, or allow any one to give, any land of the village in *Pasayta*, or keep any debt upon the village, but should make it prosperous, and should hand it over to the Government in the year 1831. If these be the true contents of the *patta*, they absolutely negative the existence of any legal right enforceable in an Indian tribunal, either to have the leases of the village from time to time renewed, or to continue in possession of it after the leases had expired.

As to this village of Charodi, one must start then on the inquiry as to what rights were granted by the Bombay Government to the respondent's ancestors, with this admitted fact, that in the sixty-eight years which have elapsed between the year 1822 and the institution of this present suit, not even in one of the several *pattas* granted to them is any provision to be found to the effect, that upon its expiration a new *patta* is to be granted to the lessees or their representatives or successors, while the very first of these *pattas* contained a

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clause expressly negating the existence of such a right. The reasonable and proper inference to be drawn from the silence of the *pattas* on this important point is, Sir Erle Richards, on behalf of the appellants, contends, that the legal right to obtain renewals of the *pattas* was never conferred upon the respondent's ancestors. And, no doubt, if the draftsmen of these instruments had even a rudimentary knowledge of their business, one would have expected that such an important matter as that would have been provided for, but, unfortunately for this contention, those experts have drawn these instruments in language so obscure that the instrument could scarcely have been more obscure had obscurity been aimed at, and have resolutely omitted from every *patta* but the first the ordinary provision to be found in every properly-drawn lease, that the lessee shall deliver up possession at the end of the term. Mr. DeGruyther, on behalf of the respondent, on his side not unnaturally contends that the inference to be drawn from the continued omission of such a provision is that the lessees had a legal right to continue in possession after the *patta*, or lease, had terminated. He puts forward, moreover, as their Lordships understood him, this additional contention, namely, that in 1822 a settlement was made with the ancestor of the respondent then in possession of this village of Charodi, in which the amount of the *jumma* was fixed, that the effect of such a settlement is that the person in possession by whom the *jumma* is to be paid, was fixed or settled permanently in the possession, at all events, of this village, with a right to manage it, that the *pattas* could not have been designed to take away the rights thus conferred, and that the only way of reconciling the grant of them with the relation created by the settlement is to hold that the *patta* only dealt with the *jumma* and the mode of management of the village, not with the tenure of it, if that term may be used. To determine which, if any, of these contentions is well-founded, it is necessary to examine in detail the provisions of those *pattas* the contents of which are satisfactorily proved.

First, then, as to the *pattas* granted on the 21st of August 1833. In the year

1827, during the currency of the first lease a report was made to the Talukdari Settlement Officer by Lieutenant Melville, of the 7th Regiment, in which he described the *kasbatis* of Viramgam as proprietors of certain villages. He apparently was not aware that they then actually held under *pattas* for terms of years granted to them by the Bombay Government. No importance can, therefore, be attached to his use of the word "proprietors." In July 1831 the question of the increase of the *jumma* fixed by the first batch of leases was under consideration. Several *kasbatis* presented a petition to the Government insinuating that the *jumma* fixed in 1822 was then fixed permanently, and should not be increased, also asserting that it was part of the arrangement made by Williamson that the eight villages taken from them in the first instance should, at the end of the seven years, be restored to them, and claiming that this arrangement should be carried into effect. The reply of the Government to this petition, dated 16th September 1831, was to the effect that the order made by the Government on the 16th of November 1822 could not be set aside. Sometime thereafter the above-mentioned lease was granted to Bapabhai, the father of Fatumyia, and his brother, Miabhai, as the lessees. It is endorsed as having been delivered to the latter. The *jumma* is increased to Rs. 142 payable in eight instalments, at different times, and in unequal amounts. The term is seven years, commencing in the year 1830-31 and terminating in the year 1836-37.

By the second clause of the lease it is provided that on failure to pay any instalment on the day named, the Government are to "take back" the *patta* and cause the revenue of the village to be collected by other hands, the lessees being responsible for any deficit in the year in which the *patta* is taken over, and that at the end of that particular year the Government "would if it so pleases give the village to some person other than the lessees," who, it was asserted, shall not get it, but should be held liable for any loss which might accrue to the Government during the remainder of the term.

The seventeenth clause provides that if the Government should find that the lessees

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were spoiling the village, or did not abide by the clauses of the lease, the Government would send arbitrators to inquire into the matter, and if they should find that the village would be spoiled if allowed to remain in the hands of the lessees the *pattas* would be taken back from them, and they would have to pay such a penalty as the Government might choose to impose.

The facts that the granting of a *patta* for seven years was part of the arrangement made with Mr. Williamson, and that the *pattas* then granted contained a clause that the village should be given up to the Government at the end of the term, coupled with the clauses of the lease of 1833, providing for the transfer of the village in certain events to persons other than the lessees, are quite destructive of the theory that these *pattas* merely regulated the amount of the *jumma* but not the tenure, and that independently of them altogether this family of *kasbatis* was fixed in permanent possession of this village of Chahodi. In the year 1838 a new *patta* was apparently granted for seven years, but neither the original nor any copy of it was forthcoming at the trial. On the expiration of this term in the year 1845, the Collector forwarded to the Revenue Commission of Ahmedabad a report, dated the 8th of September 1845, proposing, amongst other things, to increase the *jumma* of this village. In it he sets forth in paragraph 5 that the *kasbatis* being sent for in order to enter into a fresh settlement, declared that the settlement made by Mr. Williamson was permanent and that the *jumma* was not to be increased. They were unwilling to take leases, on any terms other than the original. The Collector thereupon refused to renew the leases and limited the privileges of the *kasbatis* to the receipt of Rs. 20 per cent. on the revenue pending the pleasure of Government. In the 10th paragraph of the report he proceeds to add: "This long enjoyment of the villages at the same rental has increased their (*i. e.*, the *kasbatis*) real or feigned impression that the original settlement was permanent, which it certainly was not."

He then proposed that the rent of the

villages should be slightly increased, and that if the *kasbatis* did not accept the leases offered, the villages should continue under the direct management of the Government and the *kasbatis* should be allowed Rs. 20 per cent. of the revenue.

It will be observed that both parties to this dispute took their stand respectively on Mr. Williamson's arrangement. They only differed as to its terms. The *kasbatis* insisted that according to it the eight villages taken from them were to be restored to them at the end of the term of the first lease, and that the rent should not be increased, while the Government insisted that the grant of any lease after the first was entirely a matter at their discretion.

The Government refused to yield. The position they took up clearly appears from a letter dated 24th February 1847, addressed by the direction of the Governor in Council to the Revenue Commissioner of this district, Mr. A. Blane, pointing out that the *kasbatees* did not appear from the former proceedings connected with the settlements previously made with them to have any valid title to "a permanent continuance of the terms upon which they have hitherto held their villages," and suggesting that the *jumma* should be increased by 5 per cent., that if they consented to this their term might be renewed for seven years, but that the Governor in Council desired that a distinct reservation should be inserted in the new lease endorsing the right of the Government to raise the rent if circumstances should show it to be expedient, and that if they refused to consent to this the villages should be retained under Government management, an allowance being made to the *kasbatis* during pleasure to an amount equal to the profit which Mr. Williamson settled would have been left them. There could scarcely be an assertion more absolute than this of the power of the Government to alter the terms of any leases they might make to the *kasbatis* as they themselves should deem fit, to give or withhold such leases at will, and to dispossess the *kasbatis*

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and take the management of these villages into Government hands.

The existence, however, in the Bombay Government of the power and right which they assert in this letter of the 24th of February 1847 belonged to them, is equally inconsistent with the existence in the respondent or her ancestors either of the absolute ownership of this village or of the right to have the leases of it perpetually renewed. The Government terms were ultimately accepted, and a new *patta* of the village, bearing date the 4th of September 1849, was granted to Fatumya and Bapuji, his brother (the respondent's grandfather), to hold for a term of seven years (from 1844-45 to 1850-51) at the increased yearly rent of Rs. 144-1-9, payable by five instalments on the days therein named. The lease is executed by the lessees. It will be found at page 68 of the Record. Had not the draftsman of this instrument been, like his predecessor, almost enamoured of obscurity, one would have expected that he would have laid at rest all matters of dispute on this point by simply inserting in this lease the proper and usual provision that at its termination the lessees would deliver up possession of the demised premises to the lessor. Through ignorance or carelessness he resolutely abstained from doing this. He did, however, insert some clauses which merit attention. It is provided, *first*, that if the instalments of the rent be not paid when due, attachment will be levied on the village by the Government, and "the management" will be carried on, presumably, by the Government. *Secondly*, that the lessees shall not alienate or pledge the village or the land composing it to anyone. *Thirdly*, that the lease was granted out of kind consideration for the lessees' maintenance, that they, the lessees, should, therefore, make good arrangements for the prevention of crime in the village, or otherwise the (*tharav*) settlement would be cancelled. *Fourthly*, that if an attachment for arrears of rent were levied by the Collector, or if a creditor by an application to the Courts caused an attachment to issue against the village, the management of the village would be taken out of the hands of the lessees and carried

on by the Government, the (*tharav*) settlements would be cancelled, and the whole income of the village to be taken charge of by the Government.

Then follows a clause, No. 10, inconsistent to some extent with the succeeding clause, No. 11, but evidently introduced to put an end for the future to all controversy touching the increase of the *jumma*. It provides that the village is given to the lessees on *patta* according to the settlement or agreement therein before set out, that when the lease expired the lessees should hold charge of all income and produce of the village, and should agree to the payment of the amount of the revenue which the Government might fix, and that if they failed to pay this the income should be taken charge of by the Government. The eleventh clause provided that the village was given on *patta* to the lessees on the agreement thereinbefore set out, and that if they did not act accordingly to the agreement the *patta* should be void.

The existence of the statement that the *patta* was granted out of kind consideration for the maintenance of the lessees is due to this, that during the dispute about the increase of the rent, the two lessees and another person had presented a petition to the Revenue Commissioner stating that they were in very indigent circumstances, that attachments had gone out against their villages, and that they had not left in their houses corn for their sustenance or any wearing apparel.

If the evidence of the case stopped here it would, in face of this lease, in their Lordships' opinion, be quite impossible to contend that the *patta* merely fixed the amount of the rent, and that by the settlements the lessees or their ancestors had acquired as against the Bombay Government a right to the property in, or to the permanent possession of, this village of Charodi. The granting of a lease was part of the original settlement or agreement, and these leases are treated in several places as the instruments by which the estate or interest in the village is conveyed to the lessees.

This clause 10 is the only piece of written evidence produced, indicating even in the most remote way that the lessees were

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entitled at the end of each lease to have a renewal of it granted to them. *Prima facie* a lease for a term does not import any right to a renewal of it. On the contrary, it *prima facie* implies that the lessee's right to the premises demised ends with the term. In order that the respondent should succeed, therefore, on this point, she must find sufficient evidence, apart from legislation, of an agreement, express or implied, with the Bombay Government imposing on them a legal obligation to renew for all time, if required, these leases as they terminate, and conferring on each lessee the correlative legal right to demand that renewal. In their Lordships' view it would require something much more clear, plain, and explicit than this confused and almost unintelligible clause, to be treated as, in effect, a covenant by the lessor for a perpetual renewal of the lease of this village.

No new *patta* was granted in 1851. The lessees continued to hold possession and to pay that rent till 1860. Fresh *pattas* for one year each were given in the years 1860 and 1861, at an increased rent of Rs. 160 and again from 1862 to 1865; between 1860 and 1870 yearly renewals appear to have been granted, the rent being sometimes increased. In the year 1874 there was a failure of issue in the case of the holders of two of the nine villages retained by the *kasbatis* under Williamson's settlement, namely, the villages of Keela and Leah or Lea. The said Fatumyia claimed the former village as the nearest collateral heir of the last holder. The Revenue Commissioner reported upon this matter to the Government of Bombay, and the Governor in Council passed a resolution, dated the 27th November 1874, by which it was declared that the tenure of the *kasbatis* was merely lease-hold, and that their villages lapsed to the Government on failure of heirs. He accordingly directed that this village of Keela should be resumed by the Government.

This direction was on the 5th of July 1877 approved of by the Secretary of State. But Fatumyia and Bapuji, unwilling to submit to this decision, instituted in the year 1878 a suit against the

Secretary of State for India in Council claiming to be entitled to this village as heirs of the last holder, and they supported their claim by a document purporting to be a *sanad* granted by one of the Mogul Emperors some centuries earlier. The District Judge who heard the suit decided that this *sanad* was a forgery, and that the last holder, through whom the plaintiffs claimed, was a mere lease-holder, and dismissed the action with costs. The plaintiffs acquiesced in that decision. They never sought to question it in any Court of law. The question of the renewal of the leases of the *kasbati* tenants was brought before the Government of Bombay about this time by the Revenue Commissioner, and a formal resolution was on the 25th of July 1877 passed by that Government to the effect that it appeared all the leases had expired, that there was no necessity to make any change, it being quite clear that the villages were held on lease-hold tenure at the pleasure of the Government, that it was desirable to renew for periods of seven years the leases which had expired, a very slight nominal increase of rent being made in each case, to show that the Government maintained their rights and would continue so to do and directed that words should be inserted in the new leases making this perfectly clear. This resolution was carried out. A form of lease in the English language was drawn up, and on the 7th of October 1878 approved of by the Bombay Government. It contained, amongst others, clauses restraining alienation and at last providing that on the termination or sooner determination of the lease, the lessee should, without objection or obstruction, yield up the village demised unless the Secretary of State in Council should then be pleased to renew the lease, and also a condition of re-entry on the breach of any of the provisions of the lease.

A lease in this form on the 22nd of December 1879 was granted to Fatumyia and Bapuji, the respondent's father. The *kabulyat* was signed by them, but, as they subsequently asserted that they did not sign the document of their own free will and pleasure, the appellant does not, therefore, desire to treat them as bound by it. It can only be looked at as containing a renewed expression of the view consistently

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entertained by the Government in reference to the true position and rights of the *kasbatis*. No further leases were granted. The lessees and those who succeeded them continued to pay the rent reserved, notice was served in 1898 upon the two ladies, Bai Nandbai and Bai Rajbai, requiring them to quit and deliver up possession of the village of Charodi on the 31st of July following. It was not disputed that if these ladies had by the continued payment of their rent become tenants of this village from year to year, this notice was adequate and sufficient to determine that tenancy. Up to this the evidence touching the administrative dealings of the Bombay Government and its accredited officials with the *kasbatis* and their villages, including that of Charodi, has alone been dealt with.

Their Lordships are of opinion that the just and reasonable inferences to be drawn from it when properly considered are, that not only has the respondent failed to discharge the burden which, as already stated, rests upon her, but that the Bombay Government never departed from the position in which they were left by Mr. Williamson's arrangement; that they never by an agreement, express or implied, conferred upon the respondent or any of her ancestors the proprietary rights in, or ownership of, the village of Charodi claimed by her; that they never recognised or admitted the existence of such rights, or of any rights analogous to them, in them or her; that the only rights in this village which the Government conferred upon her ancestors were those conferred by the leases which the Government from time to time, at their own will and pleasure, chose to grant to them (save such rights as are conferred by the creation of a tenancy from year to year in manner already mentioned); that this Government never conferred upon any of the lessees of the said village a legal right to insist, at the termination of his lease, upon a new lease of the village being granted to him; in other words, that the Bombay Government never were under any legal obligation to grant any lease of this village; and that the granting or withholding of a lease of it rested from the first solely in their discretion.

It was contended, however, on behalf of the respondent that her case is much strengthened by a consideration of the Bombay Government's dealings with the *grassias*. They were ancient Rajpoot proprietors, and before the cession of the Ahmedabad Zilla, stood to their native sovereigns in that relation, their lands being cultivated by *ryot* tenants from year to year and at will. They and the *mewassies* were clearly distinguishable from the *kasbatis*. The last-named held their lands by contract, neither by *sanad* nor by defiance, and Colonel Walker, the first official appointed to deal with this district, was well aware that there was no analogy between the holdings of the *grassias* and those of the *kasbatis*. The word "*taluk*" was first applied to these Rajpoot proprietors by the British themselves. Notwithstanding the ancient proprietary rights of the *grassias*, they took leases of their lands from the Bombay Government, and thenceforward their legal rights were, in accordance with the principle laid down in the authorities already quoted, determined entirely by the contract which they had made with that Government, altogether irrespective of what their position and rights may have been before the cession of their territory.

All this is stated at length in the account by J. Peile, Tulukdari Settlement Officer of the Talukdari of Ahmedabad Zilla, and the measures adopted for their restoration under and in connection with the Act VI of 1862 of the Bombay Legislature published in 1867, pages 7, 9, 14, 42, 43, 47, 64 and 67. Indeed in the preamble of that Statute it is recited that these *talukdari* estates are only held on lease-hold tenure determinable at the pleasure of the Government. So that the case of the *grassias* makes against the case of the respondent instead of in her favour, inasmuch as it shows clearly that after the cession of territory to a new sovereign when it comes to be a question of legal right, the contract with the new sovereign is conclusive and the rights against the old sovereign avail nothing.

It only remains to consider the effect of any of the legislation of the Bombay Government on the question in issue on this appeal. Act VI of 1862, for the reasons

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given in the above-mentioned publication of Mr. Peile, does not apply to *kasbati* lessees at all. They never were *talukdars* of Ahmedabad in the true sense. They did not lose their ancient right of ownership of their land by taking leases, as did the *grassias*, and, therefore, did not suffer the injustice which the Statute was designed to remedy.

The Statute of 1888 is entitled an Act to provide for the revenue administration of estates held by superior landlords in the districts of Ahmedabad, etc. In the preamble it is recited that it is expedient to remove doubts as to the applicability of certain portions of the Bombay Land Revenue Code of 1879 to estates held by certain superior landlords in the above-mentioned districts, and to make special provision for the administration of the said estates and for the partition thereof. In the first section a *taluqdar* is defined to include "a *thakur*, *mehwassi*, *kasbati* and *naik*." Section 23 provides that nothing in the Act shall be deemed to affect the validity of any agreement entered into before the passing of the Act by or with a *taluqdar* and still in force as to the amount of his *jumma*, nor of any settlement of the amount of *jumma* made by or under the orders of Government for a term of years and still in force. Every such agreement and settlement is to have effect as if the Act had not passed. And section 33 enacts that certain sections of the Bombay Land Revenue Code of 1879 are not to apply to the estates to which this Act applies. By section 33 it is also provided that the word "*taluqdar*" shall be substituted for the word "occupant," the words "registered *taluqdar*" for the words "registered occupant," and the words "*taluqdar's* holding," or such words to that effect as may be required by the context, for the word "occupancy" when applying this Code of 1879 to the estates to which this Statute of 1888 applies. The seventy-third section of the Code provides that "the right of occupancy" shall, subject to the provisions contained in section 56, and to any conditions lawfully annexed to the occupancy, save as shall be otherwise prescribed, be deemed to be a hereditary and transferable property.

It is seriously contended, as their Lordships understood, that the effect of this substitution

of the words "the right of occupancy" for the words "the right or interest of a *taluqdar*" in or to his holding, is that a *kasbati's* interest in a lease-hold held for a term of years is changed in its nature and becomes a hereditary and transferable property, notwithstanding that by the very conditions of the lease his interest is limited to a term, and he is restrained from alienation: and notwithstanding also that by section 68 of this Code it is enacted that an occupant is entitled to the use and occupation of his land for the period, if any, to which his occupancy is limited. These two sections, in their Lordships' view, plainly mean that a lessee, whether a true "*taluqdar*" or a "*thakur*," "*mehwassi*," "*kasbati*," or "*naik*," is bound by the terms of his lease, one term of which is that he shall only occupy for the term of years for which a lease for years is granted, and *prima facie* no longer. Section 73 was amended by the Act of 1901, but the amendment is immaterial on this point.

Their Lordships are clearly of opinion that these Statutes do not bear in any way on the issue raised in this case. They think that the decree of the High Court cannot be sustained, and that the decision of the District Judge is equally erroneous. The fallacy underlying the former on the point as to the right of the respondent to occupy permanently is clearly revealed in the passage printed at page 496 of the Record in which the High Court deals with the lease of 1833:—

"There are no other provisions for forfeiture of the management. There is no provision for renewal of the *patta*, but it is to be inferred from the nature of the management and from the fact that the *putta* was for a term, that renewal was contemplated. This inference is supported by both previous and subsequent events; by previous events, because in 1823 permanent possession by the *kasbatis* was contemplated; by subsequent events, because the renewal did, in fact, take place."

Their Lordships, dealing with the legal rights of the parties alone, are clearly of opinion that the decrees of both Courts are erroneous and should be reversed, that the main appeal, that of the Secretary of State, should be allowed, and the cross-appeal dismissed, and that judgment should be enter-

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ed for the Secretary of State, dismissing the respondent's action. And they will humbly advise His Majesty accordingly.

The respondent must pay the costs here and below.

Appeal allowed.

Solicitor for the Appellant: *India Office.*

Solicitors for the Respondent: Messrs. T. L. Wilson & Co.

COURT OF THE BOARD OF REVENUE,
UNITED PROVINCES.

REVENUE PETITION No. 15 of 1912-13

OF BARA BANKI DISTRICT.

November 12, 1914.

Present:—Mr. Holms, J. M.

Raja UDIT NARAIN SINGH—OBJECTOR

—APPELLANT

versus

RAM BALI AND OTHERS—OPPOSITE PARTY—

RESPONDENTS.

Partition—Mortgagee in possession—Party to partition between co-sharers—Objections to method of partition, when to be urged—Proprietor full, mortgagee subsequently becoming

A mortgagee in possession of a share is a party to a partition between the co-sharers. If he has any objections to make to the method of partition, he should urge them at the proper time when the partition proceedings are being drawn up and not after they are confirmed, although he has become a full proprietor after the proceedings have been drawn up.

Appeal against the order of the Officiating Commissioner, Fyzabad, dated the 5th October 1912, upholding that of the Deputy Commissioner, Bara Banki, dated the 6th September 1911, upholding the order of the Assistant Collector, Bara Banki, dated 18th April 1911.

FACTS.—This was a partition case and at the time the case commenced, the objector-appellant was the mortgagee of a share in the *mahal* that was to be partitioned. Subsequently, after the partition proceedings had been drawn up he acquired full proprietary rights in the share. The proceedings were confirmed and partition was made in accordance with those proceedings. The objector kept silent all this time. It was only when everything had come to a close that he objected to the method

of partition. The Assistant Collector disallowed the objection and his order was confirmed in appeal by the Deputy Commissioner, on the ground that the partition had been made in accordance with the partition proceedings, to which no objection was taken. When the case came up in appeal before the Commissioner, he held that the partition having been effected according to the partition proceedings and the objection having been lodged at a very late stage, it was impossible to re-consider those proceedings, although the objector came into the *mahal* as auction-purchaser of the share mortgaged to him, after the case had begun and after the proceedings had been drawn up, to which he was no party, and although his predecessor-in-interest appeared to have had no interest in those proceedings.

Babu Ram Chandra, for the Appellant.

JUDGMENT.—The appellant at the time of partition was recorded as the mortgagee in possession of a share belonging to a non-applicant. The proclamation under section 110 of the Land Revenue Act, which issued in April 1906, was signed by his *mukhtar-i-am*. On the 23rd of October 1908 appellant put in a petition stating that he had now acquired full proprietary rights and asking that a separate *mahal* should be formed of his two-anna share. This was properly rejected as being too late. The partition proceeding was confirmed on the 25th of May 1909, but up to the time of its confirmation the appellant raised no objection regarding the points he now brings forward. It was not till the 23rd of March 1911, or nearly two years later, that he brought them forward for the first time. The Deputy Commissioner has properly pointed out that the partition has been made in accordance with the partition proceeding to which no objection was made by the appellant. The Commissioner does not seem to have appreciated the fact that the appellant himself as mortgagee in possession was a party throughout the whole course of the partition. Had he any objections to urge as to the method of partition, they should have been urged at the time the partition proceeding was being drawn up.

Appeal dismissed with costs.

Appeal dismissed.

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MADRAS HIGH COURT.
FULL BENCH.

SECOND CIVIL APPEAL No. 734 OF 1912.

April 1, 1915.

Present:—Sir John Wallis, Kt., Chief

Justice, Mr. Justice Ayling and

Mr. Justice Sadasiva Aiyar.

SUBRAMANIA AIYAR—PLAINTIFF—

APPELLANT

versus

BALASUBRAMANIA AIYAR—

DEFENDANTS NOS. 1 AND 2—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. II, r. 2, O. XXXIV, rr. 1, 14—Transfer of Property Act (IV of 1882), ss. 61, 85, 99—Same person holding several mortgages on the same property, whether entitled to sue on one mortgage reserving his rights under a prior mortgage—Mortgages, consolidation of—Several mortgages—Separate causes of action.

It is open to a mortgagee holding more than one mortgage on the same property to bring a suit for the recovery of his debt due only under one of the mortgages and to sell the property under the decree in that suit subject to his rights under a prior mortgage. [p. 319, col. 2.]

A mortgagee having several mortgages on the same property is entitled to treat them as separate causes of action and is not bound to bring one suit on all mortgages. [p. 319, col. 2.]

Second appeal against the decree of the District Court of Tinnevely, in Appeal Suit No. 584 of 1910, preferred against that of the Court of the Additional District Munsif of Tinnevely, in Original Suit No. 60 of 1909.

The second appeal came on for hearing before Sankaran Nair and Tyabji, JJ., on the 11th and 16th April 1913 when the Court made the following

ORDER OF REFERENCE.

SANKARAN NAIR, J.,—The plaintiff brought this suit for the sale of the properties which were mortgaged to him under two instruments, dated the 9th December 1894 and the 6th December 1901, respectively. In his plaint after praying for certain reliefs the plaintiff added that he would file a separate suit later on for the recovery of the debt due to him on the hypothecation bond for Rs. 2,000, executed in his favour on some of the properties specified in the plaint schedule and certain other properties.

An objection was taken in the first Court by the defendants (mortgagors) that a claim like this was not maintainable, that the

plaintiff was bound to sue to recover the amounts due under all the mortgages and that he could not get a decree for the sale of certain properties subject to his claim on a mortgage. The claim which was reserved was on a prior mortgage. The District Munsif overruled the objection and passed a decree in the plaintiff's favour, directing the properties to be sold for the debt which was found due on the two mortgages sued on, subject to the plaintiff's claim on the first mortgage.

On appeal the District Judge arrived at the conclusion that such a suit was not maintainable. He accordingly directed the plaintiff either to amend the plaint by also praying for the relief that he might be entitled to on the first mortgage or by abandoning his claim on that mortgage in respect of these items. The plaintiff abandoned his claim, but reserved his right to question the District Judge's order in appeal. The decree of the first Court was confirmed by him with certain modifications as to the debt due.

In second appeal, a preliminary objection is taken by the respondents' Pleader that no appeal lay against the decree of the District Judge, since there was nothing in the decree against which the plaintiff is entitled to take an objection; but the Judge holds in his judgment that the plaintiff is not entitled to reserve his claim and it is, therefore, impossible to say that the plaintiff has no right to appeal. Overruling this objection, the question that remains for consideration is whether such a suit is maintainable. It was held by this Court in *Dorasami v. Venkateshaya* (1) and *Nattu Krishnama Chariar v. Annangara Chariar* (2) that it was not open to a mortgagee to bring a suit to recover the debt due under only one of the mortgages and to sell the property under the decree subject to his claim under a prior mortgage. Those decisions were based upon two grounds, *first*, upon section 85 of the Transfer of Property Act which requires all persons interested in the mortgaged property to be made parties to the suit; and, *secondly*, upon the words of section 61 of the Transfer of Property Act and upon the form of decree for sale, No. 128 of Schedule IV of the

(1) 25 M. 108; 11 M. L. J. 373.

(2) 30 M. 353; 17 M. L. J. 301; 2 M. L. T. 330.

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Civil Procedure Code (Act XIV of 1882). In a later case, *Radhakrishna Iyer v. Muthuswamy Sholagan* (3), it has, however, been held that there is nothing to prevent a decree being passed to enforce a mortgage subject to a prior mortgage. The prior decisions in *Dorasami v. Venkateseshayyar* (1) and *Nattu Krishnama Chariar v. Annangara Chariar* (2) were not referred to and the reasons given in those judgments have not been considered. In so far as those judgments were based upon section 85 of the Transfer of Property Act, those judgments may now be disregarded, as that section has been repealed and Order XXXIV, rule 1, of Act V of 1908 now enacts that "a puisne mortgagee may sue for foreclosure or for sale without making the prior mortgagee a party to the suit"; and the rule itself says that it is only those persons having an interest either in the mortgage security or in the right of redemption that need be made parties to the suit. In so far as those judgments are based upon section 61 of the Transfer of Property Act and the form of decree for sale given in the Civil Procedure Code, the reasoning still holds good. The learned Judges in *Dorasami Venkateseshayyar* (1) say that according to that section a mortgagee cannot seek to obtain an order for sale on one of the mortgages only. Those provisions of law are practically reproduced now in the Civil Procedure Code, Order XXXIV, rules 2 and 4. There is no difference in this respect. We are unable to hold, therefore, that the decisions in *Dorasami v. Venkateseshayyar* (1) and *Nattu Krishnama Chariar v. Annangara Chariar* (2) have ceased to be in force on account of the repeal of the provisions of law then in force. These decisions, however, seem to be in direct conflict with the decision of *Radhakrishna Iyer v. Muthuswamy Sholagan* (1). The question is an important one which very frequently arises, and it is, therefore, desirable that it should be set at rest by an authoritative ruling. We would, therefore, refer to the Full Bench for decision the question, whether it is open to a mortgagee to bring a suit for the recovery of his debt by sale of the properties mortgaged to him subject to his interest in a prior mortgage.

TYABJI, J.—I agree. I only wish to add that the following points seem to me to be

involved in the question which we refer to the Full Bench: *first*, whether the suit is defective by reason of a prior mortgage not being sued upon in the proceedings before the Court, in other words, whether the reservation purported to be made by the mortgagee of his right to sue upon the prior mortgage affects the maintainability of the suit on the later mortgage, and *secondly*, if a suit is so brought with such a reservation and a decree is purported to be passed with such reservation, whether the reservation can have any effect or whether a subsequent suit on the prior mortgage must be unaffected by the fact of any such reservation being made or omitted to be made. I do not wish to express any opinion on this point, but I should like it to be considered whether the decisions in *Watson & Co. v. Collector of Rajshahye* (4), *Mohan Lal v. Ram Dial* (5) and *Sukh Lal v. Bhikhi* (6) have any, and if so, what bearing on this point. These decisions were not cited to us and have not been considered by me with reference to this case. The second point will also involve the consideration of the question whether, if the prior mortgage comes to the cognisance of the Court, the mortgagee (even though he should purport to reserve his rights under the prior mortgage) must of necessity be put to the alternative either of amending the plaint by suing upon both mortgages or of abandoning his rights under the prior mortgage.

Mr. T. R. Venkatarama Sastri, for the Appellants.

Mr. K. R. Rangaswami Aiyangar, for the Respondents.

OPINION OF THE FULL BENCH.

WALLIS, C. J.—In support of the view taken in *Dorasami v. Venkateseshayyar* (1) reliance was placed on the provisions of sections 61, 85 and 99 of the Transfer of Property Act, as well as on the form of decree No. 123 of Schedule IV of the Code of Civil Procedure. The modifications introduced into sections 85 and 99, when re-enacted as Order XXXIV, rules 1 and 14 in the Code of 1908, affect all these grounds except the first. Under Order XXXIV, rule 1, which is in accordance with

(4) 13 M. L. A. 160; 12 W. R. (P. C.) 43; 3 B. L. R. (P. C.) 48; 2 Suth. P. C. J. 269; 2 Sar. P. C. J. 500; 20 E. R. 511.

(5) 2 A. 843.

(6) 11 A. 187; A. W. N. (1889) 13.

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the decision of the Full Bench of the Allahabad High Court in *Ram Shankar Lal v. Ganesh Prasad* (7), only parties interested in the mortgage security or the right of redemption need be joined in a suit relating to the mortgage, and the explanation makes it clear that a prior mortgagee is not to be regarded as interested in a suit brought by a puisne mortgagee for sale or foreclosure, or in a suit brought by the mortgagor to redeem a puisne mortgage. Consequently, he need not be made a party to such suits, and it follows that, if such a suit results in a decree for sale, the sale must be subject to his rights. It cannot, therefore, now be said that Order XXXIV, rule 1, requires a prior mortgagee to be joined and the property to be sold free of his mortgage whether or not the prior mortgagee be the same person as the puisne mortgagee. *Secondly*, the language of rule 1 shows that in the case of a puisne mortgage what is mortgaged and has to be redeemed, that is to say, the mortgaged property, consists only of the equity of redemption under the prior mortgage, and that, therefore, the form of decree in the Civil Procedure Code does not require that on redemption of the puisne mortgage, the land itself should be re-conveyed free of the prior mortgage as well. This ground then can no longer be relied on. The argument based on section 99 also goes, as the re-enacted Order XXXIV, rule 41, only debar the mortgagee from bringing the mortgaged property to sale otherwise than by a suit in enforcement of the mortgage, when such sale is in satisfaction of the mortgage-debt itself, and not, as under section 99 of the Transfer of Property Act, whatever the nature of the claim. This shows that the Legislature does not consider it desirable except in the case specified, to prevent the mortgagee from acquiring the equity of redemption otherwise than by suit upon the mortgage itself, and affords a strong argument against the imposition of such a restriction by the Court.

Coming now to section 61 of the Transfer of Property Act the provisions of that section, which is modelled on section 17 of the Conveyancing Act of 1881, are a restriction of the equitable rule regarding the consolidation

(7) 29 A. 385 (F. B.); A. W. N. (1907) 97; 4 A. L. J. 273; 2 M. L. T. 248.

of mortgages, *viz.*, that a mortgagor seeking to redeem a particular mortgage should be required at the same time to redeem all the other mortgages created by him in favour of the same mortgagee. I am unable to say that the provisions of this section afford sufficient reason for refusing to allow a mortgagee suing on a puisne mortgage to sell subject to a prior mortgage in his favour. It is, no doubt, laid down in *Vadju v. Vadju* (8) citing *Brown v. Cole* (9) that, in the absence of any stipulation, express or implied, to the contrary, the right to redeem and the right to foreclose must be regarded as co-extensive; but those observations were made with reference to the time for bringing such suits and not to their other incidents. On the other hand it was laid down generally in *Wickenden v. Fayson* (10), that a sale cannot be directed against a mortgagee, that is to say, free of his mortgage, without his consent whether he be a party to the suit or not; see also section 96 of the Transfer of Property Act. *Lastly*, with reference to the query of their Lordships in *Sri Gopal v. Pirthi Singh* (11), as to whether in view of the provisions of section 43, Civil Procedure Code, now Order II, rule 2, a mortgagee having several mortgages on the same property is entitled to treat them as separate causes of action or must bring one suit on all his mortgages, I think we are bound by the decisions of this Court to say that he is entitled to treat them as separate causes of action.

In the result, therefore, I would answer the question referred to us in the affirmative.

AYLING, J.—I agree.

SADASAYA AIYAR, J.—I entirely concur with the judgment of my Lord the Chief Justice.

The question referred to the Full Bench is "whether it is open to a mortgagee to bring a suit for the recovery of his debt by sale of the properties mortgaged to him subject to his interest in a prior mortgage" I agree with the decisions in the two cases decided by

(8) 5 B. 22.

(9) (1845) 14 Sim. 427; 14 L. J. Ch. 167; 9 Jur. 290; 60 E. R. 424; 65 R. R. 618.

(10) (1856) 6 De G. M. & G. 210; 106 R. R. 82; 43 E. R. 1212; 25 L. J. Ch. 162; 4 W. R. 39; 26 L. T. (o. s.) 192.

(11) 24 A. 429; 4 Bom. L. R. 827; 6 G. W. N. 889; 29 I. A. 118 (P. C.).

NAZIR PEYADA v. JYATINDRA NARAIN ACHARYYA.

this Court in *Abdul Rakman v. Mahomed* (12) (Muthuswami Aiyar and Best, JJ.) and *Radhakrishna Iyer v. Muthuswamy Sholagan* (3). (Munro and Abdur Rahim, JJ.) which answered this question affirmatively.

As regards the *obiter dicta* in *Dorasami v. Venkateshachari* (1) and *Balasubramania Nadar v. Sivaguru Asari* (13), I agree generally with the acute criticisms found in the article beginning at page 168 of 20 M. L. J. though I differ from the learned critic in respect of his remark (at page 170) that "it does not seem legitimate to infer" from section 61 of the Transfer of Property Act that a mortgagor cannot redeem one of two mortgages made of the same property to the same person. I also agree with the judgment of Beaman, J., in the case of *Dhondo Ramachandra Kulkarni v. Bhikaji Gopal* (14). I might be permitted to suggest to the Legislature that section 61 of Act IV of 1882 might be re-placed by a section enacting that all consolidation, even in the case where the mortgagee and mortgagor are the same persons and the property is the same, is abolished.

Reference answered.

- (12) 2 M. L. J. 168
 (13) 11 Ind. Cas. 629; 21 M. L. J. 562.
 (14) 27 Ind. Cas. 1005; 17 Bom. L. R. 144; 39 B. 138.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 4011 of 1913.

May 7, 1915.

Present:—Justice Sir Asutosh Mookerjee, Kt., and Mr. Justice Roe.

NAZIR PEYADA—DEFENDANT—APPELLANT
 versus

JYATINDRA NARAIN ACHARYYA

CHOWDHURY—PLAINTIFF—RESPONDENT.

Bengal Tenancy Act (VIII of 1885), s. 29, applicability of—Tenancy split up—New rent fixed, if enhancement.

Section 29 of the Bengal Tenancy Act is applicable where the holding remains constant but where the original holding is split up into a number of new tenancies no question can arise as to the effect of the section.

Raj Kumar v. Faizuddin, 30 Ind. Cas. 283; 22 C. L. J. 81, referred to.

Appeal against the decree of the Subordinate Judge of Mymensingh, dated the 17th September 1913, reversing that of the Munsif, 3rd Court, Mymensingh, dated the 21st of December 1912.

Babu *Hit Lal Guha*, for the Appellant.

Mr. B. Chakravarti, and Babu *Sushil Madhab Mullick*, for the Respondent.

JUDGMENT.—This is an appeal by the defendant in a suit for rent. In 1886, he held 11 *puras* of land under the plaintiff at an annual rent of Rs. 40. In 1891, by mutual consent of the parties, some lands were excluded from the holding and the remainder was divided into five parcels.

Five new and distinct tenancies were thereupon created, one to be held thenceforth by the defendant and the other four, by his four brothers respectively. The parties argued that the rent for each of the new holdings should be Rs. 8 a year. The plaintiff now seeks to recover rent on the basis of the contract of 1891. The defendant contends that the contract was in contravention of section 29 of the Bengal Tenancy Act. This defence is clearly of no avail. Section 29 provides that the money rent of an occupancy *raiyat* may be enhanced by contract, subject to the condition that the amount must not be enhanced so as to exceed by more than two annas in the rupee the rent previously payable by the *raiyat*. This provision is plainly applicable only where the holding remains constant [*Raj Kumar v. Faizuddin* (1).] Here the original holding was split up into five new tenancies. Consequently no question can arise as to the effect of section 29 of the Bengal Tenancy Act on the transaction.

The result is that the decree of the Subordinate Judge is confirmed and this appeal dismissed with costs.

Appeal dismissed.

- (1) 30 Ind. Cas. 283; 22 C. L. J. 81.

ATUL CHANDRA SINGHA v. KUNJA BEHARI SINGHA.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL NO. 508 OF 1912.

April 19, 1915.

Present:—Mr. Justice Fletcher and

Mr. Justice Teunon.

ATUL CHANDRA SINGHA—PLAINTIFF—
APPELLANT

versus

KUNJA BEHARI SINGHA AND OTHERS—

DEFENDANTS—RESPONDENTS.

Appeal—Partition suit—Preliminary decree, nature of, appeal against, if competent, when—Civil Procedure Code (Act V of 1908), s. 97, scope of.

Under section 97 of the Code of Civil Procedure not only has an appellant a right to appeal against a preliminary decree, but he is bound to appeal or else he is precluded from questioning it in a subsequent proceeding.

Where no appeal is preferred against the final decree, the appeal against the preliminary decree is not incompetent.

Nistarinee Dabee v. Rai Mohun Biswas, 20 Ind. Cas. 576; 18 C. L. J. 214 and *Ugra Narain Singh v. Basan Narain Singh*, 19 Ind. Cas. 630; 17 C. W. N. 868; 18 C. L. J. 209, followed.

The law gives a right to appeal against the preliminary decree and that right is not taken away because no appeal is preferred against the final decree, which is subject to the decision in the appeal in the preliminary decree. If that appeal succeeds the final decree ought to be amended in accordance with the result of the appeal.

Appeal against the decree of the Subordinate Judge, first Court, Midnapur, dated the 29th November 1911, reversing that of the Munsif, Ghatal, dated the 9th of September 1910.

Babu Amarendra Nath Bose, for the Appellant.

Babus Jyoti Prosad Sarbadhikari, Trailokhya Nath Ghose and Dharendra Kanta Roy (for Babu Biraj Mohan Majumdar), for the Respondents.

JUDGMENT.—This is an appeal from the decision of the learned Subordinate Judge of Midnapore, dated the 29th of November, reversing the decision of the Munsif. The suit was a partition suit. Two points have been raised in this case, of which the first is whether the appeal was properly preferred to the lower Appellate Court. To decide this the following dates are necessary. The preliminary decree was made on the 9th September 1910. The present appeal was preferred before the lower Appellate Court on the 4th November 1910. The final decree was made in the partition suit

on the 11th March 1911. Under section 97 of the Code of Civil Procedure not only has the appellant a right to appeal against the preliminary decree, but he is bound to appeal or else he is precluded from questioning it in a subsequent proceeding. The appellant contends that as no appeal was preferred against the final decree, the appeal against the preliminary decree is incompetent. We do not think that it is so. That is quite clear from the decision in the case of *Nistarinee Dabee v. Rai Mohun Biswas* (1). A similar view seems to have been taken in the case of *Ugra Narain Singh v. Basan Narain Singh* (2). There is another decision * * * * to the contrary, namely, the case of *Khirodamoyi Dasi v. Adhar Chandra Ghose* (3). It seems to us that we ought to follow the decisions in the first two cases cited. It is quite clear that the law gave a right to appeal against the preliminary decree and that right was not taken away because no appeal was preferred against the final decree, which was subject to the decision in the appeal in the preliminary decree. If that appeal succeeds the final decree ought to be amended in accordance with the result of the appeal. The case of *Mackenzie v. Narsingh Sahai* (4) has also been relied upon by the learned Vakil for the appellant. That case, it is admitted, was under the old Code of Civil Procedure. There a party preferred an appeal against a preliminary decree without preferring an appeal against the final decree. Section 97 was expressly enacted to get over the practice which had grown up by virtue of a Full Bench decision of this Court. There is, therefore, nothing in the first contention.

The second question raised is whether there was a previous partition. It is purely a question of fact. The learned Judge has held that there was a previous partition and we cannot disturb his finding.

The present appeal, therefore, fails and is dismissed with costs.

Appeal dismissed.

(1) 20 Ind. Cas. 576; 18 C. L. J. 214.

(2) 19 Ind. Cas. 630; 18 C. L. J. 209; 17 C. W. N. 868.

(3) 21 Ind. Cas. 516; 18 C. L. J. 321.

(4) 1 Ind. Cas. 413; 10 C. L. J. 113; 33 C. 762.

MARDAN SINGH v. SHEORAJ NARAIN SINGH.

OUDH JUDICIAL COMMISSIONER'S
COURT.

FIRST CIVIL APPEAL NO. 102 OF 1913.

April 13, 1915.

Present:—Mr. Lindsay, J. C., and

Mr. Kanhaiya Lal, A. J. C.

MARDAN SINGH AND OTHERS—PLAINTIFFS

—APPELLANTS

versus

SHEORAJ NARAIN SINGH AND OTHERS—

DEFENDANTS—RESPONDENTS.

Court-fee, amount of, payable on appeal—Redemption of usufructuary mortgage—Appeal, subject-matter of dispute in.

Where in a suit for redemption of a usufructuary mortgage the mortgagor seeks on appeal to establish that he is not liable to pay the money which has been adjudged by the Court below to be due to the mortgagee, he is liable to pay a Court-fee on that amount of the money which is the subject-matter in dispute in the appeal and not on the amount of the principal sum secured by the mortgage.

Ram Adhin v. Hanuman, 9 O. C. 153; *Husaini Khanam v. Husain Khan*, 29 A. 471; A. W. N. (1907) 133; 4 A. L. J. 375 and *Kodi Venkatappa Row v. Barnala Suryanarayana*, 17 Ind. Cas. 442; 12 M. L. T. 493, referred to.

Appeal from the decree of the Subordinate Judge, Lucknow, dated the 31st May 1913.

Babus *Har Dayal* and *Daya Kishen Seth*, for the Appellants.

Babus *Bisheshar Nath*, *Lachhman Prasad* and *Mahesh Prasad*, for the Respondents.

JUDGMENT.—This was a suit for redemption of a usufructuary mortgage and for the recovery of surplus profits said to have been realized by the defendants from the mortgaged property. The allegation of the plaintiffs was that the mortgage-money was satisfied from the usufruct and that Rs. 22,877-6-8 were approximately due to them from the defendants. The Court below decreed the claim for redemption, subject to the payment of Rs. 19,541 by the plaintiffs to the mortgagees.

In this appeal the plaintiffs seek to establish that the entire mortgage-money was satisfied from the usufruct and that a sum of not less than Rs. 10,000 was due on account of surplus profits to the plaintiffs. The plaintiffs have valued the appeal at Rs. 29,541, but have paid Court-fee on the principal sum of Rs. 2,500 secured by the mortgage. The Court-fee payable in appeal is, however, determined, as laid down in *Ram Adhin v. Hanuman* (1), by the difference

between the amount adjudged to be payable by the mortgagor and the amount, if any, which the mortgagor admits he is liable to pay. So far as the mortgagor seeks to recover the mortgaged property, he is liable to pay a Court-fee on the principal sum secured within the meaning of section 7, clause IX, of the Court Fees Act. But when he seeks on appeal establish, that he is not liable to pay the money which has been adjudged by the Court below to be due to the mortgagee, he is liable to pay a Court-fee on the amount of the subject-matter in dispute in the appeal. Order XXXIV, rule 9, of the Code of Civil Procedure requires that the Court should settle the accounts of the mortgage once for all and pass a decree, directing the defendant, if so required, to re-transfer the property and to pay to the plaintiff the amount which he may have realized in excess. If in the plaint the mortgagor requires the Court to direct the mortgagee to pay to him any money, which he may have realized in excess, he should pay the requisite Court-fee on that relief, treating that portion of the claim as one for accounts within the meaning of section 7, clause IX (f), read with section 11, of the Court Fees Act. The decision in *Husaini Khanam v. Husain Khan* (2) seems hardly to be consistent with the language of section 7, clause IX, of the Court Fees Act, which applies to suits to recover immoveable property mortgaged, and, as pointed out in *Kodi Venkatappa Row v. Barnala Suryanarayana* (3) no additional relief can be granted unless the requisite Court-fee is paid on the same. The learned Counsel for the plaintiffs-appellants, however, states that he is willing to forego his claim for surplus profits as laid in the plaint and the memorandum of appeal. The plaintiffs-appellants are, therefore, liable to pay a Court-fee on the sum of Rs. 19,541, which is the subject-matter of this appeal, after deducting such fee as they may have already paid on the appeal. We direct the plaintiffs-appellants accordingly to pay the deficiency of Rs. 625 within a month from this date. The claim for surplus mesne profits as laid in the

(1) 9 O. C. 153.

(2) 29 A. 471; A. W. N. (1907) 133; 4 A. L. J. 375.

(3) 17 Ind. Cas. 442; 12 M. L. T. 493.

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plaint and the memorandum of appeal will be deemed to have been withdrawn and an amendment will be made accordingly therein.

*Additional Court-fee ordered to be paid;
Decree amended.*

ODUH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL NO: 8 OF 1913.

June 15, 1915.

Present:—Mr. Stuart, A. J. C., and

Mr. Kanhaiya Lal, A. J. C.

Babu NARENDRA BAHADUR SINGH—
DEFENDANT—APPELLANT

versus

THE OUDH COMMERCIAL BANK, LTD,
FYZABAD—PLAINTIFF—RESPONDENT.

Mortgage—Commission agreed to be paid to mortgagee—Mortgagor's liability to pay commission—Circumstances attending agreement to be looked into—Penalty, definition of—Punishment, element of, essential—Default, agreement to pay interest at, when penalty—Interest, penal rate of—Stipulations by way of penalty—Court, duty of—Compensation, reasonable, assessment of—Conduct of parties subsequent to execution of deed to be considered—Mortgage-suit—Novation—Acceptance, qualified, effect of—Substitution of existing mortgage-deed by executing fresh deed, agreement as to, not fulfilled—Mortgagor, remedy and position of—Reduction in money in suit, claim as to—Estoppel, equitable—Construction of document—Mortgage-deed, interpretation of—Right to sue, accrual of—Amendment of plaint—Costs, when defendant not entitled to—Limitation—Penal clauses in mortgage-deed, amount awarded for breach of, if portion of mortgage-money—Charge on mortgaged property—Contract Act (IX of 1872), s. 74—Discretion of Court—Post diem interest—Court, power of, to fix interest from date for payment till date of realisation—Circumstances of each case to be examined.

Where a mortgagor deliberately and voluntarily, without any deception, surprise, pressure, mistake of fact, or unfair dealing, agrees to pay a commission to the mortgagee, in short, where the parties are completely on equal terms when the agreement is arrived at, and pays it, the mortgagor cannot, in a suit subsequently brought by the mortgagee on the basis of the mortgage, avoid his liability for the commission paid. [p. 332, col. 1.]

Sunder Koer v. Rai Sham Krishen, 4 A. L. J. 103; 11 C. W. N. 249; 5 C. L. J. 106; 17 M. L. J. 43; 9 Bom. L. R. 304; 2 M. L. T. 75; 34 I. A. 9; 34 C. 150, referred to.

"Penalty" may be defined as a liability agreed to by the parties to be imposed as a punishment, fair or unfair, on the party committing the breach of contract. [p. 335, col. 2.]

An agreement to pay at default simple interest, or even compound interest at the same rate as the simple interest, fixes the price for accommodation of money at an ordinary or at a progressive rate and

does not contain the element of punishment or penalty; but an agreement to pay at default a higher rate of interest does contain that element. [p. 335, col. 1.]

Sunder Koer v. Rai Sham Krishen, 34 C. 150; 4 A. L. J. 109; 11 C. W. N. 249; 5 C. L. J. 106; 17 M. L. J. 43; 9 Bom. L. R. 304; 2 M. L. T. 75; 34 I. A. 9; *Mackintosh v. Crow*, 9 C. 689; 13 C. L. R. 102; *Nanjappa v. Nanjappa*, 12 M. 161; *Umar Khan Mahamad Khan Deshmukh v. Salakhani*, 17 B. 106; *Kutub-ud-din Ahmad v. Bashir-ud-din*, 5 Ind. Cas. 665; 7 A. L. J. 394; 32 A. 448; *Avathani Muthukrishnier v. Sankaralingam Pillai*, 18 Ind. Cas. 417; 13 M. L. T. 20; 24 M. L. J. 135; 36 M. 229; *Sankaranarayana Vadhyaar v. Sankaranarayana Ayyar*, 25 M. 343; 11 M. L. J. 421; *Jai Ram v. Shree Shanker Bakhsh*, 9 Ind. Cas. 406 and *Banke Behari Lal v. Ahlad Singh*, 13 Ind. Cas. 473, referred to.

Where a mortgage-deed contained *inter alia* (a) a primary obligation to re-pay the principal money in fifteen instalments with simple interest at 8 per cent. per annum payable six-monthly on balance due after payment of instalments due, (b) a secondary obligation to re-pay, in case of default of instalments, compound interest at 12 per cent. per annum with six-monthly rests on each instalment or part of an instalment not paid by due date, and (c) another secondary obligation to re-pay, in case of default of interest due, compound interest at 12 per cent. per annum with six-monthly rests on the balance of interest not paid by due date:

Held, that the stipulations (b) and (c) were stipulations by way of penalty within the meaning of section 74 of the Contract Act. [p. 336, col. 1.]

Where a stipulation in a deed is found to be in the nature of a penalty, the Court in assessing the amount of reasonable compensation must examine the evidence relating to the conduct of the parties subsequent to the execution of the deed. [p. 336, col. 1.]

No legal novation or modification of an existing contract is created in a case where one party proposes the novation but the other party accepts the proposal in a qualified manner. [p. 346, col. 2.]

Where a mortgagee agrees to have the existing mortgage-deed substituted by another on more favourable terms to the mortgagor, but never fulfills that agreement the mortgagor cannot subsequently claim the benefit of the terms of the deed that was to be substituted, if he had failed to sue the mortgagee for specific performance of the agreement within the limitation prescribed therefor by law. [p. 346, col. 2; p. 347, col. 1.]

A debtor cannot, by invoking in his aid the doctrine of equitable estoppel against the creditor, say that the creditor is bound, not by the terms of the contract entered into between them, but by those of another contract subsequently arrived at between the debtor and a third person for the purpose of paying off the existing debt, and afterwards broken off, unless the debtor can show that he was induced by the creditor to break his contract with the third person. [p. 347, col. 2.]

Where a clause in a mortgage-deed provided that the mortgagee could not sue unless (1) the entire demand for two instalments for two consecutive years and interest for the principal on two consecutive years remained unpaid and (2) nothing was

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paid for two consecutive years on account of principal or interest:

Held, that the two sub-clauses were quite independent of each other, and that the right to sue did not arise unless nothing had been paid on account of principal or interest for two years. [p. 348, col. 1.]

Where an amendment of plaint is allowed, which is purely of a formal nature and does not in any way prejudice the defendant or increase his costs, he is entitled to no costs. [p. 348, col. 1.]

The amount awarded as reasonable compensation for breach of penal clauses in a mortgage-deed must be considered for the purposes of limitation as a portion of the mortgage-money, and can be charged against the mortgaged property. [p. 342, col. 1.]

Sunder Koer v. Rai Sham Krishen, 34 C. 150; 4 A. L. J. 109; 11 C. W. N. 249; 5 C. L. J. 106; 17 M. L. J. 43; 9 Bom. L. R. 301; 2 M. L. T. 75; 34 I. A. 9 and *Baid Nath Das v. Shamanand Das*, 22 C. 143, referred to.

Gulri Koor v. Bhubaneswari Coomar Singh, 19 C. 19; *Moti Singh v. Ramohari Singh*, 24 C. 699; 1 C. W. N. 437 and *Mathura Das v. Raja Narindar Bahadur*, 23 I. A. 138; 1 C. W. N. 52; 19 A. 39 at p. 47; 6 M. L. J. 214; 7 Sar. P. C. J. 88, distinguished.

A penal clause is not invalidated by section 74 of the Contract Act. It remains effective, but the amount awarded as compensation for its breach is left to the discretion of the Court up to the maximum fixed by the clause. [p. 349, col. 1.]

A Court is not in any way bound to fix the rate of interest from the date fixed for payment up till the date of realisation according to the provisions of the mortgage-deed, but in fixing it it ought to be guided by the circumstances of each particular case. [p. 350, col. 1.]

Sunder Koer v. Rai Sham Krishen, 4 A. L. J. 109; 11 C. W. N. 249; 5 C. L. J. 106; 17 M. L. J. 43; 9 Bom. L. R. 304; 2 M. L. T. 75; 34 I. A. 9; 34 C. 150 and *Managi Singh v. Sahab Ram Singh*, 3 Ind. Cas. 289; 10 C. L. J. 203 at p. 206, referred to.

Appeal from the decree of the Additional Subordinate Judge, Lucknow, dated the 31st October 1912.

Dr. *Rash Behari Ghosh*, Dr. *Satish Chandra Banerji*, Messrs. *Beni Madho Ghosh*, A. P. Sen, Pandit *Lachhmi Narain Shukla* and *Thakur Lal Behari Singh*, for the Appellant.

Pandit *Moti Lal Nehru*, Dr. *Tej Bahadur Sapru*, Pandit *Gokaran Nath Misra*, *Babu Ram Chandar*, *Babu Rudra Dat Singh*, *Babu Manohar Lal* and Mr. A. Spears, for the Respondent.

JUDGMENT.—The suit, against the decree in which the present appeal and cross-objections have been filed, was instituted on the 22nd of August 1911 in the Court of the Subordinate Judge of Fyzabad. It was subsequently transferred for hearing to the Court of the Additional

Subordinate Judge of Lucknow, by whom it was decided on the 31st October 1912. The plaintiff is the Oudh Commercial Bank, Limited, Fyzabad. The Manager of the Bank was Rai Ram Saran Das Bahadur and there were several Directors. The suit was instituted on the foot of a deed of simple mortgage, dated the 2nd September 1894, executed by Babu Narendra Bahadur Singh, *Talukdar* of Hanswar, for a consideration of Rs. 2,35,000. The plaintiff Bank claimed Rs. 9,25,935-14-3 principal and interest, together with such demands, as under the terms of the deed might become due from the date of the suit to the date of realization, along with costs and interest up to the date fixed by the Court for payment, and in default of payment the attachment and sale of the mortgaged property in satisfaction of the amount due out of the sale-proceeds, and further an assertion of the right of the Bank to a decree for the realization of the remaining money if the sale-proceeds were not sufficient to cover the entire demand. The defendant admitted execution of the deed and the accuracy of the account and statement of re payments. He denied his liability for a sum of Rs. 4,700 said to have been paid towards commission. He further set up that the whole claim was barred by limitation, and took a secondary plea that, even if the whole claim were not barred by limitation, the claim for the mass of interest was barred by limitation. He further asserted that the claim for interest could, in no way, be considered as a charge upon the mortgage security. He pleaded in addition undue influence, fraud, and misrepresentation, and claimed certain modifications. Fourteen issues were framed.

The learned Subordinate Judge found, that the defendant's acceptance of the clauses as to enhanced rate of interest had not been secured through undue influence, fraud, or misrepresentation, and that the stipulations as to enhanced interest were neither hard nor unconscionable. He found, however, that one stipulation was of a penal nature. His decision as to the modifications set up was that the defendant had not established that any of the alleged modifications could affect the terms of the deed. He decided the plea of limitation against the defendant, and in the end awarded a decree for Rs. 7,26,725-15-6 with propor-

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tionate costs. He declared the whole amount a charge on the mortgaged property and fixed the 30th of April 1913 as the last date when the decretal amount should be paid.

The appeal filed by the defendant traverses the findings of the learned Subordinate Judge on every point decided against the defendant. The cross-objections traverse the findings of the learned Subordinate Judge on every point decided against the plaintiff. The appeal has been argued very fully by leading Counsel, and the whole of the points in dispute have been set out thoroughly and clearly.

The deed was written in Urdu. An accurate translation of its terms is on the record. The arrangement of the clauses is unmethodical, and in order to understand the terms of the deed; it is better to rearrange its provisions so as to bring out each head. The references are to the clauses.

The deed is dated the 2nd September 1894. The amount advanced was Rs. 2,35,000.

All the *taluka* villages were hypothecated in security.

Conditions as to re-payment of the amount advanced with simple interest.

(1) The amount advanced was to be re-paid in fifteen instalments of varying amounts falling due on specified dates, and

(2) interest at 8 per cent. per annum was to be paid on 30th June and 31st December on the amount due for "principal." (The Bank in their calculations have interpreted the word "principal" in this place to mean amount advanced less amount re-paid on account of instalments and amount due on unpaid instalments. It will be discussed later whether the word "principal" should bear that meaning).

Conditions as to payment of compound interest.

(1) In default of full payment of amount due on account of any instalment on due date, interest at 12 per cent. per annum, which was to be calculated with six-monthly rests (in other words, compound interest at 12 per cent. with six-monthly rests), was to be charged on the amount unpaid.

(2) In default of payment of amount due for interest on due dates at 8 per cent. on the principal (the interpretation of this word in

the calculations of the Bank has already been noted) compound interest at 12 per cent. per annum with six-monthly rests was to be charged on the balances of interest due.

(4) If there were a balance due on account of principal or interest or both on 1st September 1909, compound interest at 12 per cent. per annum with six-monthly rests was to be charged on the balance.

Post diem interest.

(9 and 14) In case the Bank had to sue on the foot of the deed, interest was to run on the decretal amount *plus* costs at 12 per cent. per annum till realization. (This interest is treated as simple interest in paragraph 9 and as compound interest with six-monthly rests in paragraph 14.)

Right to sue.

(5 and 6) The villages hypothecated were to be cleared of all declared encumbrances. If that were not done within four months, the Bank was to be at liberty to bring a suit for attachment and sale of the hypothecated property.

(10) If the villages hypothecated were encumbered with undeclared encumbrances or decayed, the Bank was to have a right to sue from the date of discovery of undeclared encumbrances or the date of decay.

(7) If both the following contingencies arose:

(i) the entire demand for instalments for two consecutive years and interest on principal for two consecutive years remained unpaid, and

(ii) nothing were paid within two consecutive years on account of principal or interest,

the Bank was to have the right to sue for the whole amount due.

(14) If the mortgagor and his heirs "neglected to fulfil the conditions of the deed" or did not pay interest or the instalments at the appointed times the Bank was to have the right to sue, and to obtain compound interest on the decretal amount at 12 per cent. with six-monthly rests in conformity with the conditions laid down in paragraph 7.

(The meaning of these provisions will be discussed later).

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Duties and disabilities of the mortgagor.

- (13) He was to pay any balance due.
 (8) He was not to mortgage, sell, hypothecate, or transfer the property or get it placed in the charge of the Court of Wards.
 (12) He was deprived of the power to effect a decrease in the gross rental or to grant leases for more than seven years.

Rights of mortgagor.

- (15) He could pay instalments in excess of Rs. 10,000 and pay off the whole balance after two years with one year's notice.

We proceed to examine the evidence which shows how the deed came into being. On the 19th September 1893 the defendant submitted a form of an application for a loan to the plaintiff Bank (Exhibit 2). In this application he stated that his annual income was Rs. 50,000 and requested a loan of Rs. 2,25,000 for payment of his prior debts to be re-paid by instalments within fifteen years. He offered to pay 8 per cent. per annum on the loan and proposed to hypothecate the whole of his *taluka* (the net profits of which he stated to be Rs. 41,473) as security. The Bank replied in a letter, dated the 21st of September 1893, asking him to state his liabilities in detail and to give further particulars as to the security. On the 5th October 1893 the defendant replied enclosing a list of his liabilities, which was subsequently found to be inaccurate, and offering to give further details as to the security. He appears to have sent a subsequent letter dated 12th November 1893, which is not in evidence. To that letter the Bank replied on the 21st November 1893 stating that he had not so far sent complete details as to the security. The defendant appears to have written again on the 27th November 1893. The contents of that letter are not proved. The Bank replied to that letter on the same date, requesting the defendant to come to Fyzabad town (the defendant resided in the Fyzabad District at a distance from Fyzabad town) in order that he might see one of the Directors, by name Hari Singh, to discuss the terms of the loan with him personally. It does not appear whether the appellant did or did

not comply with that request. However another letter passed dated the 19th January 1894 from the Bank to the defendant, which appears to show that there had been an interview of the parties between the 27th of November 1893 and 19th of January 1894. On the 28th March 1894 a draft deed (Exhibit 186) was sent by the Bank to the defendant. This fact is established by the contents of a letter dated 7th April 1894 from the Bank to the defendant (Exhibit 81). The defendant replied on the 14th April 1894 (Exhibit 9) that he had been unable to sign the draft, as it required some amendments which he could not discuss properly except in a personal interview, and that he was ill and unable to come to Fyzabad though he hoped to do so later. He apparently came to Fyzabad later, for in a subsequent letter of the 13th of May 1894 he refers to a visit to Fyzabad on the 29th April 1894. He sent the draft with certain corrections to the Bank on 7th May 1894, as is shown by letter Exhibit 10. The draft is before us. It shows that the defendant had gone through every paragraph, noting the portion which he accepted and the portions with regard to which he proposed corrections. When he proposed corrections he inserted the nature of the corrections proposed in the margin. He treated a subsequent draft in the same manner. Comparing this draft with the deed that was finally executed, we find that clauses 1 and 2, which have been retained in practically the same words in the final deed, were accepted by the defendant. The third clause, which related to the payments of the instalments, was not accepted by the defendant. He proposed alterations both in the dates of payment and the amounts payable. The effect of those alterations (which were finally accepted by the Bank, subject to the modification that as Rs. 2,35,000 were eventually borrowed alterations became necessary which involved an increase of the four last instalments) was to cause the dates for re-payments of instalments not to coincide with the dates for re-payments of interest, and further to reduce the amounts of instalments payable at first and increase the amounts of instalments payable later. As it was the intention of the parties that

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interest should be paid upon the balance of the principal due, the result of these alterations was that while the interest was high the instalments would be smaller, and when the amount of interest payable decreased the instalments would be larger. The suggested correction shows that the defendant was capable of making an intelligent arrangement in his own interests. He accepted the fourth clause, which allowed compound interest at 12 per cent. with six-monthly rests to be calculated upon any balance of instalments not paid within fifteen years. This clause in the first draft has been reproduced practically in the final deed. He accepted the fifth clause, which has been slightly altered in the final deed. In the first draft the defendant is given three months within which to clear off declared encumbrances and in the final deed he was given four. In the sixth clause he proposed certain alterations which did not materially affect the force of the clause. With regard to the seventh clause there was a distinct disagreement. The Bank had inserted in the seventh clause a condition of the nature of the condition 7 (i) as given earlier in this judgment in the description of the contents of the deed. The defendant did not wish the Bank to have the power to sue for the whole amount due if the entire demand for instalments for two consecutive years and interest on principal for two consecutive years remained unpaid. He wished the Bank to have only the power to sue for the amount of unpaid instalments and interest, if such a contingency arose. He agreed to the eighth clause, which prohibited his power to transfer. The ninth clause in the draft was to have the effect of allowing compound interest at 12 per cent. with six-monthly rests by way of *post diem* interest. The defendant agreed to the principle, but wished to alter the words. The tenth clause was objected to by the defendant. It refers to his liability in case of disturbance of the mortgage security. The eleventh clause in the draft declared a right to charge compound interest at 12 per cent. with six-monthly rests on the amount of any instalments not paid within due date. The defendant desired to alter the wording of the clause. He accepted the principle. The twelfth clause referred to

the defendant's disability to effect a decrease in the gross rental of the hypothecated property or to grant a lease for more than seven years. It has been practically reproduced in the final deed. The defendant accepted this clause in its entirety. The thirteenth clause is a more or less formal clause by which the defendant was to agree that he and his heirs and representatives should be bound by the terms of the deed. He accepted this clause in its entirety. The fourteenth clause purported to give the Bank the power to sue for the whole amount due on certain conditions. It reproduced and included the seventh clause. The defendant did not agree to this condition. He desired that the Bank should only have the power to sue for the instalments due. The fifteenth clause which defined the rights of the Bank and gave the defendant power to pay more than the stipulated amount of instalment, was not noted on by the defendant.

On the 7th May 1894 (Exhibit 10) the defendant sent the draft back to the Bank with his proposed amendments on it, and the Bank is said by him in his letter of the 13th of May 1894 (Exhibit 11) to have replied at once that the Directors would consider his proposals. In a letter dated 16th May 1894 (Exhibit 12) from the Bank to the defendant it is stated clearly that the Bank would consider the amendments. This letter crossed the defendant's letter of the 13th May and on the 16th May (Exhibit 13) the Bank repeated in reply to the letter of the 13th that the amendments would be carefully considered. In these letters the Bank requested the defendant to come personally and arrange the terms at an interview. On the 19th May 1894 (Exhibit 14) the defendant wrote to the Bank apologising for his inability to come. On the 30th May 1894 (Exhibit 15) the Bank wrote to defendant expostulating with him for failing to come. On the 5th June 1894 (Exhibit 16) the defendant wrote a long letter to the Bank explaining the reasons for his absence. A second draft was then submitted by the Bank to the defendant. This draft, Exhibit 187, was prepared on the 21st July 1894. The amount to be borrowed was again stated in this draft to be Rs. 2,25,000. Clauses 1 and 2 remained

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practically the same. In clause 3 the Bank accepted the defendant's suggestions as to the dates of payments and the amounts to be paid on account of the instalments. The fourth clause remained practically the same. In the fifth clause the period for clearing the declared encumbrances was extended to four months. The defendant suggested some alterations in wording of the clause for the extension of the period. The defendant took no exception to the sixth clause which has been practically retained in the deed. With regard to the seventh clause the parties were again in dispute. The Bank wished to sue for the whole amount due, if for two years consecutively payment was not made of instalments or on account of interest. The defendant had previously objected to the Bank having a right to sue for the whole amount due on account of default of payment of instalments or interest. In this draft he wished to cut out that clause altogether, and to substitute a clause giving the Bank a right to sue for the whole amount if nothing were paid for two years on account of principal or interest. To the eighth clause the defendant wished to add words, giving him the right to obtain further loans on the mortgaged property by means of deeds of subsequent charge. The ninth clause referred to *post diem* interest. The defendant noted against that "this is quite unnecessary but I do not see any harm in it." The tenth to the fifteenth clauses were accepted by the defendant. They are practically the same as those clauses in the existing deed.

The only correspondence which we can discover with regard to this second draft is contained in four letters from the defendant to the Bank, Exhibit 189, Exhibit 190, Exhibit 17 and Exhibit 191, dated respectively the 1st of August, the 4th of August, the 8th of August and the 18th of August 1894. Exhibit 189 refers to certain amendments proposed. Exhibit 190 is important on two points. In this (as translated) the defendant states: "The commission on Rs. 2,35,000 borrowed from the Bank comes to Rs. 4,700 at the rate of 2 per cent. The stamp required for the execution of the deed will be worth Rs. 1,175. The money required for the stamp should either be sent to me or you may yourself purchase

the stamp from the treasury. However after the execution and completion of the deed, this entire money which amounts to Rs. 5,875 shall be deducted from the debt. The rest of the money will be held in deposit by the Bank and the same will be made payable by means of cheques." In Exhibit 191 he says much the same. These two letters show that the amount to be borrowed had been raised from Rs. 2,25,000 to the figure at which it finally stood, Rs. 2,35,000. Further the defendant had agreed that after the execution of the deed and after the payment of Rs. 2,35,000 to him by the placing of that amount to his credit in the Bank's books (presumably in current account) a debit should be made against that account of Rs. 4,700 on account of commission and Rs. 1,175 on account of the expenses of the stamp on the deed. It is clear that the deed was finally executed on the 2nd September 1894, and it is to be noted that the difficulty with regard to clause 7 was got over by inserting both the suggestion of the Bank and the suggestion of the defendant with regard to the Bank's right to sue for the whole amount in case of default. The manner in which this deed was prepared explains the obscurity of certain passages, the inconsistencies and redundancies. Continual alterations by parties who were desiring different objects resulted in the creation of a clumsily worded document.

Having examined the manner in which the transaction came into being, we shall now discuss the pleas taken by the learned Counsel for the appellant in the eighth, ninth, tenth and eleventh grounds of appeal to the effect that the execution of those clauses of the deed which refer to the payment of enhanced interest was procured by undue influence, fraud, and misrepresentation, and that those clauses themselves are hard and unconscionable.

An examination of the notes and criticisms of the defendant upon the drafts indicates that the defendant was perfectly capable of understanding the meaning of every term of the document and their effect. He was not only capable of objecting to what did not suit him, but he was capable of suggesting what would suit him. It will be seen that the negotiations which culminated

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in the execution of the deed in suit lasted very nearly a year, and that during that period the defendant had studied at his own residence the conditions of the proposed arrangement for many months. The defendant has given evidence on his own behalf, and his case appears to be that he understood what would be the effect of the clauses with regard to enhancement of interest, but that he assented to those clauses because he had been assured by Rai Gokul Chand Bahadur, who was then one of the Directors, and by Rai Ram Saran Das Bahadur that those clauses would never be enforced against him. The learned Subordinate Judge has given satisfactory reasons for his finding that he does not believe the evidence of the defendant upon this point. We agree with his conclusion and with the reasons supporting it. We find that in the first draft (Exhibit 186) the defendant, while taking exception to other clauses, accepted unconditionally the second clause, with regard to the charge of compound interest on arrears of interest, and proposed with regard to the eleventh clause, that related to the charge of compound interest on unpaid instalments, alterations in the wording only. He accepted the principle that compound interest should be paid on overdue instalments. His explanation, that he was talked over by Rai Gokul Chand Bahadur and the others into accepting these clauses on the understanding that they would never be enforced, would, in our opinion, be too weak to be accepted if it stood alone. In view of the fact that when enhanced interest was charged under these clauses he made no protest, it becomes incredible. We find that, when he received an account charging interest at the enhanced rate, he replied on the 21st October 1896 (Exhibit 28) excusing himself for non-payment of the amount due because he had no ready money and making no protest against the charge of enhanced interest. On the 10th February 1897 (Exhibit 30) he writes acknowledging the correctness of the accounts submitted and making no protest as to the enhanced interest charged. Nowhere can it be found that he made a protest in subsequent correspondence against the enhanced rate of interest. Thus there is not the slightest ground for a finding

that the defendant was induced by anybody to believe that the clause allowing enhanced interest would not be enforced, or that his consent to any portion of the deed as executed was obtained by fraud or misrepresentation.

The plea of undue influence is based on the following grounds. It is asserted that the defendant owed money to the Bank at the time that the negotiations commenced, that the Bank had threatened to sue him with regard to that amount, and that he was so obsessed by fear of legal proceedings being taken against him that he was unable to resist the influence put upon him by the Bank to accede to onerous conditions. Further, it is set up that Rai Gokul Chand Bahadur had been the defendant's legal adviser in various cases (the gentleman in question was a Pleader practising in Fyzabad), and that the defendant was thus absolutely under the influence of Rai Gokul Chand Bahadur. At the time that the deed was executed the defendant's debts amounted in all to Rs. 2,25,811-8-3. Many of these debts were on account of deeds executed by the defendant's father. Out of this total amount he owed the plaintiff Bank at the date that the deed was executed only Rs. 22,517-9-6. If the Bank had sued him for that amount, he could have paid it from six months of his income for on his own showing in his application for the loan (Exhibit 2) his annual income was then Rs. 50,000. At the time that the negotiations commenced he owed the Bank something less than Rs. 22,517-9-6. The suggestion of undue influence in respect of what he previously owed the Bank cannot possibly be accepted. With regard to the alleged influence of Rai Gokul Chand Bahadur on the defendant, we find no reason to suppose that Rai Gokul Chand Bahadur exercised any influence whatever upon the defendant to induce him to accede to the terms of the loan. It would appear rather that the defendant utilized Rai Gokul Chand Bahadur's friendship to obtain a loan, his legal adviser happening also to be a Director of the Bank from which he wished to obtain money, and he appears to have trusted to the latter gentleman's friendly offices to obtain what he wanted. With regard to

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his other debts, the learned Subordinate Judge has shown that he was paying higher interest on the deeds that he proposed to satisfy than the interest which the Bank agreed to accept. This transaction was distinctly to his advantage. The defendant's income, as has been stated, was then some Rs. 50,000 a year, Rs. 41,473 of which were obtained from the profits of the mortgaged property. In ordinary circumstances he had every prospect of re-paying the amount of interest and the instalments due under the terms of the deed and retaining sufficient income to support himself with suitable comfort. At the time that he executed the deed he had every reason to suppose that his income was likely to rise. It appears that, in spite of the fact that the land revenue on his *taluka* has been somewhat enhanced, the income actually has risen, for the defendant stated in his evidence (o. p. 75) that his income in 1912 was Rs. 63,000. The terms of the deed were not onerous if he paid the interest and the instalments regularly. As far as we can see, in spite of his losses at the time of the famine of 1896 he could have, if he wished, paid the interest and the instalments regularly all along. We, therefore, find that he was not induced by undue influence to accede to any portion of the deed, and from our previous findings it is clear that the terms of the deed are neither hard nor unconscionable.

We next consider the point taken in the 23rd ground of appeal. The amount of Rs. 4,700, which was included in the total consideration of Rs. 2,35,000, was paid on account of commission by a cheque dated the 4th of September 1894, two days after the execution of the deed (Exhibit A36). Rai Ram Saran Das Bahadur endeavoured to explain in examination-in-chief what was meant by this item. He stated (o. p. 125): "The sum of Rs. 4,700 was paid to the plaintiff by the defendant as commission. It had been agreed with the defendant before the loan was advanced that he will have to pay Rs. 2 per cent. on the loan as commission since the money had been lying unused so long. (Exhibit 190 shown). This agreement as to commission must have been made before the 4th August 1894." In cross-examination (o. p. 148) he stated, "the defendant paid Rs. 4,700 at the rate of

2 per cent. on the amount advanced. The money was lying idle for about three or four months. We did not invest it nor attempt to invest it because we thought we might be called upon to advance it to the defendant any time.

"I did intimate to the defendant that he would be liable for interest upon the money lying idle.

"Q. Whether you charged commission at the rate of 2 per cent. calculating the loss of interest on the money lying idle?

"A. I did not calculate the actual loss in interest when fixing the amount or rate of commission.

"(Exhibit A 33 shown). The word commission appears on the cheque and also in the Bank accounts (Exhibits A 34 and A 35.)

"Q. I put it to you that you are ashamed to admit that your Bank charged commission, though you actually did charge it and now you call it compensation?

"A. No, I am not ashamed of it."

The defendant deposed (o. p. 73), "there was no talk about the commission before the deed was executed. There was no talk about compensation to be paid for the money lying idle in the Bank during the negotiations. I issued the cheque for payment of commission after the deed had been executed," and at o. p. 115 when shown Exhibits Nos. 190 and 191 he stated: "They bear my signatures. These are my letters. On going through these letters I now say that before execution of the deed in suit I had agreed to pay commission to the plaintiff Bank."

We have already given the portions of these letters relating to the payment of commission. It is clear that the charge for commission at 2 per cent. was of the nature of a bonus. There is nothing to show that any particular sum of money was kept idle. But the letters and the accounts show that Rs. 2,35,000 were credited in consideration of the execution of the deed to the defendant in the Bank's books, and that, after that amount had been credited, he paid the Bank Rs. 4,700 on account of this commission.

There are two leading Chancery cases on the subject of commission. The first case

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is the case of *James v. Kerr* (1). In that case a young man in poor circumstances borrowed £100 from a Solicitor at 5 per cent. per annum, and covenanted in a deed of mortgage to employ a particular third person as his Solicitor to conduct his case in an impending action and to pay, if he succeeded in that action, £225 by way of bonus. He succeeded in his action and then sued to redeem the mortgage. The Court held (1) that the mortgage was tainted with champerty, (2) that the bonus was illegal as being a collateral advantage stipulated for by a mortgagee and (3) that the transaction was voidable as an undue advantage obtained from the mortgagor when under the pressure of distress. Redemption was accordingly decreed for £100 and interest thereon. In that case the bonus was disallowed on three grounds, the two most important of which were that the transaction was champertous, and that undue influence had been exercised upon the mortgagor. It is true that the plea that there was a collateral advantage which clogged redemption was also accepted. The learned Judge, who decided this case, decided the subsequent case of *Mainland v. Upjohn* (2). In that case he decided that, when a commission had actually been paid, the mortgagor could not obtain credit for the payment of that amount in a subsequent suit on the mortgage. He stated at page 143: "Sir Horace Davey was justified in saying that Mr. Upjohn could not insist on any commission which had not actually been paid, but he said—and this is really the turning point to my mind on this part of the case—that where the commission had actually been paid the transaction amounted in fact to this—the payment by the mortgagee of the whole amount of the advance to the mortgagor and the return by the mortgagor of a certain part of it to the mortgagee. It does not matter whether the money was actually paid over in cash and then re-paid. If two persons not only understand what they are about—and I have no doubt that in this case Mr. Douglas did thoroughly understand what he was about—if those persons meet and one says to the other, 'now

I will lend you £1,000 upon condition that out of it you pay me a certain sum as commission for that loan,' and the transaction is concluded there and then on that basis, and only a portion of the £1,000, deducting the bonus, is paid over, that is equivalent to the payment over of the full amount of the £1,000 and a re-payment out of it of the bonus. If the mortgagor has been deceived, or taken by surprise, or if there has been any oppression or improper dealing in the matter, there is ample equity, of course, to set it right on that ground; but if both parties know precisely what they are doing, and this is voluntarily done, and done in pursuance of a deliberate bargain, how a mortgagor can possibly say to a mortgagee, 'pay that money back to me,' I cannot conceive. It is impossible. The money can only be recovered when it has been paid over under a mistake of fact, or under some pressure—some advantage taken of the payer which disentitles the payee to retain the money. But where no such advantage has been taken, where there has been no such improper pressure, if the parties are completely on equal terms, all I can say is that the money in such a case as that must be treated as having been actually paid by the mortgagor to the mortgagee as an inducement to lend the rest of the amount; and then, I conceive, the mortgagor has no right to recover it, nor has he any right to complain that the whole amount is charged against him in the mortgage-deed. Of course, all this is quite independent of any case of improper dealing, exorbitant amount, great oppression, dealing with an ignorant person who has not got proper advice, and so on. All cases of that kind I entirely exclude; but treating for the moment both parties as being on completely equal terms, one not at all under the influence of the other, both bargaining and knowing perfectly well what they are about, in my opinion, money so paid over cannot legally be claimed back, nor can a mortgagor say to the mortgagee in such a case, 'though I have paid you that money and agreed that it should be received by you as a consideration for the advance you have made me, I will strike it out of the mortgage account.'"

Previously in his decision the learned Judge had referred at page 139 *et seq*

(1) 40 Ch. D. 449; 58 L. J. Ch. 355; 60 L. T. 212; 37 W. R. 279; 53 J. P. 628.

(2) 41 Ch. D. 126; 58 L. J. Ch. 361; 60 L. T. 614; 37 W. R. 411.

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to the case of *Potter v. Edwards* (3). Now in that case a commission had been allowed by the Court of Equity on the ground that the security was risky and Kay, J., discussed the decision in *Potter v. Edwards* (3) and accepted it completely. It is to be noted, however, that in the subsequent passage he has carried the doctrine further than the doctrine laid down in *Potter v. Edwards* (3). He has applied principles, which relate to all cases in which a commission has been actually paid apart from the fact whether the security is or is not risky. There is no conflict between the decision of *James v. Kerr* (1) and *Mainland v. Upjohn* (2), because in the previous case the commission had not been paid. We find it necessary to draw attention to this point as the head-note of the report in *Mainland v. Upjohn* (2) is misleading. It commences, "where advances have been made by a mortgagee to mortgagor upon security of a speculative character, such as a building estate." We do not find that Kay, J., decided anywhere that security in *Mainland v. Upjohn* (2) was of a speculative character. The security was partly free-hold property, the mortgagee does not appear ever to have lent more than could be recovered with safety upon the security, and Kay, J., has clearly laid down that the question of risk does not enter in the determination of the point.

Applying the principles of *Mainland v. Upjohn* (2) the defendant would not be entitled to the recovery of Rs. 4,700. He had not been deceived or taken by surprise, nor had there been any improper pressure or unfair dealing in the matter. Both parties knew perfectly well what they were doing. Their acts were voluntary and in pursuance of a deliberate bargain. There was no mistake of fact, no pressure, and no advantage taken of the prayer. The parties were completely on equal terms.

The principles in *Mainland v. Upjohn* (1) have been affirmed, in so far as Indian Courts are concerned, by the decision of their Lordships of the Privy Council in *Sunder Koor v. Rai Sham Krishen* (4). It will be seen from

the report of that case (page 152) that a sum of Rs. 8,700 and a sum of Rs. 3,300 had been expended for commission on the execution of the first and second bonds. These sums formed a portion of two sums of Rs. 35,000 and Rs. 20,000 (page 157) and were separable from the remaining items. The learned Judges of the Calcutta High Court had held that the larger amounts (which included the lesser) were chargeable, and their Lordships of the Privy Council agreed with their conclusion. We, therefore, decide this point against the appellant.

We shall now take up the points covered by the 12th and 13th grounds of appeal, which are also covered by a portion of the cross-objections. We shall first examine the difference in figures up to the end of 1895 if instalments and interest had been paid in full or if nothing had been paid on account of instalments and interest. Under the terms of the deed the mortgagor had to pay interest at 8 per cent. on Rs. 2,35,000. Thus he had to pay on 31st December 1894 Rs. 6,214-7-0, the interest from 2nd September 1894 to 31st December 1894. There would be further due the interest from the 1st of January 1895 to the 28th of February 1895, Rs. 3,123-5-4, and on the 1st of March 1895 he had to pay Rs. 10,000 towards the first instalment. According to the interpretation of both parties, when he had paid the first instalment the principal was reduced to Rs. 2,25,000 and the interest on that amount at 8 per cent. from the 1st March 1895 to 30th June 1895 amounted to Rs. 6,000. The interest at 8 per cent. from 1st July 1895 to 31st December 1895 amounted to Rs. 9,000. Thus, if he had paid up everything that was due from him, he would have paid Rs. 10,000 instalment towards principal and Rs. 24,347-12-4 towards interest—Rs. 34,347-12-4 in all—and the total amount due would have remained at Rs. 2,25,000, making a grand total of Rs. 2,59,347-12-4. If he paid nothing during this period he would owe at the end of it Rs. 2,35,000 principal, and according to the manner in which the plaintiff Bank has calculated the

(3) 26 L. J. Ch. 468.

(4) 34 C. 150; 4 A. L. J. 109; 11 C. W. N. 249; 5 C. L. J. 106; 17 M. L. J. 43; 9 Bom. L. R. 304; 2 M. L. T. 75; 34 I. A. 9.

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interest, Rs. 24,347-12-4 interest, that is to say, Rs. 2,59,347-12-4 *plus*

(1) compound interest at 12 Rs. a. p. per cent. with six-monthly rests on Rs. 6,214-7-0 from 1st January 1895 to 31st December 1895 ... 768 1 7

(2) compound interest at 12 per cent. with six-monthly rests on Rs. 9,133-5-4 from 1st July to 31st December 1895 ... 548 0 0

Total 1,316 1 7

(3) compound interest at Rs. 12 per cent. with six-monthly rests on Rs. 10,000 from 1st March 1895 to 31st December 1895 ... 1,024 0 0

that is to say, he would be worse off to the extent of Rs. 2,350-1-7 if he paid nothing on account of interest and the first instalment. This calculation is made on the interpretation placed by the Bank on the terms of the deed. If these terms be taken (as we consider they should be taken) to mean that in default simple interest continued to run at 8 per cent. on the whole Rs. 2,35,000 and not on Rs. 2,35,000 less the amount of instalments due, and compound interest at 12 per cent. with six-monthly rests on unpaid interest and unpaid instalments, the amount would be greater.

Examining the contents of the deed we find that it contains *inter alia*

- (a) a primary obligation to re-pay Rs. 2,35,000 in fifteen instalments, with simple interest at 8 per cent. per annum payable six-monthly on balance due after payment of instalments due. (It is to be noted that there is no condition to pay compound interest at 8 per cent. per annum.)
- (b) a secondary obligation to re-pay, in case of default of instalments, compound interest at 12 per cent. per annum with six-monthly rests on each instalment or part of an instalment not paid by due date.
- (c) another secondary obligation to repay, in case of default of interest due, compound interest at 12 per cent. per annum with six-monthly rests on the balance of interest not paid by due date.

The failure to comply with second-

dary obligations (b) and (c) involved an obligation which as has been shown, would (even on the interpretation of the plaintiff Bank) have amounted in the case of total default by the end of 1895 to Rs. 1,024 in the case of (b) and Rs. 1,316-1-7 in the case of (c).

The question now arises whether stipulations (b) and (c) are "stipulations by way of penalty" within the meaning of section 74, Act IX of 1872, as amended by Act VI of 1899. The learned Subordinate Judge considered clause (b) not to be a stipulation by way of penalty, and considered clause (c) a stipulation by way of penalty. There is an appeal against his decision on the first point and a cross-objection against his decision on the second. Until the amendment of section 74 the doctrine laid down for the most part in Indian Courts was that an agreement to pay enhanced interest from date of default was not a penalty within the meaning of the unamended section and must be enforced. This doctrine is set out *inter alia* in the case of *Mackintosh v. Crow* (5) and *Nanjappa v. Nanjappa* (6). At page 166 of the latter decision it is stated: "In such an agreement no question of penalty arises because it imposes an obligation on the debtor to pay a larger sum than what was originally due. In the words of section 74 of the Contract Act"—that is to say, before amendment—"no sum is named as the amount to be paid in case of such breach." The Bombay High Court, however, had laid down that apart from the provisions of the section as then unamended, such an agreement might be considered penal in certain circumstances. This decision will be found in *Umarkhan Mahamad Khan Deshmukh v. Salekhan* (7). At page 113 the following words are used:—"Upon this review of the authorities we think the safer conclusion is that.....a proviso for enhanced interest in the future cannot be considered as a penalty, unless the enhanced rate be such as to lead to the conclusion that it could not have been intended to be part of the primary contract between the parties."

According to the former view an agreement to pay enhanced interest from the date

(5) 9 C. 689; 13 C. L. R. 102.

(6) 12 M. 161.

(7) 17 B. 106.

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of default could in no circumstances be considered penal. According to the latter view it could be considered penal in certain circumstances. The view of the Bombay High Court was based upon the principles enunciated by English Courts of Equity in *Astley v. Weldon* (8), *Wallis v. Smith* (9) and other cases.

But the amendment of the section which, in extension of the previous abolition of the distinction between penalties and liquidated damages, declared that, if the contract contained any other stipulation by way of a penalty, the Court should award not the penalty stipulated for but reasonable compensation not exceeding the amount of the penalty, and further explained that a stipulation for increased interest from the date of default may be a stipulation by way of penalty, withdrew decision of the point to a considerable extent from consideration of the question of the meaning of the primary contract.

In cases decided after the section was amended, it was held in *Kutub-ud-din Ahmad v. Rashid-ud-din* (10): "According to the English authorities it is well-settled that if a mortgagee stipulate for a higher rate of interest in default of punctual payment, he must reserve the higher rate as the interest payable under the mortgage and provide for its reduction in case of punctual payment, and if he do so he will be entitled to recover the higher rate. But he cannot effect his object by reserving the lower rate and then fixing a higher rate in case of non-payment of the lower rate at the appointed time, such an agreement being considered in equity as in the nature of a penalty."

The decision goes on to say that the soundness of the rule has been questioned, but the rule was approved as binding on Indian Courts. The facts in that case were that the rate of interest was to be at 24 per cent. per annum from the date of execution, and that the mortgagor was entitled to a reduction to 15 per cent., if he paid the interest punctually. The Court held that, as he had not paid the interest punctually,

it could be calculated at 24 per cent. There was no question of enhanced interest being charged from date of default, and we quote this decision simply with regard to the remarks as to the penal nature of enhanced interest from date of default. In *Sunder Koer v. Rai Sham Krishen* (4)—a case to which we have referred in another connection—their Lordships of the Privy Council at page 157 examined the explanation in the amended section 74, but did not decide all the conditions which would cause increased interest from date of default to be considered a stipulation by way of penalty. They said: "The 'explanation' to section 74 of the Contract Act as amended says that 'a stipulation for increased interest from the date of default may be a stipulation by way of penalty.' The Indian Courts have invariably held that where (as in the present case) the stipulation is retrospective, and the increased interest runs from the date of the bond and not merely from the date of default, it is always to be considered a penalty, because an additional money payment in that case becomes immediately payable by the mortgagor. Their Lordships accept that" view of the Statute, and it is unnecessary to discuss under what circumstances increased interest running only from default should or should not be considered a stipulation by way of penalty."

The history of the law on the subject and the meaning of the amended section have been discussed fully by a Full Bench of the Madras High Court in *Avathani Muthukrishniah v. Sankaralingam Pillai* (11), which overrules the decision in *Sankaranarayana Vadhyar v. Sankaranarayana Ayyar* (12). Nowhere has a criterion been laid down, by which it can be decided when a stipulation for increased interest from the date of default is, and when it is not, a stipulation by way of penalty. It has been brought to our notice that in two cases decided in this Court by single Judges, *Jai Ram v. Sheo Shanker Bakhsh* (13) and *Banke Behari Lal v. Ahlad Singh* (14), stipula-

(8) 2 B. & P. 346; 5 R. R. 618; 126 E. R. 1318.

(9) 21 Ch. D. 243 at p. 261; 52 L. J. Ch. 145; 47 L. T. 389; 31 W. R. 214.

(10) 5 Ind. Cas. 665; 32 A. 448; 7 A. L. J. 394.

(11) 18 Ind. Cas. 417; 36 M. 229; 13 M. L. T. 20; 24 M. L. J. 135.

(12) 25 M. 343; 11 M. L. J. 421.

(13) 9 Ind. Cas. 406.

(14) 13 Ind. Cas. 473.

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tions similar to the stipulations in this case were not regarded as penal, but [apart from the fact that the latter decision was based on the decision of *Sankaranarayana Vadhyar v. Sankaranarayana Ayyar* (12), which has since been overruled] neither decision lays down any principle on the point, and the decisions interpret only the terms of the deeds before the respective Courts.

Interest is generally the price paid for the use of money advanced, and as such is not of the nature of a penalty. A debtor is not punished by payment of simple interest. He pays interest for the accommodation. In the case of an agreement to pay simple interest there can be no difficulty in accepting this proposition. In the case of an agreement to pay compound interest at the same rate as the simple interest agreed on, the debtor fixes the price paid for the accommodation at a progressive rate, and the element of punishment or penalty is absent. Thus their Lordships of the Privy Council say in *Sunder Koor's* case (4), to which reference has been made, "Compound interest is in itself perfectly 'legal,'" that is to say, it can be legally enforced as part of a contract. But where the parties agree that, if the debtor does not keep his engagement to pay the interest by due date either at the non-progressive rate when the interest first falls due, or at the progressive rate on subsequent defaults, he shall be made to pay at a higher rate, the element of punishment appears. A penalty then arises for non-compliance with the conditions. So their Lordships continue, "But compound interest at a rate exceeding the rate of interest on the principal moneys, being in excess of and outside the ordinary and usual stipulation, may well be regarded as in the nature of a penalty."

There has been a disposition in some Courts to regard the words "stipulation by way of penalty" as meaning "stipulation by way of a hard and unconscionable penalty." In *Avathani Muthukrishnier v. Sankaralingam Pillai* (11) to which reference has been made, the ordinary common sense meaning of the word "penalty", when used in relation to contracts, is stated to be "a liability agreed to by the parties to be imposed as a vindictive punishment on the party committing the breach of contract, and not merely as reasonable and even liberal compensation to the

other side injured by the breach of contract." We consider that the definition should be rather a liability agreed to by the parties to be imposed as a punishment on the party committing the breach of contract. A penalty may be a vindictive penalty or a reasonable penalty. It may be severe or mild, it may be fair or unfair, but in all circumstances it remains a penalty. To constitute the existence of a penalty it would appear only necessary to establish the element of punishment, however well-deserved and temperate such punishment might be. It may be argued against this interpretation that its acceptance would involve a substitution of the words "is a stipulation by way of default" for the words "may be a stipulation by way of default" in the explanation to section 74. We do not concede that this interpretation involves such substitution. It is true that according to our interpretation cases in which a stipulation for increased interest from the date of default would not be a stipulation by way of a penalty would be rare, but it does not follow that they would not exist. We regard illustration (d) as intended to give a glaring instance of such a stipulation by way of penalty. The existence of illustration (f) is not against our conclusion as it obviously gives a case of the price paid for accommodation. No interest is there charged.

We have derived considerable assistance from certain remarks in *Avathani Muthukrishnier v. Sankaralingam Pillai* (11) at page 265:—"What then is the real principle underlying the Court's interference with the contract between parties as to a payment to be made by way of damages? In my opinion it can be no other than this—the doctrine that the Court will carry out all contracts between parties is confined to the carrying out of the primary contract and does not extend to a secondary or subsidiary contract to come into operation if the primary contract is broken. In bonds securing the payment of money, the contract regarded as primary is the promise to pay the amount due to the creditor with the interest, if any, agreed upon. Any further contract, to be binding on the promisor if he breaks this contract, is regarded as a secondary one, intended to secure the fulfilment of the primary contract, and the Courts both in England and in India do not feel bound to carry out such a secondary contract

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apart from its justice and reasonableness...
.....If the secondary contract is a just and reasonable one, the Court, of course, has the power to award the damages secured by it as reasonable in the circumstances."

We are of opinion that both stipulations (b) and (c) are stipulations by way of a penalty. But it does not follow from this that the penalty stipulated is in either case an unreasonable penalty, and it is our duty to assess reasonable compensation for the breach of these stipulations which must be something between 8 per cent. simple interest and the highest amount due under these stipulations. It is to be noted that no rate of 8 per cent. compound interest was ever fixed, and, even if it had been we need not necessarily have awarded it, for our duty would be to award reasonable compensation. To decide the amount of compensation we must examine the evidence showing the conduct of the parties subsequent to the execution of the deed.

The defendant after a very short time began to get irregular in his payments and seems soon to have become dissatisfied with the terms of his obligation and to have formed the idea of borrowing money elsewhere to satisfy it. Before August 1895 he had according to his evidence (o. p. 64) approached a certain Babu Moti Chand and the Bank of Upper India to obtain a loan. He failed in both instances. In August 1900 he had paid Rs. 61,895-14-2, but the debt in spite of that re-payment had then accumulated to Rs. 2,97,638-15-0. He then approached the Allahabad Bank, Lucknow, asking for a loan of Rs. 3,00,000. His letter to the Allahabad Bank has not been proved. The Bank replied, (Exhibit A2) in a letter dated the 28th August 1900, asking the defendant for a definite agreement to pay 8 per cent. and to mortgage his entire property. The defendant had apparently had an interview with the Agent of the Allahabad Bank at Lucknow. Reference is made to this in a subsequent letter from the Agent (Exhibit A3) dated 24th September 1900. There is nothing to show how negotiations progressed between that date and the 6th of April 1901. But we find from Exhibit A4, a letter from the Agent dated 12th April 1901, that the defendant had agreed in the letter of 6th April to the terms proposed by the Allahabad

Bank. In Exhibit A4 the Agent notes his intention of sending a draft bond, and on the 20th May 1901 (Exhibit A5) the Agent wrote to the defendant enclosing the draft bond (Exhibit A5 X). This was a bond for Rs. 3,15,000. The Bank were at liberty to call in the money at the expiration of five years if there had been default in the payment of interest. If interest were paid regularly the right to sue was deferred. Compound interest was to be charged at 8 per cent. with six-monthly rests. There appears to have been some discussion as to the terms of this draft, and amendments proposed by the defendant seem to have been accepted (see his evidence at o. p. 64). On the 22nd July 1901 the Agent telegraphed to the defendant (Exhibit A6), "When may we expect draft deed duly approved?" Then (see defendant's evidence at o. p. 64) the defendant went to Rai Gokul Chand Bahadur taking with him the whole of the papers and at Rai Gokul Chand Bahadur's instance wrote the following letter dated 23rd July 1901, of which this is a translation to the plaintiff Bank (Exhibit 97):—

"Your letter demanding the payment of money due to the Bank together with the accounts for the half-year ending with June 1901 came to hand. As the money due to the Bank has enormously increased and as the interest on the unpaid instalments is also running at a high rate I, therefore, request you to have a fresh deed executed by me in respect of the money due to the Bank bearing interest at 8 per cent. per annum fixing the period of re-payment at 15 years. Half-yearly interest to be payable on 30th of June and 31st of December, but if the same be not paid on the due dates then the same will also carry interest at 8 per cent. per annum. Kindly let me hear soon about the acceptance or non-acceptance of this my proposal of 23rd July 1901."

It is to be noted that the defendant did not ask the plaintiff Bank to give him the same terms as the Allahabad Bank had accepted. Under the terms of the Allahabad Bank a right to sue accrued within five years if interest were not paid regularly and within ten years in any circumstances. The defendant asked the plaintiff Bank to give him a deed on which the Bank would not have a right to sue for fifteen years. Rai

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Ram Saran Das Bahadur on receiving this letter put up this memorandum to the Directors (Exhibit A32) on 24th July 1901:—

"Attached is a letter from Babu Narendra Bahadur Singh, *talukdar* (Fyzabad District). in reply to our half-yearly letter regarding his balance to 30th June 1901, amounting to Rs. 3,16,794. Under the conditions of the existing bond the total amount is payable on the 1st March 1909, but as he has been very backward in paying his instalments of principal and interest, *we can demand the whole amount due at once.*

[We note that under the conditions of the deed (as we shall subsequently explain) the plaintiff Bank had not the right to sue on their deed at that time. Of course they could have demanded the whole amount then, but they could not have recovered it legally. If Rai Ram Saran Das Bahadur meant to suggest that the right to sue had arisen, he misinterpreted the terms of the deed].

"One of the conditions of the bond is that interest at 12 per cent. will be charged on all arrears of instalments of principal and interest, although the amount was advanced at 8 per cent.

"The applicant now says that as the condition for payment of interest at 12 per cent. is very hard, the rate being excessive for large amounts, another bond may be taken from him for three lakhs or so, on the mortgage of his whole *taluka* in this district, as before, with this proviso, that interest will be charged at 8 per cent. and no higher on the whole amount, compound interest being payable if the interest is not paid regularly on 30th June and 31st December.

(We note that Rai Ram Saran Das Bahadur did not draw the attention of the Directors to the fact that the defendant did not wish the right to sue under the new bond to accrue within less than fifteen years).

"He wishes to know at an early date, whether the Directors are willing to grant his request. The property is worth about 9 or 10 lakhs of rupees.

"To the Directors for consideration and orders."

The Directors before whom this memorandum was laid were Rai Gokul Chand Bahadur, Kadir Bux, Sarju Prasad and E. L. Graham.

We do not know whether there were any other Directors of the Bank at that time. On the 24th July 1901 Rai Gokul Chand Bahadur, who had been consulted by the defendant and informed of the proposed arrangement with the Allahabad Bank, Lucknow, made the following note: "I have learnt from a very reliable source" (he apparently meant from the defendant himself) "that the Allahabad Bank has already agreed to advance money to this *talukdar* at 8 per cent. If we do not agree to have the bond renewed on the terms suggested by him, he will pay our money *at once.* Under these circumstances I would advise the Bank to grant the prayer without any lapse of time." The remaining three Directors agreed with Rai Gokul Chand Bahadur. On the 25th July 1901 the Bank sent the following reply (Exhibit 97):

"Your letter dated 23rd instant was laid before the Directors of the Bank and your proposal regarding interest has been accepted and it will be given effect to from the date of the execution and completion of the deed. Please remit as much money as may be in hand, so that the account in respect of the entire money due to the Bank may be prepared and sent to you. Also please send a list of the villages showing their *nikasi kham*, *malguzari*, cesses, etc., in accordance with the current Land Revenue Register, so that an inquiry may be made."

It is to be noted that no necessity has been established by the plaintiff Bank for the making of any such inquiry. From that date the defendant ceased to carry on negotiations with the Allahabad Bank, Lucknow. There is no evidence to show that he ever broke off negotiations with the Allahabad Bank, Lucknow. He seems simply to have discontinued the correspondence. It is impossible to say whether he definitely intended to drop negotiations with the Allahabad Bank, Lucknow, then or at any future time. Rai Ram Saran Das Bahadur has given evidence with regard to what happened afterwards. He stated (o. p. 128), "The defendant never sent in the papers asked for nor turned up, and thus the negotiations fell through." He further stated in cross-examination (o. p. 150), "I had no doubt as to the sufficiency

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of the security in spite of enhancement of Government revenue under the Revised Settlement. I did not like the idea of being paid off in 1901 under the transaction between the defendant and the Allahabad Bank when we could offer the same terms as the Allahabad Bank did.

"I did not like the idea of so much money being returned to us.

"I was willing to give up the claim for the future interest at the enhanced rate.

"At that time I took Rs. 8 per cent. per annum, without any stipulation as to future enhancement in the rate of interest, as a good investment.

"(Note on Exhibit A32 shown to the witness). It was initialled by Gokul Chand and signed by all other Directors. Kadir Bux, Sarju Prasad and Mr. E. Graham besides Gokul Chand were the Bank Directors at the time (Exhibit 98 shown).

"There was nothing in the note (on Exhibit A 32) requiring a fresh security.

"Q. Why should you then have asked for such a list as is referred to in the Exhibit 98?

"A. To satisfy ourselves as to the net income at that time.

"Q. You were going to reduce the interest on the security of the same property and yet you say that you were going to ascertain the income. Does it not look strange to do so?

"A. All I wanted was to ascertain if the income was such as would enable the defendant to pay interest.

"I started the inquiry at my own initiative as Manager of the Bank.

"I knew at the time of this letter that the Revised Settlement had been concluded."

At o. p. 153 he stated: "I sent no draft to the defendant because the defendant had not supplied the list as asked for. The new deed would have comprised the same property.

"The consent as regards reduction in the rate of interest was not contingent upon the defendant's furnishing further security. We had decided to forego the clause about the enhanced rate of interest without calling for fresh security.

"Q. Then why did you ask for further list?

"A. We were anxious to know the net profits, simply to find out how the defendant was going to pay up the interest."

There is much in this transaction upon which we shall have to comment, but at present we need only remark that the proceedings of the plaintiff Bank (apart from the proceedings of Rai Ram Saran Das Bahadur) show clearly that in July 1901 they knew that, if they held their hands, the defendant would in all probability re-pay them the total amount due on the deed, and that they deliberately entered into negotiations with him to prevent his paying at the time, but that they never carried these negotiations to the point of drafting a fresh deed and forwarding it to him for approval.

The defendant was dissatisfied with his failure to obtain a fresh deed from the plaintiff Bank and he deposes that he approached the Maharaja of Ajudhia, who was an intimate friend of his, about January or February 1902 (o. p. 67). The Maharaja appears to have approached the Manager of the Delhi and London Bank, Lucknow, and to have asked him whether he could advance the defendant the money that he required. We find a copy of an important letter which was admitted as genuine by the learned Counsel for the plaintiff at the time of appeal (although admission of a copy of it was objected to when the writer was examined on Commission) dated the 28th August 1902, in which the Manager of the Delhi and London Bank, Lucknow, wrote to the Manager of the Delhi and London Bank's Head Office, London — "Narendra Bahadur Singh, *Talukdar*, Bishan Chandpur, Fyzabad District, No. 142, *Talukdar* List, page 50.

"This *Talukdar* has applied to us through the Maharaja of Ajudhia for a loan of three and a half lacs of rupees on the security of his property paying Government revenue Rs. 45,731, the profit being over 1 lac. The loan is to be for a period of five years, instalments Rs. 40,000 a year and interest half-yearly.

"Kindly let us have your instructions by wire."

The copy which we have before us need not necessarily be an accurate copy of the original but it has been certified as a true copy by Mr. Corlett, the successor of the Manager who wrote that letter. The profits

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of the defendant's estate were certainly not one lakh and there must be a clerical error as to the amounts of instalments, as five instalments of Rs. 40,000 a year amount only to Rs. 2,00,000 in five years. If the Maharaja of Ajudhia had stated that the defendant's profits were a lakh of rupees, it does not follow that the Bank would have agreed to advance the money, if it had subsequently discovered that the profits were about half that amount.

We next find a letter from the Maharaja of Ajudhia to the defendant (Exhibit A8) dated the 1st of September 1902. This was to inform the defendant that the Manager of the Delhi and London Bank, Lucknow, had shown some inclination to lend the defendant the money that he required. On the 8th October 1902 the Delhi and London Bank in London sanctioned the loan by telegram. The learned Counsel for the plaintiff takes no objection to the proof of the copies of the telegram dated the 8th of October 1902 and the letter dated the 10th October 1902 confirming it. The interest agreed on this transaction if it eventuated was 7 per cent. On the 11th October 1902 the Maharaja of Ajudhia telegraphed to Narendra Bahadur Singh (Exhibit A9) that the Delhi and London Bank required a copy of the deed in suit and the *khewat* and *jamabandi* of extra villages. On the 22nd October 1902 the Maharaja telegraphed to the defendant (Exhibit A10) to come at once. On the 28th October 1902 (Exhibit A11) the Maharaja of Ajudhia wrote to the defendant asking him why he had not come, and pointing out the necessity of his putting through the transaction quickly. On the 4th November 1902 Kali Charan, the Cashier of the Delhi and London Bank, Lucknow, telegraphed to the Maharaja of Ajudhia (Exhibit A 13) that the Bank was losing interest owing to the failure of the defendant to complete the transaction. On the 5th November 1902 the Maharaja of Ajudhia telegraphed to the defendant informing him of what Kali Charan said (Exhibit A 14). The defendant appears to have telegraphed then saying that he was ill. He frequently seems to have been ill when his presence was essential for the completion of a business transaction. There is no proof as to what he telegraphed, but there is a letter dated the

7th of November 1902 (Exhibit A15), in which the Maharaja of Ajudhia expressed his regret at hearing the defendant's illness. There were subsequent letters on the 10th and 16th November 1902 from the Maharaja of Ajudhia on the same point, and on the 26th November 1902 (Exhibit A18) Kali Charan, Cashier, requested the defendant to come to Ajudhia on the following Sunday to meet the Manager of the Delhi and London Bank. It appears that many of these telegrams and letters were not admitted in evidence before the lower Court, but the learned Counsel for the plaintiff agrees to their admission now and to their discussion. Mr. Fulton, the Manager of the Delhi and London Bank, apparently arrived at Fyzabad on the last Sunday in November and discussed the matter with the defendant. A draft deed was prepared. There is a conflict of evidence as to what happened exactly after this. The defendant's account (o.p. 68) is as follows :—

"On the day following I went to Rai Gokul Chand taking all the papers with me, viz., the draft deed and telegram sent to me by Delhi and London Bank.

"I handed over all the papers to Gokul Chand. He said he would get the Bank rate reduced to 7 per cent. per annum. He wrote me a letter. I saw Rai Ram Saran Das. He asked for an application which I submitted on the 11th December 1902. Rai Ram Saran Das said that as the Delhi Durbar was drawing near he would send me a reply and draft deed later on."

It is quite possible that the defendant saw Rai Gokul Chand Bahadur early in December. Rai Ram Saran Das Bahadur denies that he saw the defendant as early as the 2nd or 3rd of December, but admits that he saw him later. Rai Gokul Chand Bahadur had evidently had an interview with the defendant on this subject before 9th December 1902, for we find (Exhibit A 21) a letter from Rai Gokul Chand Bahadur dated 9th December 1902, which may be translated as follows :—

"Your transaction has been completely settled as I have informed you yesterday. Please see Babu Ram Saran Das and settle other details with him."

According to Rai Ram Saran Das Bahadur whose evidence appears to us more likely to be correct on this point, he and Rai

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Gokul Chand Bahadur saw the defendant on the 10th December 1902. He is unable to fix the date clearly and he thinks that it was somewhere between the 5th and 11th December. A remark in the letter of Rai Gokul Chand Bahadur (Exhibit A21) would indicate that it was the 10th. According to Rai Ram Saran Das Bahadur (o. p. 132), Rai Gokul Chand and he represented the Bank at that meeting and all that was agreed to was that there should be a new deed executed on which the interest would run at 7 per cent. He denies that the defendant was ever promised on behalf of the Bank that the Bank would give him the same terms as the Delhi and London Bank had offered to give him.

The draft propounded by the Delhi and London Bank is Exhibit A37. The draft is an incomplete draft. The amount of consideration is not stated. It is said that the money was to be paid off in instalments, but neither the dates nor the amounts of instalments were stated. The draft is not a draft which anybody could agree to accept as it stood. It could at best have afforded a basis for the execution of another deed. Some of the terms no doubt might have been utilized in the preparation of another draft. But there would have been a considerable amount to clear up. It is to be noted that the terms of the draft vary considerably from the terms of the proposed loan submitted by Mr. Fulton to the Head Office in London. On the 11th December 1902 the defendant wrote to the plaintiff Bank a letter (Exhibit 158) of which the following is the translation:—

"I beg to say that I borrowed two lakhs and thirty-five thousand rupees from the Oudh Commercial Bank, Fyzabad, under a deed and agreed to re-pay the debt by instalments in 15 years with interest at Rs. 8 per cent. per annum and also stipulated that interest in case of default and on the overdue instalments would be paid at the rate of 12 per cent. per annum. This increased the amount of debt and I had to sustain a heavy loss and damage, and it is owing to this reason that the said debt has not yet been repaid. Being now compelled I have arranged to borrow elsewhere at 7 per cent. per annum to re-pay the said debt and the settlement and acceptance of the terms of the loan have already been communicated

to the Oudh Commercial Bank through a letter from Rai Bahadur Gokul Chand, Pleader." (This letter has not been proved, and although it is possible that a letter was written it does not follow that the particulars suggested were contained in it). "I, therefore, beg to say that if the Oudh Commercial Bank, Fyzabad, itself agrees to accept, in the same manner, the same terms and the same interest, the said Bank may get the deed renewed by me, because it is excessive interest and penalty that necessitate arrangements for a loan elsewhere. I hope you will inform me of the acceptance of the proposal."

This letter was written on the 11th December 1902.

On the 13th December 1902 the defendant admits that he broke off all negotiations with the Delhi and London Bank. He did not wait to get an answer from the plaintiff Bank. He deposed at o. p. 69: "The Maharaja got annoyed that I should have cancelled the loan settled through him. He asked who would pay the damages to the Delhi and London Bank for keeping unused for a month the money intended to be advanced by that Bank. I replied that I would pay the damages. Maharaja said he would pay the money out of his own pocket.

"The Maharaja issued a cheque to Bhagwan Pershad Bakhshi for Rs. 2,500 to be paid after realisation to Delhi and London Bank. The cheque was issued in my presence. The Maharaja asked Bakhshi to pay the money to Delhi and London Bank."

It has been proved that such a cheque was paid. The cheque is dated 13th December 1902 and the counterfoil runs, "Pay to Bakhshi Bhagwan Pershad Rs. 2,500 on account of penalty in respect of the deed of Babu Narendra Bahadur Singh in favour of the Delhi and London Bank."

But the evidence of the then Manager of the Delhi and London Bank proves that no portion of this money was ever received by the Bank. It would appear that the money was paid as commission (unauthorized by the Bank) to certain Indian subordinates of the Bank in respect of the trouble they had taken in endeavouring to negotiate the loan. The incident is of importance as showing that negotiations were definitely broken off with the Delhi and London Bank on the 13th December 1902 before the defendant had time to obtain a reply

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to his letter from the plaintiff Bank. The defendant then went to the Delhi Durbar of 1902-03. After his return Rai Gokul Chand Bahadur wrote to him (Exhibit A 22) a letter dated 15th January 1903, to the effect that the papers had been made over to Rai Ram Saran Das Bahadur and that it was settled that the deed should be renewed. On the 7th February 1903 the defendant wrote to the Bank (Exhibit 159) asking why nothing had been done, and pointing out that he was losing money owing to the Bank's delay. The same day the Directors passed the following resolution (Exhibit A 31):

"Read an application from Babu Narendra Bahadur Singh, *talukdar*, for the renewal of his bond at 7 per cent. interest. Resolved that the bond may be renewed on condition that if the amount due to the Bank will at any time exceed four lakhs, the Bank will have the option to sue for the whole amount (principal and interest)."

The resolution agreed to an arrangement different from the arrangement proposed by the defendant. It is not possible to say whether this resolution was passed before or after the defendant's letter of the same date was received. On the 9th February 1903 Rai Ram Saran Das Bahadur replied to the defendant (Exhibit 160) by a letter the translation of which is as follows:—

"I beg to acknowledge receipt of your letter of the 7th instant and in reply beg to state that the Bank is willing to advance the loan at 7 per cent. per annum as you were told then, *i. e.*, at the interview." (This would apparently be the interview that took place on the 10th December 1902.) "You have not yet sent the list of villages whereby we might have been apprised of the Government revenue, gross rent, and profits, and enabled to make arrangements for an inquiry, nor have you favoured us with your presence.

"At all events, the delay which has occurred is due to you.

"I would, therefore, request you to send the required list through one of your experienced *karindas*, so that some person from this place may be sent with him with a view to make necessary inquiries.

"I beg to add that as long as the deed

is not renewed, no proceedings can be taken apart from the terms of the old deed."

It is to be noted that this is the first reply that the defendant received to the letter of the 11th December 1902 and that any one would consider on reading it that it implied a qualified acceptance of the proposals in that letter, in other words, that it implied a readiness on the part of the plaintiff to give the defendant the same terms which he had been offered elsewhere, but that those terms would not be substituted for the terms of the old deed until a new deed had been executed. Rai Ram Saran Das Bahadur knew that the plaintiff Bank did not intend to offer the defendant the same terms as those offered by the Delhi and London Bank, and that so far from accepting a deed on which the right to sue would not accrue for fifteen years the plaintiff Bank proposed the execution of a deed on which the right to sue would accrue very quickly. Yet he refrained from informing the defendant of the terms of the resolution of the Bank. The defendant replied to this letter in Exhibit 161 dated the 14th of February 1903. In this he stated that there had been a delay in sending the list showing the gross rental. From this it would appear that he had promised to send such a list. The translation of a portion of this letter is important:

"You know this full well that had I taken the loan early in December 1902 when the transaction was settled with the Delhi and London Bank, Lucknow, I would have been secure against the loss sustained. On the 5th December 1902, Rai Bahadur Babu Gokul Chand and you too verbally said that I should enter into the transaction with your Bank in the same manner in which the loan transaction was settled with the Delhi and London Bank, Lucknow on the same terms and at the same rate of interest, *i. e.*, 7 per cent. per annum; that you had sanctioned the same; that I should send a letter to the Oudh Commercial Bank, Limited, Fyzabad, communicating the terms whereon settlement was made elsewhere and that the aforesaid Bank's sanction in writing will be sent to me after which I might renew the deed.

"On the assurance given and the agreement made orally by you and Rai Gokul

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Chand Bahadur as well, I refused to enter into the transaction of loan settled with the Delhi and London Bank, Lucknow, for which, as you know well, I had to pay Rs. 2,500 as penalty on account of interest."

A reply to this is contained in Exhibit 162, dated 17th February 1903, in which Rai Ram Saran Das Bahadur makes no attempt to reply to these complaints. This letter states that, as a perusal of the estate record shows that the profits of the property hypothecated have come to about Rs. 33,500, no renewal will be made unless further security is given. To this the defendant sent a very long reply (Exhibit 163) dated the 21st February 1903, in which he complained of the delay in settling the matter and of the bad faith of the plaintiff Bank. The plaintiff Bank's reply (Exhibit 164) dated 23rd February 1903, does not touch the points raised. It merely requests the defendant to have a personal interview. The defendant replied in Exhibit 165, dated 5th March 1903, that he did not see the object of a personal interview as nothing remained to be settled. In Exhibit 166 dated the 7th March 1903, Rai Ram Saran Das Bahadur replied that nothing had been settled respecting the security of the terms of the loan and that a personal interview was necessary. The defendant replied on the 18th March 1903 (Exhibit 167) that a complete settlement had been made. On the 20th March 1903 the plaintiff replied begging the defendant to come to a personal interview (Exhibit 180) and on the 1st of April 1903 (Exhibit 181) repeated the request. After that nothing appears to have been done for some six years. In 1909-10 an attempt was made to settle matters by the District authorities. That attempt proved unsuccessful. It was suggested in the lower Court that a modification of the terms was arrived at by the action of the District authorities. The learned Subordinate Judge found that no modification had been arrived at and ground No. 22 of the appeal refers to this point. The learned Counsel for the appellant has withdrawn that ground in the course of argument. The defendant made no further payments and finally the suit was brought.

It has been argued that the defendant man *incapable of taking care of himself*

who has been overreached by clever rogues. We do not consider that the defendant is deficient either in intelligence or judgment. He appears to have been perfectly capable of taking care of himself and managing his loan transactions. He seems to have criticized the terms of the loan with considerable ability. He was indolent and lax. It was with the greatest difficulty that he could bring himself to keep an appointment or to check accounts. Sometimes he would examine a draft, suggest conditions, refuse conditions, or get people to check accounts for him, and when roused he could make effective protests. But he was palpably a man who was disinclined to attend to his affairs and at the end he seems to have let himself drift. It is to be noted that portions of the correspondence which we have gone through show that it took several months to get a complete list of his liabilities and securities out of him. He kept the drafts in his hands for five months, though a final agreement could easily have been arrived at in a week. He was continually missing appointments. Sometimes he sent excuses, sometimes he did not. When he made re-payments he was usually late. He always had some excuse for breaking engagements, usually illness, and an excuse of undeserved misfortune for not making re-payments. He does not appear to have treated the persons with whom he did business with consideration, for example, when he negotiated the loan with the Agent of the Allahabad Bank he got the best terms he could, and then, leaving the matter in suspense, went off at once to the plaintiff Bank to see whether he could use the arrangement that he had made with the Allahabad Bank as a weapon by the use of which he could extract better terms. Finally he grew tired of the transaction, or thought it was not worth his while to take any further trouble in the matter, and dropped negotiations with the Allahabad Bank. Then he put the Maharaja of Ajudhia to the trouble of arranging for a loan with the Manager of the Delhi and London Bank, Lucknow. When the Maharaja wanted him and telegraphed to him on more than one occasion to come and settle the business he made no effort to oblige him, and offered the usual excuse

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of illness, which on this occasion does not appear to be true, as it was put in at the last moment. After a long time he went to Mr. Fulton at Fyzabad and practically settled everything with him. Having done this he threw over the Maharaja and the Delhi and London Bank with the nonchalance with which he had previously thrown over the Allahabad Bank, went back to the plaintiff Bank to see if he could screw better terms out of them, and finally, without waiting for an answer from the plaintiff Bank, broke off negotiations with the Delhi and London Bank leaving the Maharaja of Ajudhia to pay compensation for him. He has stated in his evidence (o. p. 110) that he preferred to get a renewal from the plaintiff Bank because he was averse to pay an unauthorised commission of Rs. 14,000 to the Indian subordinates of the Delhi and London Bank for negotiating the loan. He never informed the Maharaja of Ajudhia of this fact and seems to have been absolutely indifferent with regard to the inconvenience, to which he put his friend in the cause of the transaction. In our opinion he was endeavouring to play off one Bank against another, but was unable to do so with success. Owing to his carelessness and indolence he got the worst of the transaction. But this was not because the other side endeavoured in the beginning to take advantage of him, but because he tried to take advantage of the other side and was not equipped for the encounter. It was open to him at any time until the end of 1904 to re-open negotiations with either the Allahabad Bank or the Delhi and London Bank. (After that date these Banks would have probably refused to have anything to do with him.) But he made no attempt to do so. He could then have cleared off the whole debt with comparatively little sacrifice by selling a portion of his property. When he discovered that he was not likely to get any better terms from the plaintiff Bank he did not do this either.

We now come to the conduct of the plaintiff Bank. The two persons connected with the plaintiff Bank, with whose conduct we are mainly concerned, are Rai Gokul Chand Bahadur, one of the Directors, and Rai Ram Saran Das Bahadur, the Manager. The former may be exonerated

on all charges set up against him with regard to the execution of the original deed. There is nothing to show that he was the defendant's family lawyer. He appears to have represented him in certain legal proceedings. He was in no position to dominate the defendant's will, and there is nothing to show that he ever attempted to dominate the defendant's will. The defendant wanted money, and, knowing Rai Gokul Chand Bahadur socially and professionally, he obtained his assistance to procuring a loan. Rai Ram Saran Das Bahadur hardly came on the scene at first. The loan was fair. The defendant's story as to misrepresentation and so on is a false story, such as would be told by a weak man like himself who has an idea that he had been badly treated over a pecuniary transaction. The transaction in the beginning was fair enough. The defendant was in a position to pay the interest and the instalments regularly, and there is nothing to show that he could not have done so, had he made a reasonable effort, and up till the time that the defendant entered into negotiations with the Allahabad Bank there is nothing in the conduct of the plaintiff Bank to which we take exception. But after that, the action both of the Bank and of the two gentlemen to whom we have referred is open to considerable criticism. The defendant informed Rai Gokul Chand Bahadur of his proposed loan from the Allahabad Bank and Rai Gokul Chand Bahadur (who was of course only one Director out of many) discussed with him the advisability of attempting to get the same terms from the plaintiff Bank. Whether the idea of approaching the plaintiff Bank emanated from Rai Gokul Chand Bahadur or from the defendant is not clear. We cannot go so far as to say that the former suggested it. The defendant's evidence shows that he is capable of saying anything which he thinks would help his case, and on his word alone we cannot say that Rai Gokul Chand Bahadur suggested the arrangement. Whoever proposed it, the result of the conversation was the letter of the 23rd of July 1901 (Exhibit 97). The balance was then Rs. 3,16,794. The defendant had re-paid Rs. 71,895.14-2 and had incurred a total liability of Rs. 1,50,000 in

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seven years of which he had paid something less than half. Rs. 1,50,000 was not a very large sum for the accommodation provided up till that time.

The Directors were asked to decide, whether they should recover their money at once by letting the defendant borrow money from the Allahabad Bank and re-pay them and incidentally lose a customer for the time or whether they should accept his terms, and give him a new deed which would tie up their money for fifteen years further. There was no third suggestion that things should be left as they were, and on the terms of the deed which they possessed they were not entitled then to sue for the money in spite of the suggestion made by Rai Ram Saran Das Bahadur. The Directors deliberately agreed to grant the defendant's application and to tie up the Bank's money for fifteen years further. They could have realized their money at once by letting the defendant borrow the money from the Allahabad Bank and they refused to take it. The Bank can thus claim no sympathy for having been kept out of its money so long.

From this time it appears to have entered into the head of Rai Ram Saran Das Bahadur that he might retain the defendant as a customer without giving him any fresh terms. There is no proof that the Directors were cognizant of his plan. But he, as Manager, had been expressly authorized under their resolutions of the 24th and 25th July 1901 to complete the transaction, and this authorization was a good authorization under the provisions of section 68, Act VI of 1882. In his reply to the defendant of 25th July 1901 (Exhibit 97) he rightly pointed out that it was necessary to execute a new deed to give effect to the arrangement. But it was, of course, the business of the Bank to prepare the draft as it had done with regard to the original deed. The latter portion of the letter requesting information as to the profits of the villages was clearly inserted to place obstacles in the way of execution of a new deed. The Directors had never asked that such inquiries should be made, and no useful purpose could be served by making them. The defendant had mortgaged by the original deed the whole of the *taluka* property, and had no landed property left, except a little property of trifling value in the Gorakhpur and Azamgarh Districts (o. pp. 71 and 73). If

the income of his property had been considered sufficient to pay interest at a higher rate under the original deed, it is difficult to see the necessity of checking that income when it was proposed to reduce the rate of interest in the subsequent deed. In no circumstances was it necessary to make such an inquiry. A very short calculation would show that if Rs. 3,20,000 were lent on a deed at 8 per cent. to be re-paid in fifteen instalments, Rs. 25,600 would be due for the first year as interest and Rs. 21,333-5-4 would be due as an instalment, the total amount being Rs. 46,933-5-4. The defendant had stated his total income in Exhibit 2 to have been Rs. 50,000 in 1894, and, as the Directors had already agreed to the terms of the new deed for Rs. 3,20,000 re-payable in fifteen instalments, it was clear that the defendant could not pay the amount of instalments and the amount of interest and leave for himself more than a bare pittance to live on. Those are the facts, and Rai Ram Saran Das Bahadur was in a position to know them. The Bank was not likely to get its instalments paid regularly. If the instalments were allowed to go, the amount of interest payable under the new deed could be paid regularly if the defendant wished to pay it. The plaintiff Bank did not want its money back. It could have got its money back by letting the defendant execute a deed in favour of the Allahabad Bank, and the question whether interest would or would not be regularly re-paid depended not so much on the amount of the defendant's income as on the determination of the defendant to keep his obligations. It is tolerably clear that the Bank did not want its money back and that it wanted interest to accumulate.

The best way of getting interest to accumulate was to keep the defendant to the terms of the old deed, and it was very easy to arrange that he should be kept to the terms of the old deed. Any one, who knew his character, would know that a request to give further information would be resented. He might or might not give the information. If he were requested to make arrangements for drafting the deed himself in all probability he would never take the trouble to do so. So the onus of drafting the deed was thrown upon the defendant and he was asked to give additional information. He did neither, and the arrangement fell through. All this will

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have a very distinct bearing when the question of compensation has to be considered.

We next come to the arrangement proposed with the Delhi and London Bank. Rai Ram Saran Das Bahadur may be exonerated here on the charge of ever having promised anything definite. Rai Gokul Chand Bahadur appears as the defendant's adviser. He was not authorized by the other Directors to represent the Bank. There is nothing to show that Rai Gokul Chand Bahadur, although he gave advice, ever promised anything definite. The defendant went to him for his opinion and also to see whether he could not get better terms out of the plaintiff Bank than the half promise of the Delhi and London Bank. This letter may have been obtained on a misconception as to the defendant's income. Rai Gokul Chand Bahadur apparently encouraged the defendant to approach the plaintiff Bank and offered to represent his case. But he does not appear to have pledged the plaintiff Bank in any way to accept the terms of the draft prepared by the Delhi and London Bank. His letter of the 9th December 1902 (Exhibit A21) shows that he told the defendant to see the Manager and settle other details. If he had pledged the Bank to an unqualified acceptance there would have been no other details to settle. There is nothing to show that Rai Gokul Chand Bahadur and Rai Ram Saran Das Bahadur represented themselves as plenipotentiaries. They evidently told the defendant that the Bank would probably agree that interest would run at 7 per cent. But nothing further appears to have been settled. They could not have agreed to a deed on exactly the same terms as the draft from the Delhi and London Bank, for that draft did not set up anything definitely.

One strong point in favour of this finding is that the letter sent by the defendant on the 11th December 1902 (Exhibit 158) contains no reference to an agreement made by Rai Ram Saran Das Bahadur and Rai Gokul Chand Bahadur to give the defendant as good or better terms as the Delhi and London Bank had offered. The learned Counsel for the appellant suggests that the defendant was deceived by Rai Ram Saran Das Bahadur and Rai Gokul Chand Bahadur and wrote the letter at their instigation. But the defendant never says this. At o. p. 68 he

says that Rai Ram Saran Das Bahadur asked for an application. At o. p. 102 he says that he thought that formal assent had been given by Rai Gokul Chand Bahadur. He admits at o. p. 105 that Rai Ram Saran Das Bahadur and Rai Gokul Chand Bahadur said that they would consult their colleagues and did not pledge the plaintiff Bank into accepting his terms, and at o. p. 106 he says that he does not understand what other details there were left to settle. It is true that when he asserted in Exhibit 161 that these two gentlemen had sanctioned the arrangement and that the Bank's sanction would be subsequently sent to him, Rai Ram Saran Das Bahadur avoided answering this allegation in his reply (Exhibit 162), and when the accusation was repeated in Exhibit 163 again refused to answer it, and only answered it when it was repeated again in Exhibit 165 when he made a statement in contradiction in Exhibit 166. But the explanation would appear to be that the defendant never received a real assurance. If he had received such an assurance he would have mentioned it ordinarily in his letter of the 11th December 1902. No doubt he received a partial and modified assurance, which did not bind the plaintiff Bank, and was trying in his subsequent letters to get an admission from Rai Ram Saran Das Bahadur that an unqualified assurance had been given him. Rai Ram Saran Das Bahadur undoubtedly tried to avoid making an admission that any assurance had been given, but his shuffling on this point does not show that an unqualified assurance was given. The conduct of Rai Ram Saran Das Bahadur in the subsequent correspondence shows that he was again playing with the defendant, and endeavouring to wear him out until he dropped the negotiations out of fatigue. He was working on his knowledge of the defendant's character, and Rai Gokul Chand Bahadur as shown in his letter of 15th January 1903 (Exhibit A22) had also a similar intention. There is no evidence that any other Director knew anything about it. The conduct of Rai Ram Saran Das Bahadur in subsequent letters was disingenuous. In all the transactions he had carefully avoided giving anything like a definite assurance and he pledged neither the plaintiff Bank nor himself to anything of value. He was palpably keeping the defendant imbred with hope and working on his hope and on the

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defendant's inherent incapacity ever to complete anything, in order to prevent the defendant entering into transactions with another Bank: He kept back from him the resolution of the plaintiff Bank. He did nothing towards having that resolution carried out. The plaintiff Bank is bound to this extent in the matter. It had the opportunity of saying to the defendant that it would do nothing for him, that it would refuse to give him any better terms and that if he got the money elsewhere and paid off the debt, it would be pleased with the result. But the Directors clearly did not want to be paid off. They wanted to let the money lie, and to let it accumulate until the principal and interest due approached the value of the security, and then to sell the mortgaged property, leaving the defendant to depend on the little property that he has in Gorakhpur and Azamgarh. The Bank was not responsible for every act of Rai Ram Saran Das Bahadur, but it was responsible for a deliberate refusal to part with the defendant as a client and it has no claim for consideration on the plea that the Bank had been kept out of its money for a considerable number of years.

We leave for the moment decision as to the amount of compensation to which the plaintiff can reasonably be entitled for breach of the penal clauses.

The learned Subordinate Judge decided that the parties could not be put on the same terms as the terms proposed either by the Allahabad Bank or the Delhi and London Bank, because in both cases a novation of the contract was suggested by the defendant to the plaintiff—

(a) *firstly*, on the terms proposed by the Allahabad Bank, and

(b) *secondly*, on the terms proposed by the Delhi and London Bank.

Such a novation, according to his view, could only be effected by execution of an agreement in writing, and no such agreement was executed. The defendant's remedy, if any, was according to the learned Subordinate Judge to sue for specific performance of the agreement to modify, and such remedy had become barred by limitation some time previous to the institution of the present suit. In the case of the transactions of July 1901 it is clear

that the Directors agreed (but with a qualification) to accept the terms proposed in defendant's letter of the 23rd July 1901, "I, therefore, request you to have a fresh deed executed by me in respect of the money due to the Bank bearing interest at 8 per cent. per annum fixing the period of re-payment at 15 years, half-yearly interest to be payable on 30th of June and 31st of December; but if the same be not paid on the due dates then the same will also carry interest at 8 per cent. per annum," and a qualified assent was conveyed to the defendant in the letter of the 25th July 1901, "Your proposal regarding interest has been accepted and it will be given effect to from the date of the execution and completion of the deed." The arrangement fell through simply because a deed was not executed. It was, as found by the learned Subordinate Judge, the duty of the plaintiff to prepare a draft of the deed, and the plaintiff failed to do this without justification. But there can be no doubt as to the fact that a novation or modification of the existing contract was not effected by the two letters in question.

We do not consider that the provisions of section 92 (4), Act I of 1872, have application in this connection. The defendant has not proposed to prove an oral agreement. His proof is contained in the proceedings of the Directors (Exhibit A32) of 24th-25th July 1901 and the two letters which have already been quoted. But reading all three together, no legal novation or modification is created. The proposal is accepted in a qualified manner, and the Bank's reply implies that the amount due is to be calculated on the terms of the present deed up to the execution of a fresh deed. Thus as no fresh deed was executed, it is impossible to state even the amount due on which new calculations of interest could be based. The non-execution of a subsequent deed was attributable to the deliberate abstention from action of Rai Ram Saran Das Bahadur, but the defendant (as Rai Ram Saran Das Bahadur no doubt expected he would do) was too lax to take his proper remedy. He could have insisted within the period of limitation allowed that the Bank should carry out its

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obligation, but he did not do so, and he is debarred by the law of limitation from doing so now. The position of the respondent is even stronger with regard to the events of 1902-1903. The proposal here is contained in Exhibit 158 dated 11th December 1902, and there was no acceptance of that proposal by the Bank. We are not satisfied that there was an acceptance of that proposal by Rai Ram Saran Das Bahadur or Rai Gokul Chand Bahadur. The Bank agreed in its resolution not to lend money on the terms on which the Delhi and London Bank had proposed to lend it, but on different terms (Exhibit A31, dated 7th February 1903), and the qualified acceptance (Exhibit 160, dated 9th February 1903) in addition to containing a palpable clerical error (7 per cent. per mensem being written) refers to conditions stated at an interview which we are satisfied fell short of the acceptance of the Delhi and London Bank.

The learned Subordinate Judge did not, however, consider the question from the two points of view which were put before him in argument. The *first* is whether the Bank agreed to a remission of the rate of interest which could be enforced by way of a qualification of the terms of the deed in suit, and the *second* is whether the Bank is equitably estopped by its conductor the conduct of its authorized representatives from asserting a right to more than could be obtained under the terms of the draft deed of the Allahabad Bank or the draft deed of the Delhi and London Bank. With regard to the first point there was no suggestion on the part of either side as to remission of arrears. We consider that there was no unqualified agreement on the part of the plaintiff Bank to reduce the rate of interest in the future. Such an agreement unless unqualified cannot be considered in this connection. With regard to the second point we find that on the widest extension of the principle of estoppel, without confining the rule to the rule laid down in section 11^a, Act I of 1872 [*Ganges Manufacturing Company v. Sourajmull* (15)], and applying the principle laid down in *Sarat Chunder Dey v. Gopal Chunder Laha* (16), the defendant

is not at liberty to invoke that doctrine in his aid, unless he can show that he broke off negotiations with the Allahabad Bank and the Delhi and London Bank because the plaintiff Bank or their authorized agents induced him to do so by offering him the same terms as or better terms than were offered by those Banks. It is to be noted that he is not proved ever to have broken off negotiations with the Allahabad Bank and that within less than a year from the date that he received the last proved communication of the Allahabad Bank (which he is not proved to have answered) he had opened negotiations with the Delhi and London Bank. We find that he definitely broke off negotiations with the Delhi and London Bank on 13th December 1902, when he had received no assurance from the plaintiff Bank, and that he was partly actuated in so doing by reluctance to pay Rs. 14,000 as an unauthorized commission. He had received no assurance from the plaintiff Bank, Rai Ram Saran Das Bahadur, or Rai Gokul Chand Bahadur that the plaintiff Bank would give him as good or better terms. On this finding we are unable to modify the conditions under colour of the doctrine of equitable estoppel. This disposes of the points taken in the 14th, 15th, 16th, 17th, 18th, 19th, 20th, and 21st grounds of appeal.

We now come to the first, second, third fourth, fifth, sixth and seventh grounds of appeal. The appellant urges that the whole suit is barred by limitation. According to our construction of the deed the right to sue could originate on the occurrence of one of the contingencies stated in clauses 5, 6, 10, 7 and 14. The contingencies provided for in clauses 5, 6 and 10 did not arise. We now examine the meaning of contingencies provided for in clauses 7 and 14. Badly worded as these clauses are, the meaning is fairly clear. No right to sue accrues under the provisions of clause 14 unless a right to sue accrues under the provisions of clause 7. Clause 7 provides on the face of it that the plaintiff cannot sue unless (1) the entire demand for two instalments for two consecutive years and interest for the principal on two consecutive years remains unpaid and (2) nothing is paid for two consecutive years on account of principal

(15) 5 C. 669; 5 C. L. R. 533.

(16) 20 C. 296; 19 I. A. 263.

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or interest. The second clause is not included in the first for if (unlikely as it might be) the defendant had paid Rs. 1,30,000 in the first year, Rs. 85,000 of which was to go to payment of instalments and Rs. 45,000 to advance payments for interest, and paid nothing for the next five years, no right to sue would have accrued. On the other hand the first clause is not included in the second. The learned Subordinate Judge considered that acceptance of the plea of the plaintiff on this point involved an absurdity. He noted that, if no suit could be brought unless a breach of the second clause could be shown, the money could not be called in for fifteen years if the defendant paid one pie every alternate year. We agree that, if the clauses are read as independent, this will be the result, but we do not find any reason to suppose that it was not the deliberate intention of the parties that this should be so. As we have shown in a previous part of this judgment, clause 7 was the subject of considerable controversy. The plaintiff Bank wished to insert only clause (1); the defendant wished to insert only clause (2). Finally they compromised by inserting both. The defendant's object in obtaining the insertion of clause (2) was evidently to give himself undisturbed possession of the mortgaged property for fifteen years. The plaintiff Bank's acquiescence may well have been due to the fact which has been made abundantly clear by the Bank's whole conduct that as it eventually wanted to let the debt accumulate and not to sue soon, it was immaterial if the right to sue could be stopped by the defendant at will for fifteen years. The Directors did not arrive at this conclusion at first, but palpably did so at the end.

We, therefore, decide that the right to sue would not accrue apart from conditions laid down in clauses 5, 6 and 10, unless nothing was paid on account of principal or interest for two years. The last payment was made on the 24th October 1902. So the right to sue accrued on the 24th October 1904. The suit is thus well within time.

We need not discuss at length the other objections as to limitation. The learned Subordinate Judge, while finding that the right to sue accrued on 20th June 1898, held

that the suit was within time under the provisions of section 20, Act IX of 1908, owing to proved payments towards interest. The learned Counsel for the appellant, while not contesting that such payments had been made towards interest, objected that under Order VII, rule 6, Act V of 1908, no exemption had been claimed in the plaint. To this the plaintiff Bank replied that it had not instituted the suit after the expiration of the period prescribed by the law of limitation, and that, if it had, it did not claim exemption (which it urged only referred to legal disabilities under section 6, Act IX of 1908) but rather invited the Court to apply the law. The question has become academic in view of the fact that we find that the right to sue accrued on the 24th October 1904, and further inasmuch as the plaintiff Bank has before us applied to amend its plaint in order to get over any possible difficulty. The learned Counsel for the plaintiff Bank, while applying to amend the plaint, did not admit that there was necessity for amendment. He made the application *ex maxima cautela*. We do not consider that there was any necessity to amend the plaint, but we have allowed the application for the same reason as that which caused the learned Counsel to present it. We make no order as to costs on the amendment, as the amendment is purely of a formal nature. By allowing the amendment, the defendant has not been prejudiced in any way nor have his costs been increased.

The next point taken by the appellant is that, if this Court holds that any clause is penal, it cannot allow compensation for breach of such clause as a portion of the mortgage-money, or as included in the contract, that it can only allow such compensation as damages for breach of a registered contract for a period of six years from the date of suit and cannot charge their recovery to the mortgaged property. The learned Counsel argued that the Court could either enforce or not enforce the contract as it stands. It could not enforce an altered contract. He continued that a penal clause had no effect and that, when that penal clause is cut out, the contract is absolutely altered, and cannot be enforced though damages can be given for breach of its terms. He quoted in support of his argument the decisions in

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Gudri Koer v. Bhubaneswari Coommar Singh (17), *Moti Singh v. Ramohari Singh* (18) and *Mathura Das v. Raja Narindar Bahadur* (19), but all these decisions refer to damages arising outside the provisions of the contract of mortgage.

The learned Counsel for the respondent replied that at the worst a Court can sever the illegal from the legal part of a contract, and that the good can be retained and the bad can be rejected, but that there was no occasion to sever the penal clauses from the rest. The law, according to his argument, does not invalidate a penal clause. It enforces the clause, but leaves the penalty to the discretion of the Court. Further he argued that anything awarded under the terms of the deed could be charged against the hypothecated property. We consider that the amount awarded as reasonable compensation for breach of penal clauses in a mortgage-deed must be considered for the purposes of limitation as a portion of the mortgaged money. We accept the argument that a penal clause is not invalidated by section 74, Act IX of 1872. The clause remains effective, but the amount awarded as compensation for its breach is left to the discretion of the Court up to the maximum fixed by the clause. The amount awarded can be charged against the hypothecated property. Their Lordships of the Privy Council in the decision previously quoted as *Sunder Koer v. Rai Sham Krishen* (4) upheld a decree sanctioning the award of compensation for breach of a penal clause in a mortgage-deed from a date as far back as 15th June 1891 up till 17th September 1901. As the decree of the Court of original hearing was passed on 31st May 1900, it appears that the compensation (which was awarded in the form of compound interest) was for more than six years. This compensation was charged on the mortgaged property.

Further we find that in *Baid Nath v. Shamanand Das* (20) compensation for breach of a penal clause was awarded for eleven years and eleven months and declared a charge on the mortgaged property.

(17) 19 C. 19.

(18) 24 C. 699; 1 C. W. N. 437.

(19) 19 A. 39 at p. 47; 23 I. A. 138; 1 C. W. N. 52; 6 M. L. J. 214; 7 Sar. P. C. J. 88.

(20) 22 C. 148.

We, therefore, decide all the points taken in the first seven grounds of appeal against the appellant. We have now to determine the amount of compensation that should be awarded to the plaintiff Bank for breach of the penal clauses. While we do not consider that the defendant's conduct in the proceedings entitles him to any particular sympathy, we are of opinion that the conduct of the plaintiff Bank leaves much to be desired. It did not deceive the defendant. There was neither fraud nor misrepresentation present in its dealings with him, but it undoubtedly exploited his weaknesses. It knew that he was vacillating, unmethodical, and unbusiness-like, and deliberately took advantage of his failings to keep him as a debtor, while interest accumulated progressively. It intentionally refrained from recovering in 1901. The Bank had an opportunity to ensure a speedy recovery in 1903. It refused to take it. The right to sue accrued on our finding in 1904. The suit was not instituted till 1911, when after payment of Rs. 86,020 the original amount of Rs. 2,35,000 had increased to Rs. 9,25,935-14-3, and had approximated on the Manager's estimate to the value of the defendant's property (*vide* Exhibit A32, dated the 24th July 1901). The plaintiff Bank cannot be held absolved from complicity in the acts of their Manager and while we have no wish to make the share-holders suffer for acts for which they are not directly responsible, we cannot lose sight of the fact that the plaintiff Bank deliberately laid itself out to leave the defendant with barely an acre of land as a result of their seventeen years' connection with him.

After careful consideration we have come to the conclusion that a reasonable compensation in all the circumstances will be to raise the 8 per cent. simple interest, which the non-penal clauses of the deed provide, to 8 per cent. compound interest with six-monthly rests crediting all repayments first to interest due, and then to principal.

We now come to the final point for decision. The learned Subordinate Judge fixed the 30th April 1913 as the date for payment under the decree, and he allowed interest according to the rate which he considered due from the date of institution till the date fixed for payment. From that period onwards till realization he allowed simple

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interest on the total amount (including costs) at 6 per cent. per annum. In the 24th ground of appeal the appellant urges that no interest or only interest at a nominal rate should have been awarded from the date fixed for payment to the date of realization.

The plaintiff-respondent has filed cross-objections to the effect that interest should be allowed at 12 per cent. per annum from the date fixed for payment up to realization, in view of the fact that the deed contains provisions for the payment of the *post diem* interest at that rate. We do not consider that we are in any way bound to fix the rate of interest from the date fixed for payment up till the date of realization according to the provisions of the deed. Their Lordships of the Privy Council have decided in *Sunder Koer v. Rai Sham Krishen* (4)—a decision to which reference has been made in more than one place in this judgment—that the scheme and intention of the Transfer of Property Act was that a general account should be taken once for all, and an aggregate amount be stated in the decree for principal, interest, and costs due on a fixed day, and that after the expiration of that day, if the property should not be redeemed, the matter should pass from the domain of contract to that of judgment, and the rights of the mortgagee should thenceforth depend, not on the contents of his bond, but on the directions in the decree. Although the law has been amended since this decision has been passed, and the provisions of Act IV of 1882, to which it refers, have now become embodied in the provisions of Order XXXIV, Act V of 1908, there has been no alteration in the amended law which renders the decision of their Lordships any less authoritative, and we do not consider that it is possible for parties to contract themselves out of the provisions of the law in such a manner as to deprive the Courts of their discretion to fix the rate of interest awarded from the date fixed for payment to the date of realization. Our finding to this effect is supported by a decision of the Calcutta High Court, *Managi Singh v. Saheb Ram Singh* (21). Thus we find against the contention taken by the respondent Bank in its cross-objections. We are not compelled to follow the provisions of the deed with regard to the rate of interest to be allowed from the

(21) 3 Ind. Cas. 289; 10 C. L. J. 203 at p. 206.

date fixed for payment until the date fixed for realization, and on the merits we see no reason to accept that rate of interest as the rate that should be awarded. But we are not in complete accord with the contention raised by the learned Counsel for the appellant on this point. It would be unfair, we consider, to deprive the plaintiff Bank of all interest upon their money from the 1st May 1913 to the date of realization. At the same time we think that the rate of future interest should be reduced to 4 per cent. We, therefore, find partly in favour of the appellant on the point raised in the appeal and against the respondent on the point raised in the cross-objections and reduce the rate awarded by the learned Subordinate Judge to 4 per cent.

The result is that the appeal succeeds to a certain extent and that the decree will be modified as follows:—

The plaintiff will be awarded the principal sum of Rs. 2,35,000 with compound interest at 8 per cent. per annum calculable with six-monthly rests up to the 30th of April 1913. From this sum will be deducted all repayments made by the defendant; such repayments will be credited first to the interest due and, if at the time they be in excess of the interest due, then to principal. The plaintiff Bank will receive costs of the lower Court proportional to its success and will pay costs of the lower Court proportional to its failure. Remaining costs will be on parties.

The cross-objections are disallowed with costs.

The balance due to the plaintiff on account of costs of the lower Court shall be added to the amount of principal and interest due on the deed according to the principles above enunciated, and simple interest at 4 per cent. per annum shall be awarded upon this total amount from the 1st May 1913 till the date of realization.

The appellant shall pay and receive costs on this appeal proportionate to his failure and success. The plaintiff Bank will pay its own costs and those of the appellant on the cross-objections. Remaining costs of the appeal and cross-objections shall be on parties. The net balance of costs (if any) payable from the appellant on this appeal shall be added to the decretal amount due on the date that this decree is signed

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cent. per annum till date of realization. The total amount due under the decree shall be recoverable by sale of the mortgaged property.

Appeal partly allowed.

OUDE JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION PETITION No. 20 OF 1915.

April 8, 1915.

Present:—Mr. Stuart, A. J. C.

Mu ammat GULAB DEI AND ANOTHER—
DEFENDANTS—APPLICANTS

versus

PATAN DIN AND OTHERS—PLAINTIFFS—
OPPOSITE PARTY.

*Civil Procedure Code (Act V of 1908), O. XXIII, r. 1—
Withdrawal of suit with liberty to bring fresh suit—
Pedigree filed with plaint, wrong—Formal defect.*

Where a pedigree filed with the plaint turned out to be wrong according to the statement of one of the plaintiffs:

Held, that the above circumstance was not a sufficient ground to permit withdrawal of suit with liberty to bring a fresh one.

Application against the order of the Munsif, Gonda, dated the 21st December 1914.

Babus *Jiben Krishna Banerji* and *Aditya Prasad*, for the Applicants.

Babu *Surendro Nath Roy*, for the Opposite Party.

JUDGMENT—The plaintiffs in this case instituted a suit for possession of a one-third share of a grove on the allegation that they were entitled to succeed to the last holder, *Musammat Chourasi*, as reversioners and they filed a pedigree with their plaint to prove that they were the nearest reversioners in the family. In the course of the proceedings, one of the plaintiffs made a statement with regard to the family relationship which was at complete variance with the statement in the pedigree which had been filed with the plaint. The learned Munsif permitted the plaintiffs, in view of the fact that this contradictory statement had been made, to withdraw the suit with liberty to bring a fresh suit. It was not the case that the plaintiffs had put in a pedigree which, owing to a clerical error, contained certain mis-statements and they sought to correct the error. Nor was it

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and carry simple interest at 4 per cent. the case that there were two pedigrees, and that they had by error put in the wrong pedigree with the plaint and sought to put in the right pedigree later. One of the plaintiffs had made a statement in which he admitted that the pedigree filed with the plaint was wrong and it was on this allegation that they were permitted to withdraw the suit with liberty to bring a fresh one. There was no formal defect by reason of which the suit must fail, and I do not consider that the circumstance, that one plaintiff has admitted that the pedigree filed with the plaint is incorrect in several particulars, is a sufficient ground for allowing the suit to be withdrawn and a fresh suit to be instituted.

I, therefore, allow this application, set aside the order of the learned Munsif, and send back the case to him that it may be tried out on its merits. Costs will follow the result.

Application accepted.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 2581 OF 1912.

July 23, 1915.

Present:—Mr. Justice Spencer and
Mr. Justice Coutts-Trotter.

KUTTIYALI VADAKKEDATH
KUNHAN MOOTHAD—PLAINTIFF—
APPELLANT

versus

M. R. RY. A. R. BANERJI AVERGAL
AND OTHERS—DEFENDANTS—RESPONDENTS.

*Provincial Small Cause Courts Act (IX of 1887),
Sch. II, Art. 13—Suit for dues accruing to hereditary
office in temple—Civil Procedure Code (Act V of 1908),
s. 86—Suit against Ruling Chief—Consent of Governor-
General.*

Where the plaintiff, a purveyor of a temple, sues for dues accruing to him by reason of his hereditary office and not for the value of goods received by the temple, the suit is not cognisable by a Small Cause Court. [p. 352, col. 1.]

A Ruling Chief cannot be sued in a competent Court without the consent of the Governor-General in Council obtained under section 86, Civil Procedure Code, whether he is a principal party or only a *pro forma* defendant in a case, inasmuch as the section makes no distinction between cases in which personal relief against a Ruling Chief is sought and others. [p. 352, cols. 1 & 2.]

KUTTIYALI VADAKKEDATHI v. DANERJI AVERGAL.

Where the Raja of Cochin was sued as the Cochin Sircar represented by the Dewan of Cochin:

Held, that the suit being virtually against the Raja was forbidden by section 86 of the Civil Procedure Code. [p. 352, col. 2.]

Second appeal against the decree of the District Court of South Malabar, in Appeal Suit No. 78 of 1912, preferred against that of the Court of the District Munsif of Chowghat, in Original Suit No. 537 of 1911.

Mr. K. P. M. Menon, for the Appellant.

Mr. C. V. Ananthakrishnan Aiyar, for the Respondents.

JUDGMENT.

SPENCER, J.—An objection has been taken that this second appeal will not lie, as the suit is of a Small Cause nature.

It is, however, clear from the plaint that the cause of action was not the value of the goods received by the temple, but the dues accruing to the plaintiff by reason of his hereditary office as purveyor of *ghee* for a fixed annual allowance (see Article 13 of the second Schedule, Provincial Small Cause Courts Act.)

Mr. Menon has raised three points, *viz.*, that the suit as framed will lie without permission being obtained under section 86 of the Code of Civil Procedure.

1. Because the suit is not to obtain any personal relief against the Raja of Cochin or against his State.

2. Because the first defendant is really the Dewan of the Cochin State and not the Raja.

3. Because the suit is against the temple trust, which is an aggregate Corporation and because any one of the trustees has, he argues, no separate and independent existence.

The first point was considered and decided by Tyabji, J., in *Kuthaldath Narayan Mootha v. Cochin Sircar* (1), in which the defendant was described in a similar manner to the description in this suit *viz.*, the Cochin Sircar represented by the Dewan of Cochin. I agree with what the learned Judge observed on this point, and I would add that this section makes no distinction between cases in which personal relief is asked for and others. In every suit whether a particular

defendant is a *pro forma* defendant or a principal party, the Court must be taken to have the power to order his appearance in person under Order V, rule 3, or to direct him to pay costs and otherwise subject him to the jurisdiction of the Court by making him obey its directions.

The second point has not been raised either in the lower Appellate Court or in the second appeal memorandum and having regard to paragraph 2 of the plaint and to paragraph 1 of the District Munsif's judgment, it is clear that the plaintiff's case till now has been that the trusteeship was vested in the Raja rather than in his Dewan and that in mentioning the Dewan and describing him as representative of the Cochin Sircar, the plaintiff was merely complying with the provisions of section 87 of the Code of Civil Procedure.

The third point does not arise in this suit, which is ostensibly against the trustees for what they have done or rather left undone.

The second appeal fails and is dismissed with costs.

COTTE TROTTER, J.—I am of the same opinion. When the pleadings are properly translated, it is apparent that the Cochin Sircar is the first defendant, and a reference to section 87 of the Civil Procedure Code shows that this is tantamount to suing the Raja which is forbidden by section 86, see *Gilmore v. State of Travancore* (2).

The suggestion that section 86 does not apply where the Prince or Ruler is sued only in a representative character as a trustee is to my mind unarguable.

I express no opinion as to whether the objection to the jurisdiction is or is not good, as, in my opinion, the appeal fails on the merits in any event.

Appeal dismissed.

(2) 17 Ind. Cas. 444; 23 M. L. J. 605; 12 M. L. T. 496.

(1) 21 Ind. Cas. 930; 25 M. L. J. 621; 14 M. L. T. 486; (1912) M. W. N. 977.

VENKATARAMANJULU NAIDU v. RAMASWAMI NAIDU.

MADRAS HIGH COURT.

LETTERS PATENT APPEAL No. 221 OF 1914.

July 20, 1915.

Present:—Mr. Justice Oldfield and

Mr. Justice Sadasiva Aiyar.

VENKATARAMANJULU NAIDU

AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

RAMASWAMI NAIDU—DEFENDANT—

RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 115—Revisional jurisdiction of High Court—Presidency Small Cause Court's decision—Wrong decision on a question of law—Provincial Small Cause Courts Act (IX of 1887), s. 25.

Under section 115 of the Code of Civil Procedure a High Court can revise a decision of the Presidency Court of Small Causes. [p. 353 col. 2.]

Ismailji Ibrahimji Nagree v. Macleod, 8 Bom. L. R. 969; 31 B. 138, dissented from.

Haladhar Maiti v. Choytonna Maiti, 30 C. 588; 7 C. W. N. 547; *Ramdin Bania v. Sew Baksh Singh*, 6 Ind. Cas. 473; 14 C. W. N. 806; 37 C. 714; *Sarat Chandra Singh v. Brojolah Mukerjee*, 30 C. 986, followed.

But its powers under section 115 (a) and (b) are not co-extensive with its powers in appeal, it cannot, therefore, go into facts nor can it interfere on the ground of mere mistake in fact or law. [p. 354, cols. 1 & 2.]

Oldfield J.—A wrong decision of a question with which a Court is competent to deal cannot affect its jurisdiction to pass a decree based on that decision though a Court cannot confer jurisdiction on itself by the wrong determination of a question. [p. 354, col. 1]

Per Sadasiva Aiyar, J.—Even in the case of revision under section 25 of the Provincial Small Cause Courts Act, the High Court has a discretion to interfere or not and where substantial justice has been done in the lower Court, it is not advisable to use revisional powers on purely technical grounds. [p. 354, col. 2.]

Gopala Iyengar v. Venkatakrishna Iyengar, 17 Ind. Cas. 748; (1912) M. W. N. 1227, followed.

Much less is it advisable to interfere when the High Court's powers of revision are invoked under section 115 of the Civil Procedure Code. [p. 254, col. 2.]

Appeal under clause 15 of the Letters Patent against the judgment of the Hon'ble Mr. Justice Seshagiri Aiyar, dated the 24th February 1914, in Civil Revision Petition No. 354 of 1913 reported in 23 Ind. Cas. 572, preferred against the decree of the Presidency Court of Small Causes at Madras, in Ejectment Suit No. 91 of 1913.

FACTS.—The facts of the case are clearly stated in the judgment of the Hon'ble Mr. Justice Seshagiri Aiyar reported in 23 Ind. Cas. 572.

Mr. N. Chandrasekhara Aiyar, for the Appellants:—On the merits the notice given was

a valid one, the term fixed was not for 15 years and 6 months but for 15 years certain. The High Court cannot use its revisional jurisdiction under section 115 of the Code of Civil Procedure and set aside an order under section 41 of the Presidency Small Cause Courts Act on the ground of a mere error of law. Even if there was such jurisdiction to interfere, the learned Judge could not under section 115 set aside the order, as there was no irregularity in the exercise of its jurisdiction.

Messrs. M. O. Parthasaradhy Aiyangar and K. V. Krishnaswami Aiyar, for the Respondent:—The notice being invalid there was no notice to quit and the jurisdiction under section 41 of the Presidency Small Cause Courts Act does not arise for its exercise.

JUDGMENT.

OLDFIELD, J.—On the first point dealt with by the learned Judge, this Court's power to revise the decisions of the Presidency Small Cause Court, I follow the Calcutta cases, *Haladhar Maiti v. Choytonna Maiti* (1), *Sarat Chandra Singh v. Brojolah Mukerjee* (2), *Ramdin Bania v. Sew Baksh Singh* (3) in preference to *Ismailji Ibrahimji Nagree v. Macleod* (4) decided in Bombay, the former moreover being in accordance with the practice in this Presidency. The learned Judge's decision in favour of the existence of this Court's powers of revision must be sustained.

The question is then whether their exercise was justified in the case before him; one of a decree for ejectment under section 41, Presidency Small Cause Courts Act, obtained on a finding as to the validity of the notice given, which the learned Judge held to be and which may for the present purpose be treated as being mistaken in law. It is contended that this decree can be revised because it was passed in the exercise [to follow the wording of section 115 (a) of the Civil Procedure Code] "of a jurisdiction not vested in the Small Cause Court by law," inasmuch as the determination of the tenancy by a valid notice was a condition precedent to the exercise of jurisdiction under section 41 and was not fulfilled.

This seems to me unsound, because the

(1) 30 C. 588; 7 C. W. N. 547.

(2) 30 C. 986.

(3) 6 Ind. Cas. 473; 37 C. 714; 14 C. W. N. 806.

(4) 31 B. 138; 8 Bom. L. R. 969.

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validity of the notice in question was no more a condition precedent to the exercise of jurisdiction than any other fact the establishment of which might be necessary before a decree could be given, if other facts had been put in issue. And in fact the principle involved in the contention would, if accepted, entail that the Court's powers under section 115 (a) and (b) are co-extensive with its powers in appeal. So broad a principle requires strong authority to support it. But none has been adduced and there is the clear language of the Privy Council in *Amir Hassan Khan v. Sheo Baksh Singh* (5) to show that the wrong decision of a question, with which the Court is competent to deal, cannot affect its jurisdiction to pass a decree based on that decision. It is no doubt true that a Court cannot confer jurisdiction on itself by the wrong determination of a question; and in order to reconcile this principle with that enunciated by the Privy Council it may be necessary to adopt some definition of the term "jurisdiction" such as that proposed by Woodroffe, J., in *Shew Prosad v. Ram Chunder* (6). If the definition which he prefers, that based on the presence of local, personal or pecuniary consideration or the nature of the subject-matter of the suit, be adopted, the result would be in accordance with the form of section 115, since objections to the Court's competence to entertain the proceedings or to its refusal to entertain them would then be covered by section 115 (a) and (b), whilst section 115 (c) would deal with all action and refusal to take action after the beginning of the trial, which otherwise complied with its requirements. It is, however, unnecessary to elaborate the discussion further in this direction, since there is, in my opinion, no ground for treating the establishment of the validity of the notice in the case before us as having any more special character than the other facts essential to a decision on the merits or as a condition precedent to the exercise of jurisdiction. I, therefore, cannot uphold the learned Judge's interference with reference to section 115 (a).

We have also considered it with reference to section 115 (c). But it is clear from the Privy Council decision already referred

to that we cannot interfere on the ground of mere mistake in fact or law, and we have been shown nothing also. For it is not suggested that the conduct of the trial in the Small Cause Court was in any respect irregular or illegal.

In these circumstances, the Letters Patent Appeal must be allowed, the decision of the learned Judge being set aside and that of the Small Cause Court Judge restored. The defendant will pay the plaintiffs' costs throughout.

SADASIVA AIYAR, J.—There are absolutely no merits in the defendant's case. Taking it that on the construction of the rental agreement the defendant is entitled to be in possession for a term of not less than 15 years and 6 months, that is, till the 29th December 1912, the present suit was brought in ejectment in 1913 and the defendant had notice in October 1911, more than 15 months before the suit was brought, that the plaintiffs were determined not to allow him to occupy the premises for a day more than the defendant was entitled to do. Even in the case of revision under section 25 of the Provincial Small Cause Courts Act, the High Court has discretion to interfere or not and where substantial justice has been done in the lower Court, it is not advisable to use revisional powers on purely technical grounds. [See *Gopala Iyengar v. Venkatakrisna Iyengar* (7)]. Much less is it advisable to interfere when this Court's powers of revision are invoked under section 115 of the Civil Procedure Code.

On the point whether a question of jurisdiction is involved in this case so as to allow of interference under section 115, it has, no doubt, been held in *Vuppuluri Atchayya v. Sir Kanchumarti Venkata Seetarama Chandra Rao* (8) that where an Appellate Court by reason of error of law decides that the Court of first instance has or has not jurisdiction to entertain a suit *taking the facts alleged in the plaint as proved*, the High Court can interfere under section 115 with the wrong decision of the Appellate Court. I was the dissenting Judge in that Full Bench case. That decision (I fully admit) is binding upon me notwithstanding that two

(7) 17 Ind. Cas. 748; (1912) M. W. N. 1227.

(8) 18 Ind. Cas. 555; 24 M. L. J. 112; 13 M. J. T. 60.

(5) 11 C. 6; 11 I. A. 237; 4 Sar. P. C. J. 559; Rafique and Jackson's P. C. No. 83.

(6) 23 Ind. Cas. 977; 41 C. 323.

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very learned Judges of the Calcutta High Court in *Shew Prosad v. Ram Chunder* (6) have taken the view which is almost identical with mine. But all those observations of that very learned Judge (Sundara Aiyar, J.) in his judgment in the above Full Bench case which went beyond the actual conclusion of the Full Bench are *obiter* and not binding. The judgment of the Chief Justice (then Mr. Justice Wallis) in that case confined itself to the point which arose for actual decision.

In the present case, the allegation in the plaint being that proper notice to quit had been given to the defendant, the jurisdiction of the Presidency Small Cause Court over the suit was clearly not taken away by any provision of the Common or the Statute Law and the Small Cause Judge did not clutch at jurisdiction through any error of law committed by him. The decision in *Vuppuluri Atchayya v. Sir Kanchumarti Venkata Seetarama Chandra Rao* (8) does not apply, therefore, to this case and the learned Judge of this Court whose decision is appealed against had, therefore, no jurisdiction to interfere under section 115 with the judgment of the Small Cause Court. I agree, therefore, that this appeal should be allowed.

Appeal allowed.

MADRAS HIGH COURT.

FIRST CIVIL APPEAL No 208 OF 1913.

March 12, 1915.

Present:—Sir John Wallis, Kt., Chief Justice, and Mr. Justice Coutts-Trotter.

MYSORE BALAKRISHNA RAO—

PLAINTIFF—APPELLANT

versus

THE SECRETARY OF STATE FOR INDIA
IN COUNCIL, REPRESENTED BY THE COL-
LECTOR OF CUDDAPPAH—DEFENDANT—
RESPONDENT.

*Madras Forest Act (V of 1882), ss. 6, 10, 16, 17—
Notice under s. 6, essential—Knowledge of claimant by
other ways, immaterial.*

Per Wallis, C. J. and Coutts-Trotter, J.—The Madras Act V of 1882 is an expropriating Act and therefore it must be strictly construed. [p. 356, col. 2; p. 357; col. 2.]

The combined effect of sections 6 and 10 of the Madras Forest Act, is to make the notice under the second part of section 6 of that Act an essential prerequisite to confer jurisdiction on a Forest

Settlement Officer to declare the land a reserved forest under sections 16 and 17 of the Act. Where no such notice is served on the claimant his ordinary right of action is not lost and the fact that he obtained notice of the reservation by any other means is immaterial. [p. 356, col. 1; p. 357, cols. 1 & 2.]

Per Coutts-Trotter, J.—The terms of both parts of section 6 are not merely directory but mandatory; and the mandate in the second part as to notice must be strictly observed. [p. 357, col. 1.]

Nasserwanjee Pestonjee v. Meer Mynodeen Khan, 6 M. I. A. 134 at p. 155; 19 E. R. 50; *Saunby v. London Waterworks Commissioners*, (1906) A. C. 110; 75 L. J. P. C. 25; 93 L. T. 648; 22 T. L. R. 37; *Herron v. Rathmines and Rathgar Improvement Commissioners*, (1892) A. C. 498 at p. 523; 67 L. T. 658; *Rameshwar Singh v. Secretary of State for India*, 34 C. 470; 11 C. W. N. 356; 5 C. L. J. 669, followed.

Per Wallis, C. J.—By the use of the words “besides *poromboke*” in an *inam* title-deed where the *inam* tenure was converted into a free-hold, the intention is to confer absolute rights over “*porombokes*” also. [p. 356, col. 2.]

Secretary of State for India v. Ragunatha Thachariar, 18 Ind. Cas. 41; (1913) M.W.N. 261; 24 M. L. J. 31; *Papala Narayanaswami Naidu v. Pensalami Kannappa Naidu*, 14 Ind. Cas. 261; (1912) M.W.N. 496; 24 M. L. J. 36, followed.

Appeal against the decree of the District Court of Cuddappah, in Original Suit No. 10 of 1911.

Mr. K. Srinivasa Aiyangar and A. Krishna-swami Aiyar, for the Appellant.

The Government Pleader, for the Respondent.

This appeal coming on for hearing on the 24th February 1915 and having stood over for consideration till the 5th March 1915, the Court delivered the following

JUDGMENT.

WALLIS, C. J.—This is a suit brought by the plaintiff against the Secretary of State in Council to establish his title to, and to recover possession of, certain lands in the village of Putlampalli, which in the year 1905 were declared to be reserved forest by a notification under section 16 of the Madras Forest Act and have since been in the possession of Government. The plaint alleges that the declaration and taking of possession were illegal and *ultra vires*, because the Forest Settlement Officer did not give notice to the plaintiff or his agent as is required by section 6 of the Act before proceeding to constitute the lands a reserved forest. The plaintiff gave evidence that he was never served with notice, and in the absence of any evidence to the contrary the District Judge found that this was so, and this finding has not been

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seriously contested. He inferred, however, from Exhibits 1, 2 and 3 that the plaintiff was presumably aware that the suit lands were being included in the reserved forest nearly a year before the publication of final notification under section 16, and held that, as the plaintiff did not avail himself of his right under section 17 to satisfy the Forest Settlement Officer, if he could, before the publication of the notification that he had sufficient cause for not preferring his claim within the period prescribed for the submission of claims in the notice issued in the year 1895, and so secure an investigation of his claim, the irregularity was cured and did not prevent the plaintiff being barred under that section. No authority has been cited before us in support of this view, and I am unable to accept it. Under the Act the Forest Settlement Officer is constituted a Court for the decision of claims to lands which it is proposed to include in a reserved forest as between Government and the claimant, and in the event of the claim being allowed he is required under section 10, if no arrangement is come to with the claimant, either to exclude the land in question from the proposed forest or to acquire it for Government under the Land Acquisition Act. Under section 6 he is required, besides publishing notices calling for claims at the headquarters of each taluk in which any part of the land is situated and at every town and village in the neighbourhood of such land, to serve special notice to the same effect on every known or reputed owner or occupier of any land included in or adjoining the land proposed to be constituted a reserved forest or his agent or manager, and it is not disputed that the plaintiff as the registered *inamdar* of the village in which the suit land was situated should have received notice under this section. It should also be stated that there is no evidence that the steps which were being taken under the Act came to the knowledge of the plaintiff under more than five years after the issue of the proclamation under section 6. In these circumstances, it is, I think, clear that the Forest Settlement Officer in the absence of the notice required by the section had no jurisdiction to make any decision affecting the rights of the plaintiff. Numerous cases might be cited in support of this position, but it is

sufficient to cite the decisions of their Lordships in *Nusserwanjee Pestonjee v. Meer Mynodeen Khan* (1) and *Saunby v. London Waterworks Commissioners* (2).

In the latter it was held by their Lordships that the Statutory Commissioners having proceeded without serving the notice required by the Act the appellant had not lost his ordinary right of action for the trespass on his property. Reference may also be made to the forcible language of Lord Macnaghten in *Herron v. Rathmines and Rathgar Improvement Commissioners* (3) and to *Rameshwar Singh v. Secretary of State for India* (4).

If, as I hold, the notification issued under section 16 is not binding on the plaintiff and his rights are not barred by section 17, I agree with the District Judge that he is entitled to a decree. Under the terms of his *inam* title-deed, Exhibit K, his *inam* tenure has been converted into a permanent free-hold, to use the language of the grant; and the only question is, whether it includes the unassessed waste lands in the village which have been included in the reserved forest. Exhibit K acknowledges his title to a personal *inam* consisting of the right to the Government revenue on land claimed to be 39.169 acres of dry and 287.69 acres of wet land situated in the Shothriem village of Plutampalli "besides *poromboke*." The *poromboke* here mentioned obviously means the *poromboke* or unassessed waste of the Shothriem village in question, and this is the construction put upon the words in similar grants in *Secretary of State for India v. Ragunatha Thathachariar* (5), and *Papala Narayanaswami Naidu v. Pensalani Kanmiappa Naidu* (6), where, however, it is held that certain lands including lands used for communal purposes, etc., do not pass under such a grant. The *inam* register, Exhibit J, which was before the survey, no

(1) 6 M. I. A. 134 at p. 155; 19 F. R. 50.

(2) (1906) A. C. 110; 75 L. J. P. C. 25; 93 L. T. 648; 22 T. L. R. 87.

(3) (1892) A. C. 498 at p. 523; 67 L. T. 658.

(4) 34 C. 470; 11 C. W. N. 356; 5 C. L. J. 669.

(5) 18 Ind. Cas. 41; 24 M. L. J. 31; (1913) M. W. N. 261.

(6) 14 Ind. Cas. 261; 24 M. L. J. 36; (1912) M. W. N. 496.

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doubt underestimates the area of the *poromboke* in the village, but there is no ground for interpreting the grant as not conferring the whole *poromboke* of the village. The appeal must be allowed and the suit decreed for the plaintiff with costs throughout.

COURTS-TROTTER, J.—I am of the same opinion. The Act which we have to construe is an expropriating Act and to a certain extent ousts the jurisdiction of the ordinary Courts of law in favour of tribunals consisting wholly or in part of executive officers. Certain machinery is provided by the Act for the purpose of giving notice to persons who may be injuriously affected by the Act and enabling them to prosecute their claims before the tribunal set up by the Act. It is conceded that in one respect the procedure outlined by the Act has not been followed in this case, inasmuch as no notice has in fact been served upon the appellant as a known or reputed owner of lands affected, in accordance with the concluding paragraph of section 6 of the Act. It also appears that there was some evidence to show that the appellant in fact knew that it was proposed to include his lands in the new forest area, notwithstanding the absence of a notice directed to him personally. In these circumstances it was urged on behalf of the respondent that the broad policy of the Act must be looked at; and that all that was essential to give jurisdiction under it was that the appellant *quoquo modo* should have knowledge in fact of the proposal to include his lands. In support of this contention reliance was placed on the language of section 6 and of section 16. No doubt section 6 fixes no limit of time within which the personal notice to owners must be given: and section 16 fixes the date for notification of the reservation of the proposed forest only by reference to the time limited by the proclamation prescribed by the first part of section 6. From that it is argued that the second part of section 6 is only directory and that neglect to carry out its directions is a mere irregularity, which can be cured by proving that notice in fact reached the appellant. The appellant contends on the contrary that the sending of the notice prescribed by the second part of section 6 is as much a condition precedent to the exercise of the

jurisdiction conferred by the Statute as the issuing of the proclamation enjoined by the first. Looking at the language employed in the two parts of section, its terms are as mandatory in the one as in the other; "the Forest Settlement Officer shall publish a proclamation" is followed by "the Forest Settlement Officer shall also serve a notice." Where such language is used, I think, its proper construction has been determined in a series of cases in the House of Lords and Privy Council, of which I need only refer to *Herron v. Rathmines and Rathgar Improvement Commissioners* (3). The result of those cases, in my opinion, is that every such statutory mandate in an expropriating Statute must be strictly observed and that its observance is a condition precedent to the whole jurisdiction conferred. I, therefore, hold that the appellant never became amenable to the special jurisdiction of the Madras Forest Act, and that the present suit lies, if he can prove his title as *inamdar* to the property sought to be afforested. That is a question of fact upon which, in my opinion, the evidence is conclusive in his favour.

This appeal having been posted to be spoken to this day, the Court delivered the following

JUDGMENT.—It will not be necessary to remand the case to ascertain the amount of the mesne profits, as the parties have agreed without prejudice that they should be awarded at Rs. 75 a year. The appellant will be entitled to recover mesne profits at this rate up to date of delivery.

Appeal allowed; Suit decreed.

MADRAS HIGH COURT.

APPEAL AGAINST ORDERS NOS. 266 AND 267 OF 1914.

April 29, 1915.

Present:—Mr. Justice Seshagiri Aiyar and Mr. Justice Kumaraswami Sastri.

LODD GOVINDA DOSS KRISHNA
DOSS VARU AND ANOTHER—PETITIONERS—
APPELLANTS

versus

THE RAJAH OF KARVETNAGAR, MINOR,
BY GUARDIAN, W. A. VARADACHARIAR,
AND OTHERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 96 (3), O.

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XXI, rr. 2, 11 (e)—Order appointing Commissioner by consent of parties—Appeal—Certifying payment or adjustment, mode of—Power and duty of Court to make inquiry—Evidence Act (I of 1872), s. 115—Doctrine of 'no estoppel against law'—Public policy—Agreement to account for certain payments in execution of decree—Estoppel—Decree, construction of—Duty of Court—Madras Court of Wards Act (I of 1902), ss. 43 (5), 32, 55—Calculation—Payment.

Section 96 (3) of the Civil Procedure Code does not apply to an order directing the appointment of a Commissioner with the consent of parties. [p. 359, col. 2.]

Section 43 (5) of Madras Act I of 1902 does not provide for any payment but a reference to sections 32 and 55 of the Act shows that the calculation mentioned in that section will determine the net income which the Court of Wards having management will be in a position to set apart for payment. [p. 360, col. 1.]

There is no authority or principle which binds a Court to construe a decree in the mode in which the parties intended it to operate however incompatible such a construction may be with the plain language of the decree. The duty of the Court is to execute the decree as it finds it and not as understood by the parties. If a particular construction has been placed by the Court upon a decree, and if it has been enforced by the process of the Court, the parties may be estopped, with certain limitations, from claiming that the decree should be construed differently. [p. 360, cols. 1 & 2.]

Rule 2 of Order XXI, Civil Procedure Code, should be so construed as not to defeat justice. [p. 362, col. 2.]

Where a decree holder certifies a payment or adjustment to the Court under Order XXI, rule 2, the Court is bound to inquire into the truth or correctness of the statement made and to ascertain the exact amount for which credit should be given to the judgment-debtor. The Court is not confined to merely entering the figures supplied by the decree-holder. [p. 361, col. 1.]

No particular words are necessary for the purpose of certifying a payment or adjustment to the Court under Order XXI, rule 2. A mere intimation in an execution application that a certain amount had been received from the judgment-debtor but that it had been appropriated towards another liability amounts to certifying within the meaning of the rule. [p. 362, col. 1.]

The doctrine that there can be no estoppel against a plain provision of the law should not be pushed too far. The principle is that parties should not be permitted by an arrangement between themselves to commit an illegality. The right should not be extended to cases which have the effect of enabling parties to make a law for themselves in violation of the law of the land. But where such a result will not follow, there is nothing to prevent the application of the provisions of section 115 of the Evidence Act to agreements between the parties. [p. 363, col. 1.]

There is nothing opposed to public policy or illegal in parties stipulating that a certain sum of money which is recoverable as between themselves in a regular suit should be adjusted in execution proceedings. Therefore, where a decree-holder certifies and

informs the Court of an adjustment, he is not entitled to say that payments received by him are accountable by him only in a regular suit. [p. 363, cols. 1 & 2.]

Appeals against the orders of the District Court of North Arcot in Civil Miscellaneous Petition No. 520 of 1911 (in Execution Petition No. 145 of 1905 in Original Suit No. 12 of 1901) and in Civil Miscellaneous Petition No. 145 of 1905 (in Original Suit No. 12 of 1901) dated the 11th October 1911 and 7th August 1911, respectively.

Messrs. R. Sadagopachariar, T. Ranga-chariar, S. Srinivasa Aiyangar and K. Basu-yam Aiyangar, for the Appellants.

Mr. L. A. Govindaraghava Aiyar, for the Respondents.

JUDGMENT.—These appeals are from an application to execute a mortgage decree. The decree was passed in favour of the appellant's father on the 29th of September 1903. The suit itself was instituted in 1901. At the time of the institution of the suit, the Court of Wards was in charge of the estate a portion of which was mortgaged to the appellant's father. The possession of the Court commenced in 1900 and was relinquished in or about September 1905. The appellant took possession of the village thereafter. There is a dispute as to the exact date when he assumed management. He presented his application for an order absolute and for the sale of the mortgaged properties in December 1905. That order has not been exhibited in these proceedings. The District Judge says: "Before the order for sale was passed, it was not, however, ascertained what the balance of the mortgage-debt outstanding at the time of the application was, nor was the order absolute made for the realisation of any specific amount." This statement of the Court below has not been contested before us. On the 2nd of September 1909, the District Judge granted a prayer for execution and called for an affidavit, a draft proclamation and an encumbrance certificate from the appellant. On the 7th of October 1909, the appellant filed his affidavit. The judgment-debtor filed a counter-affidavit objecting to the valuation of the property and to the amount stated to be due to the decree-holder. On the 7th of August 1911, the District Judge passed an order to the effect that having regard to the dispute about the amount due, it is desirable that a Commis-

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sioner should be appointed to ascertain it. His order says: "The decree-holder's Vakil does not object to this being done." Then he referred to the suggestion of the Vakil that the accounts should be examined at the village and not in Court, and said that the request was reasonable. It is clear that on this date, the decree-holder through his Vakil consented to the appointment of a Commissioner. The only outstanding dispute was as to the place where the examination of the accounts should take place. But on the 8th of August and on the 11th of August, the Vakil is said to have filed two petitions requesting that the question "whether the decree being one for sale, the petitioner decree-holder was bound to account at all under the terms of the decree in the execution proceedings, and whether the judgment-debtor could insist on accounts being rendered in these proceedings", should be determined before a Commissioner was appointed. These two petitions are said to have been withdrawn. We regret that this should have been allowed. The grounds on which the Vakil wished to recede from the position taken up by him on the 7th of August are material. The Vakils on both sides were heard on these petitions. Finally, the District Judge affirmed his previous order on the 11th October 1911. Civil Miscellaneous Appeal No. 266 of 1911 is presented against this final order. Civil Miscellaneous Appeal No. 267 of 1911 is against the earlier order of the 7th August.

The appeals have been argued at great length. A preliminary objection was taken that no appeal lay against the first order as that was passed on consent. We do not think section 96 (3) applies to an order directing the appointment of a Commissioner. Reference may also be made to Order XXXIII, rule 4 (2), and to *Mata Palat v. Beni Madho* (1). Moreover, although the Vakil for the appellant accepted the suggestion to appoint a Commissioner, the District Judge formed his own conclusion on the materials placed before him. We must everrule the preliminary objection.

The matter in dispute between the parties relates to the amount received by the decree-holder from the mortgaged property after he took possession of it from the Court of

Wards. The judgment-debtor contended that the appellant should give credit for the net income received by the appellant and that execution should issue only for the balance. The decree-holder does not deny that he is liable to account to the judgment-debtor for the profits realised as mortgagee in possession, but argues that this liability does not prevent his levying execution for the full amount entered in the decree. There can be no manner of doubt that the conduct of the decree-holder led the judgment-debtor to believe that a separate suit for an account of the income need not be instituted and that credit will be given for the net profits in execution. It was said that a suit for the recovery of the profits will now be barred by limitation, whether there will be any such bar, and if so, to what extent, need not be gone into in these proceedings. The *first* question we have to decide is, whether under the decree the appellant is bound to give credit for the income received by him as mortgagee in possession. The decree says: "This Court doth further order and decree that the plaintiff be entitled to the net rents and profits of the mortgaged property from the beginning of *fasli* 1310 according to the provisions of section 43 (5) of Madras Act I of 1902, and that all payments made to the plaintiff on account thereof be applied in reduction of the amount due to him under the compromise deed." As we pointed out before, this decree was passed when the Court of Wards was in possession. Its intervention was sought by the *zemindar* for the purpose of liquidating the enormous debts which had accumulated over his estate and of saving, if possible, a portion of the estate for him. It was because the Court found that there was no possibility of securing to the *zemindar* any portion of the property it gave up possession in 1905. Therefore, when it assumed possession, it was with the object of paying to the secured creditors the income available from the properties mortgaged, so that after crediting a portion of the payment for the interest accruing due, the balance may be applied towards the discharge of the principal debt. The Court of Wards is in the position of a Receiver, *Adipuram Pillai v. Gopalasami Mudali* (2). When these facts are

(1) 22 Ind. Cas. 961; 36 A. 172; 12 A. L. J. 235.

(2) 31 M. 354; 18 M. L. J. 259; 3 M. L. T. 281.

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remembered, the provision in the clause for the payment of the net profits becomes intelligible. It is true, as pointed out by Mr. Govindaraghava Aiyar, section 43 (5) does not provide for any payment. By reference to sections 32 and 55, it is clear that the calculation mentioned in section 43 will determine the net income which the Court having management will be in a position to set apart for payment to the mortgagee. Section 32 distinctly provides for the payment of the debts due by the ward. However that may be, there is no warrant for reading into the clause a provision that when the mortgagee is in possession, he has to apply the net income towards the decree-debt. There are patent objections to such a construction. The clause speaks of payment and not of appropriation. Section 43 (5) which is referred to in the clause, speaks of a dispossessed incumbrancer. That same section provides for the net profits being recoverable from the Court of Wards. Obviously, therefore, the decree had reference to the management by the Court and to the payment to be made by it and not to the resumption of possession by the decree-holder. It was by an oversight that the decree did not provide for the contingency of the Court withdrawing from the management. There is no warrant for importing into the decree a provision like the one which the judgment-debtor says was in the contemplation of the parties. That would be adding to the decree and not construing it. It was argued that if the parties understood the decree in a particular sense, the Courts should give effect to it. We have no clear evidence in this case of any course of conduct by the parties which placed the construction we are asked to adopt. Nor do we think that the contention that Courts are bound to construe a decree in the mode which the parties intended it to operate is well founded. If a particular construction has been placed by the Court on a decree and if it has been enforced by the process of the Court, the parties may be estopped from claiming that the decree should be differently construed. Even this view has its limitations. But we know of no authority or principle which renders the executing Court a mere recording machine for the interpretation which the parties choose to put upon a decree, however incompatible such a construction may be with the plain language of the the decree.

Secretary of State for India in Council v. Durbijoy Singh (3) does not help the respondent. On other hand, *Bakhtiar Begam v. Husaini Khanam* (4) suggests that it is the duty of the Court to execute the decree as it finds it and not as understood by the parties. We must hold that the decree does not provide for the application of rents and profits received by the decree-holder in satisfaction of the decree.

One other minor contention may be disposed of before dealing with the principal question. In the course of the execution-application the Pleader for the decree-holder undoubtedly assented to the appointment of the Commissioner at one stage of the proceedings, although he subsequently withdrew his consent. In *Venkata Narasimha Naidu v. Bashyakarl Naidu* (5), the Judicial Committee concurred with the view of the High Court that it is open to a Pleader to abandon an issue relating to the impartibility of a *zemindari*. It was argued that this decision will not enable a Pleader to give up a question of law. It cannot be said that the point conceded before the District Judge related to a pure question of law. In his affidavit, the appellant had admitted his liability to account for the profits during the period he was in possession; and the Pleader was within his rights in following up this admission by consenting to the appointment of a Commissioner. *Rama Iyengar v. Kasinivenda Iyengar* (6) only deals with an erroneous admission that a question of law was unarguable. See also *Narayan v. Venkatacharya* (7). These do not affect the present case. However, having regard to the fact that the admission was withdrawn soon after, we do not wish to base our judgment on the consent alone.

The main point for decision is, whether the fact that the receipt of the income from the property has not been certified to the Court by the decree-holder, prevents the Judge from directing an inquiry into

(3) 19 C. 312 (P. C.); 19 I. A. 69.

(4) 23 Ind. Cas. 355; 41 I. A. 84; 26 M. L. J. 474; 18 C. W. N. 586; 12 A. L. J. 472; 36 A. 195; 19 C. L. J. 477; (1914) M. W. N. 411; 15 M. L. T. 389; 16 Bom. L. R. 344; 1 L. W. 813.

(5) 25 M. 367 (P. C.); 29 I. A. 76.

(6) 16 Ind. Cas. 746; 23 M. L. J. 327.

(7) 28 B. 408 at p. 412; 6 Bom. L. R. 434.

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the amount realised. There are two provisions in the Code of Civil Procedure relating to this matter, Order XXI, rules 2 and 11. The first of these rules deals with certifying to the Court and the latter with the contents of the application for execution. Rule 2 is an enabling provision. Rule 11, clause (a), imposes a duty on the decree-holder to state to the Court whether any payment or other adjustment has been made. It was contended that whereas the right given to the judgment-debtor to apply within a specified period for certifying the payment or adjustment may necessitate an inquiry, when the decree-holder certifies the Court has to act solely on his representation and any enquiry, regarding the amount of the payment or adjustment is not within the competency of the Court. We are not prepared to place such a restricted construction upon the powers of the Court. We fail to see why the arithmetic of the payment or adjustment is beyond the Court's jurisdiction. We cannot accede to the contention that when the manner of payment or adjustment has been notified, the Court has no power to ascertain to what extent the decree has been satisfied. To take a concrete case: suppose a decree-holder informs the Court that he desires that the judgment-debtor should be credited with the balance that may be found in his favour after taking account of a mutual and current account between the parties, we see no reason for holding that the Court is powerless to order an enquiry regarding the amount. The phrase "adjustment in whole or in part" suggests that the Court is not confined to merely entering the figures supplied by the decree-holder. The further question for consideration is whether the decree-holder has certified any such adjustment to the Court. No particular words are necessary for this purpose. See *Saadoollah Shaikh v. Kalee Churn* (8), *Alathoor Badruddin v. Gulam Moideen* (9), *Ramayyar v. Ramayyar* (10) and *Lakhi Narain Ganguli v. Felamani Dasi* (11). Two statements made by the decree-holder are relied on. In the Execution Application No. 145 of

1905 presented by him, he says: "this and a small amount collected by the plaintiff himself from the tenants have been appropriated towards the expenses of the management to which the plaintiff is entitled." Then in the affidavit which he was called upon to submit prior to the settlement of the proclamation of sale, he stated: "the amount for the recovery of which the sale was ordered is Rs. 23,11,183 on the 29th March 1903, with further interest to be added. Accordingly, with further interest up to 29th September 1909, deducting the amount of net rents paid to me by the Court of Wards, the total amount comes to Rs. 29,05,187-1-11. Credit will be given for the net income received by me up to the date of final settlement of accounts in execution proceedings. I may be permitted to add the amount of expenditure incurred over and above the net income received by me during the course of management of the said Narayanavanam Taluq." Mr. Rangachariar argued that the last clause of the paragraph is an intimation that there was no surplus income. We cannot accept this construction. The paragraph opens with a statement that "the net revenue available after deducting the *peishcush* and the land-cess" will be about Rs. 97,500. In the middle of the paragraph, it is said that "credit will be given for the net income." The last clause is only a suggestion that if in the calculation of the net income, the decree-holder had omitted to give himself credit for any legitimate expenses incurred by him in the course of the management, he would submit a statement for making deductions in that behalf. To read the clause as the learned Vakil wants us to do will render the whole paragraph meaningless. We are of opinion that in this paragraph the decree-holder distinctly intimated to the Court that credit will be given for the amounts received as net profits during the years that he was in possession. It was next contended that the affidavit only provided that "credit will be given for the net income received up to date;" and such language is not equivalent to asking the Court to certify the adjustment. The affidavit was filed with a view to enable the Court to fix the amount to be entered in the sale proclamation. The plaintiff clearly wanted the Court to apply its mind to the figure that should be so entered. It is not

(8) 12 W. R. 358.

(9) 12 Ind. Cas. 562; (1911) 2 M. W. N. 473; 10 M. L. T. 396; 24 M. L. J. 541; 36 M. 357.

(10) 21 M. 856.

(11) 27 Ind. Cas. 11; 20 C. L. J. 131.

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suggested in what other proceeding this credit was intended to be given by the decree-holder. We are of opinion that these words were intended to inform the Court that the decree must be taken to have been satisfied to the extent of the net income received by the decree-holder. We must, therefore, hold that the decree-holder intended to certify adjustment by his affidavit, that it is competent to the Court to inquire into the quantum of this adjustment and that the appointment of a Commissioner for this purpose was justifiable.

There is one other aspect of the case which leads to the same conclusion. Under Order XXI, rule 11, the decree-holder is bound to inform the Court of any adjustment or payment that has been made. It was held in *Ramayyar v. Ramayyar* (10) that if the decree-holder fraudulently keeps back information in this respect the executing Court will have power to order an inquiry. In *Pampayya v. Narasannah* (12), it was held that even apart from fraud the Court can determine whether any adjustment has been made. In neither of these cases, the effect of rule 2 upon rule 11 (section 235 or section 258 of Act XIV of 1882) were considered. The cardinal principle, no doubt, is to see that neither party overreaches the other. But where no intimation is conveyed by the decree-holder, it is doubtful whether the Court can start an inquiry on the ground that the decree-holder should have certified payment or adjustment. The better view seems to be that in all cases where the Court is seized of the question either from intimation conveyed by the decree-holder at any time before orders are passed or from the judgment-debtor within the prescribed period, the Court will be bound to inquire into the truth or correctness of the statement made. This view would give effect to the imperative provision in rule 11, clause (e), and to the permissive provision in rule 2. In the present case, the decree-holder did say in the petition for execution that moneys have been received, but he coupled it with an assertion that it has been appropriated towards the expenses of the management. The truth of this assertion is a legitimate subject for inquiry. The decision in *Tukaram v. Babaji* (13) is very analogous to the present

case. In that case, the decree-holder relied on uncertified payments to save limitation and the judgment-debtor denied them and pleaded that execution was barred. The Court held that it had power to direct an inquiry. If the truth of an assertion of an adjustment can be enquired into for the purpose of saving limitation, we fail to see why the same principle should not be extended to ascertain the exact amount for which credit should be given to the judgment-debtor. See also *Roshan Singh v. Mata Din* (14). *Fateh Muhammad v. Gopal Das* (15) was strongly relied upon by the learned Vakil for the appellant. It only lays down that where an arrangement by which a decree is adjusted, is not certified, the executing Court should not recognise it. There are observations in that judgment which are not reconcilable with recent decisions, which place a more liberal construction on the manner of certifying. In *Trimbak Ramkrishna v. Hari Laxman* (16), the question was whether a decree-holder who received moneys outside the Court without certifying was estopped from pleading that they should not be recognised as adjustments. We agree with Mr. Justice Heaton that section 258 (rule 2 of Order XXI) should be so construed as not to defeat justice. In *Khushalchand v. Nandram* (17), the learned Judges of whom Mr. Justice Chandavarkar, who took part in the decision in *Trimbak Ramkrishna v. Hari Laxman* (16), was one inclined to the view that a mere intimation of adjustment is equivalent to certifying. *Jogendra Nath Sarkar v. Probhat Nath Chatterjee* (18) follows the view taken by Mr. Justice Chandavarkar in *Trimbak Ramkrishna v. Hari Laxman* (16). These decisions do not compel us to hold that where a statement has been made in the execution petition that a certain payment was made, it is not within the province of the Court to inquire whether the mode of appropriation suggested in it is true or not. Our conclusion is that the District Judge was right in appointing a Commissioner to ascertain to what extent the profits received by

(14) 26 A. 36; A. W. N. (1903) 179.

(15) 7 A. 424; A. W. N. (1885) 76.

(16) 7 Ind. Cas. 940; 34 B. 575; 12 Bom. L. R. 686.

(17) 12 Ind. Cas. 572; 35 B. 516; 13 Bom. L. R. 977.

(18) 21 Ind. Cas. 926; 10 C. L. J. 126.

(12) 2 M. 216; 5 Ind. Jur. 196.

(13) 21 B. 122.

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the appellant and referred to by him in his petition should be applied towards the amount of the decree. The decree-holder in applying for an order absolute left the question of the amount due open.

Mr. Govindaraghava Aiyar has raised a further contention that as the decree-holder has agreed to give credit to the income from the mortgaged property in execution and as the judgment-debtor did not object to this course, the appellant should not be allowed to invoke the aid of Order XXI, rule 2. Mr. Rangachariar's reply to this is that as there can be no estoppel against a plain provision of the law, the decree-holder is not precluded from pleading that his assent does not bind him; and he relies upon *Jogendra Nath Sarkar v. Probhat Nath Chatterjee* (18), *Trimbak Ramkrishna v. Hari Laxman* (16) and *Komma Somakka v. Kodidala Pedda Ramiah* (19). There has been a tendency in recent years to push this doctrine too far. The principle is that parties should not be permitted by an arrangement between themselves to commit an illegality. The right should not be extended to cases which have the effect of enabling parties to make a law for themselves in violation of the law of the land. But where such a result will not follow, there is nothing to prevent the application of the provisions of section 115 of the Evidence Act to agreements between the parties. There is nothing opposed to public policy or illegal in parties stipulating that a certain sum of money which is recoverable as between themselves in a regular suit should be adjusted in execution proceedings. The accountability arose after decree. It was between the parties to the suit and in respect of the subject-matter of the litigation. Clause 2 of section 47 of the Code of Civil Procedure shows that an arrangement of the kind we have referred to is not obnoxious to legal procedure. The decision of the Judicial Committee in *Sadasiva Pillai v. Ramalinga Pillai* (20) supports this view. Mr. Rangachariar distinguished this case on the ground that the sanction of the Court was given in that case to the mode of enforcing the claim. Although that distinction is well founded, we think that its extension to cases like the present will not be

(19) 13 Ind. Cas. 251; 22 M. L. J. 193; (1911) 2 M. W. N. 519; 36 M. 39.

(20) 2 L. A. 219; 24 W. R. 193; 15 B. L. R. 383.

unwarranted, especially as the Code is in favour of treating applications as suits. Section 47, clause 2. See *Muhammad Sulaiman v. Jhukkilal* (21), *Lakshmana v. Sukiya Bai* (22), *Kondaji Bagaji v. Anam* (23). Moreover, in the present case after the filing of the application by the decree-holder, in which he referred to the receipt of income from the mortgaged property which he alleged he applied in a particular manner, the Court took action on it by issuing notices to the judgment-debtor. The Court by these orders must be deemed to have sanctioned the proposal of the decree-holder to give credit in execution proceedings to moneys which he is bound to account for in a regular suit. See also the observations of the Judicial Committee in *Mahomed Musa v. Aghore Kumar Ganguli* (24).

The decisions in *Appa Rao v. Krishna Iyengar* (25), *Vaidhinadasawmy Aiyar v. Somasundaram Pillai* (26) and *Ramasami Naik v. Ramasami Chetti* (27) relied on by Mr. Srinivasa Aiyangar do not affect the question. If the respondent in this case contended that receipts as mortgagee ought to be regarded as payments to the decree-holder, these decisions will be in appellant's favour. We are not deciding this case on that ground. We hold that the decree-holder has certified, that he has informed the Court of an adjustment and that he is not entitled to say that payments received by him are accountable by him only in a regular suit. The decision of the District Judge is right for the reason mentioned by us. We dismiss the appeals with costs of the sole respondent in Civil Miscellaneous Appeal No. 266.

The Commissioner will take accounts from the 1st July 1907 up to the 30th of June 1915. Credit will be given for the amount reported by the Commissioner to the judgment-debtor and in the sale proclamation the decree amount minus other amount will

(21) 11 A. 228; A. W. N. (1889) 53.

(22) 7 M. 400.

(23) 7 B. 448.

(24) 28 Ind. Cas. 930; 28 M. L. J. 548; 17 Bom. L. R. 420; 21 C. L. J. 231; 19 C. W. N. 250; 13 A. L. J. 229; 17 M. L. T. 143; 2 L. W. 258.

(25) 25 M. 537.

(26) 28 M. 473; 15 M. L. J. 126.

(27) 30 M. 255; 17 M. L. J. 201; 2 M. L. T. 167.

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be entered. The judgment-debtor can pursue his ordinary resources regarding the amount that may become due after the 1st of July 1915.

Appeals dismissed.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 468 OF 1913.

June 8, 1915.

Present:—Mr. Kanhaiya Lal, A. J. C.

INDAR DAT—PLAINTIFF—APPELLANT
versus

BALGOVIND—DEFENDANT—RESPONDENT.

Oudh Rent Act (XXII of 1886), s. 127—Trespasser, suit against—Mesne profits, decree for—Jurisdiction of Civil and Revenue Courts.

Section 127 of the Oudh Rent Act does not compel a person to recognise a trespasser as a tenant and to sue him for arrears of rent at such rate as the Revenue Court may consider fair and equitable. He has the option either of going to the Civil Court and suing him for possession and damages in the manner laid down in Order II, rules 2 and 4, Civil Procedure Code, or to acquiesce in his occupation and sue him for rent at a fair and equitable rate under section 127 of the Oudh Rent Act.

Lala Singh v. Hazari Singh, 26 Ind. Cas. 242; 17 O. C. 343 at p. 344; 1 O. L. J. 574, referred to.

Where a person, who finds his agricultural land in the wrongful occupation of another, elects to sue him in the Civil Court for possession and mesne profits, the Court cannot, while giving a decree for possession, refuse that for mesne profits on the ground that the plaintiff's remedy lies in the Revenue Courts under section 127 of the Oudh Rent Act.

Appeal from the decree of the Additional Subordinate Judge, Bahraich, dated the 2nd August 1913, upholding that of the Munsif, Bahraich, dated the 30th April 1913.

Babu Salig Ram, for the Appellant.

Mr. Fakhruddin Hasan, for the Respondent.

JUDGMENT.—The plaintiff-appellant is the lessee of the village Kishunpur Mitha on behalf of the Court of Wards in charge of the Nanpara Estate. The land in dispute is situated in that village and was cultivated by Dasrath, who was ejected by the plaintiff in June 1912. The allegation of the plaintiff was that Dasrath and his father Balgovind wrongfully took possession of the land and the former was ejected. The plaintiff, therefore, sued for possession of the land and

mesne profits. The defence was that the plaintiff gave the land to Balgovind under an agreement made in May 1912. The Court below found that no such agreement was proved and gave a decree for possession of the land. The Court of first instance also gave a decree for Rs. 120 on account of damages, but the lower Appellate Court refused to uphold that decree, on the ground that the plaintiff's remedy was to sue for such rent as the Revenue Court might consider fair and equitable under section 127 of the Oudh Rent Act.

Section 127 does not, however, compel a person to recognize a trespasser as a tenant and to sue him for arrears of rent at such rate as the Revenue Court may consider fair and equitable. A person, who finds his land in the wrongful occupation of another, has, as pointed out in *Lala Singh v. Hazari Singh* (1), the option of either going to the Civil Court and suing him for possession and damages in the manner laid down in Order II, rules 2 and 4, of the Code of Civil Procedure, or to acquiesce in his occupation and sue him for rent at a fair and equitable rate under section 127 of the Oudh Rent Act. The suit for possession, which has been decreed by the Court below, was in itself a sufficient indication that the plaintiff was not willing to acquiesce in the cultivation of the land by Balgovind. The lower Court ought, therefore, to have gone into the question of damages and given a decree to the plaintiff for such compensation for the wrongful use and occupation of the land to which he might have been found entitled. The learned Counsel for the plaintiff stated that he is willing to accept the amount of damages awarded by the Court of first instance. There is nothing to show that that amount is excessive.

The appeal is, therefore, allowed and the plaintiff's claim decreed for Rs. 120 damages with proportional costs here and below against Balgovind, defendant No. 2. The defendant-respondent will bear his own costs throughout.

Appeal allowed.

(1) 26 Ind. Cas. 242; 17 O. C. 343 at p. 344; 1 O. L. J. 574.

JANARDAN MAHATO v. BHAIRAB CHANDRA MONDAL.

CALCUTTA HIGH COURT.
SECOND CIVIL APPEAL No. 3510 OF 1912.
July 13, 1915.

Present:—Mr. Justice Chitty and
Mr. Justice Richardson.

JANARDAN MAHATO—PLAINTIFF—
APPELLANT
versus

BHAIRAB CHANDRA MONDAL AND

OTHERS—DEFENDANTS—RESPONDENTS.

Specific performance—Agreement, to sell land—Time named in agreement not adhered to, effect of—Time when essence of contract—Notice by one party to the other—Contract Act (IX of 1872), s. 55—Laches—Limitation—Specific Relief Act (I of 1877) not applicable—Rules of justice, equity and good conscience should apply.

Where the Specific Relief Act does not apply a suit for the specific performance of the agreement to sell land is governed by the ordinary rules of justice, equity and good conscience. [p. 365, col. 2.]

Time is not of the essence of a contract, until the parties expressly make it so. [p. 365, col. 2; p. 366, col. 1.]

Where in an agreement to sell some time is named, it is not until one side or the other gives the opposite party reasonable notice to complete the agreement within a definite time that the opposite party can be tied down to the time so prescribed. [p. 366, col. 1.]

A suit for specific performance should succeed if no laches is found on the part of the plaintiff and his suit is within limitation. [p. 366, col. 1.]

Appeal against the decree of the District Judge of Dumka, in Sonthal Parganas, dated the 13th May 1912, affirming that of the Subordinate Judge of Jamtara, dated the 22nd of December 1911.

Babus Mohini Mohan Chakravarti and Abinash Chandra Chakravarti, for the Appellant.

Babu Naresh Chandra Sinha, for the Respondents.

JUDGMENT.

CHITTY, J.—In this case, the plaintiff is the appellant. He filed a suit on 14th May 1909 against Srimati Thaka Sundari Dasi, wife of Naba Gopal Roy, for specific performance of an agreement to sell to him certain land. The suit has been dismissed in both the lower Courts and the plaintiff has consequently appealed.

It appears that, by a *bainamāh*, dated 12th *Sravan* 1315 (27th July 1908), the first defendant, Thaka Sundari Dasi, agreed to sell to the plaintiff this land for a sum of Rs. 3,100. Of that Rs. 200 was paid as earnest money. The *bainamāh* provided that the sale should be completed in three months, when the sale-deed was to be registered and the balance of the purchase-money paid.

The plaintiff subsequently paid and the defendant accepted a sum of Rs. 85 on 7th *Asvin* 1315. That was before the three months named in the *bainamāh* had expired. The parties thereafter did not come to terms with regard to the completion of the document. The plaintiff says that he asked Naba Gopal that his wife should go to Jamtara, and register the deed, but that Naba Gopal refused and required the plaintiff to come to Nagori where they lived and have the deed executed there. Nothing, therefore, was done with regard to the completion of the agreement. On 14th May 1909, some 10 months after the agreement, the plaintiff filed the present suit. After he had filed the suit, namely, on 16th July 1909, the defendant Thaka Sundari Dasi purported to sell the same property to Bhairab Chandra Mandal and Gopal Sundari Dasi, who are said to be mortgagees of the property from Thaka Sundari Dasi. That deed was registered on 17th July 1909. In consequence of that sale, those two persons were made parties defendant in this suit, and it is they who have contested the suit throughout. Thaka Sundari Dasi has stood aside; and, after filing her written statement, has taken no further part in the proceedings.

The learned District Judge has dismissed the plaintiff's suit *in toto*. In doing so, we think that he was clearly in error. In any case the plaintiff might have been given a chance of recovering the deposit which he had made, unless it was shown that he was guilty of laches which would prevent him from so doing. But the error of the learned District Judge consists in this that he has regarded the three months named in the contract as being the extreme limit, within which the contract was to be performed, and that there could be no extension of that time. In other words, that the three months fixed was of the essence of the contract. Now the Specific Relief Act does not apply to the Sonthal Parganas; nor did the provisions of the Civil Procedure Code of 1859 in which there was a section dealing with specific relief. The case will, therefore, have to be governed by the ordinary rules of justice, equity and good conscience. It has been a long standing rule in all matters of specific performance of contract for sale of land that time is not of the essence

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of the contract, until the parties expressly make it so. Some time is generally named in the agreement to sell, but that is rarely adhered to; and it is not until one side or the other gives the opposite party reasonable notice to complete the agreement within a definite time that the opposite party can be tied down to the time so prescribed. In this case, nothing of that kind was done; and within 10 months, the plaintiff filed the suit in which he offered to pay the amount and asked the Court to insist upon the defendant Thaka Sundari Dasi executing a conveyance in his favour. It appears to us that he was right in so doing.

It is argued that the matter would be in some way governed by the provisions of the Contract Act. There are really no provisions in the Contract Act, which are in conflict with the ordinary rules with regard to the specific performance of contracts of sale of land. On the contrary section 55 says: "If it was not the intention of the parties that time should be of the essence of the contract, the contract does not become voidable by the failure to do such thing at or before the specified time; but the promisee is entitled to compensation from the promisor for any loss occasioned to him by such failure." That would not prevent the plaintiff from coming in and requiring the defendant to perform her contract in his favour. The Limitation Act, gives three years for a suit for specific performance. This does not mean that the plaintiff is entitled to stand out for three years, but, in this case, there seems to have been no laches on the part of the plaintiff nor is any such laches found by the Courts below. The fact that he brought his suit within 10 months of the date of the *bainamah* shows that he was anxious to carry out the contract on his part.

Then, it is said that the defendants Nos. 2 and 3 were purchasers for value without notice. The Transfer of Property Act applies to the Sonthal Parganas and section 52 provides that in a case of sale of the property in question by any party to a suit or proceeding, such sale cannot affect the rights of any other party thereto under any decree or order which may be made therein, except under the authority of the Court and on such terms

as it may impose. Defendants Nos. 2 and 3, who have contested this suit, have no equities whatever in their favour. They were mortgagees of the property and they will, no doubt, be able to recover their mortgage-money from the purchase-money if and when it is paid by the plaintiff.

We think that the decisions of the Courts below cannot be upheld. We accordingly set them aside, and pass a decree in favour of the plaintiff for specific performance of the contract on the plaintiffs' depositing in Court, within two months of the receipt of the record in the Court below, the balance of the purchase-money. There will also be a decree for possession to be given to the plaintiff on payment of the purchase-money and the execution of the conveyance, but subject to any rights of the defendants Nos. 2 and 3 as mortgagees of the property. Plaintiff must have his costs of suit from defendants Nos. 2, 3 in all the Courts. If the balance of the purchase-money is not paid into Court within the two months as aforesaid, the suit will stand dismissed with costs.

Let the record be sent down without delay.

RICHARDSON, J.—I agree.

Appeal accepted.

PRIVY COUNCIL.

APPEALS FROM THE ALLAHABAD HIGH COURT.

June 3, 1915.

Present:—Lord Atkinson, Sir John Edge and Mr. Ameer Ali.

PADARATH HALWAI AND OTHERS—

APPELLANTS

versus

Pandit RAM NARAIN UPADHIA AND

OTHERS—RESPONDENTS.

Transfer of Property Act (IV of 1882), s. 59—Mortgage executed by pardanashin ladies—Attestation—Witnesses identifying ladies by their voices—Mortgage—Priority—Priority claimed but not insisted upon by an appeal, effect of—Estoppel.

A mortgage, the amount secured by which exceeded Rs. 100, was executed by two pardanashin ladies. The ladies did not appear before the two attesting witnesses and, consequently, their faces were not seen by the witnesses. However, the witnesses were well acquainted with the voices of the ladies and recognised and identified them, at the time when the mortgage-deed was executed, by their voices.

Held, that the mortgage-deed was duly attested by the two witnesses within the meaning of section 59 of the Transfer of Property Act. [p. 366, col. 2.]

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In 1887 the two villages A and B were mortgaged to S. In February 1892 the village A alone was mortgaged to L. In June 1892 the villages A and B were again mortgaged to S with three more villages. In 1893 the village A alone was further mortgaged to L, who in 1896 sued on his both mortgages making S a defendant to his suit. In his written statement S distinctly claimed priority in respect of his mortgage of 1887. But under an erroneous decree, against which S did not appeal, the village A was sold, the proceeds of the sale were applied first in payment to L in respect of his mortgage of February 1892, and the balance was paid to S, though it was insufficient to satisfy the mortgage of 1887. As L's mortgage of 1893 remained entirely unsatisfied, L obtained a decree, under section 90 of the Transfer of Property Act, in execution whereof the village B was sold and was purchased by P in 1904. In defence to a suit by S it was contended by P, that as S did not, by an appeal against the first decree of L, insist on his priority under the mortgage of 1887, the village B was relieved of all liability in respect of that mortgage.

Held, (overruling L's contention) that the fact that S did not insist on his priority did not affect his claim against the village B. [p. 370, col. 1.]

Consolidated appeals from a judgment and decrees of the High Court, Allahabad, dated March 29th, 1909, modifying those of the Subordinate Judge of Jaunpur, dated May 25th, 1905.

FACTS.—The facts of the case are sufficiently set forth in their Lordships' judgment. The case was remanded for further evidence on the question of attestation. Their Lordships have held in the case of *Shamu Patter v. Abdul Kadir Rowthan* (1) that attestation as required by section 59 of the Transfer of Property Act of 1882 could not be in due force unless the attesting witnesses saw the mortgagor signing the deed. Further evidence was that the ladies were seen through a *chick* signing the deed and were identified by their voices.

Sir E. Richards, K. C. and Mr. Brown, for the Appellants, contended that the mortgage-deed was not duly attested as it had to be signed by the mortgagor in presence of attesting witnesses. It was so laid down in *Shamu Patter's* case (1).

[LORD ATKINSON: It is not the question of fraud. It is the question of attestation acknowledged by attesting witnesses. The question is whether the attest-

ing witness saw the attestation. He knows from his sense of hearing though not of sight. What is the difference between the sense? What superiority has one over the other?]

Mr. DeGruyther, K. C., for the Respondent, then argued that the attestation was complete as the witnesses had seen the ladies signing the deed through a *chick*. He referred to *Parke v. Mears* (2) and *Synd Abbas Ali Khan v. Yadeem Ramy Reddy* (3).

Sir E. Richards, K. C., in reply, said that the two men outside the *parda* did not know the ladies by sight. This could not be attestation. By holding that this was attestation the greatest security in case of *pardanashin* ladies would be taken away.

[SIR GEORGE FARWELL: One has to be satisfied whether the hand is that of the lady or not.]

[MR. AMEER ALI: It purports to be by A. The question is whether it was by A or B. The document cannot be put in evidence before the person executing it is ascertained.]

[LORD ATKINSON: It is proved as a fact that it was executed by the ladies and that they were in the room. Are they not justified to presume that the hands were of the ladies?]

At this stage of the argument their Lordships directed Counsel to address the Board on other points, holding that attestation was proved. The judgment on this point was delivered by Lord Atkinson.

Sir E. Richards, K. C., continuing, argued that the mortgagees were not appealing against the procedure of the lower Court that their charges should have been satisfied out of the proceeds for the sale of the first village. They lost their right by not insisting on payment. The appellants bought the village free from all incumbrances. He referred to *Mamraj v. Brij Lal Chakerverti* (4); *Ponnusami Mudaliar v. Srinivasa Naicken* (5); *Imam Ali v. Baij Nath Ram Sahu* (6); *Gur Narain v. Shadi Lal* (7).

Mr. DeGruyther, was not called upon to reply.

JUDGMENT.

- SIR JOHN EDGE.—These are consolidated
 (2) 2 Bos. & Pul. 217; 126 E. R. 1244.
 (3) 3 M. L. A. 156; 1 Sar. P. C. J. 259; 18 E. R. 456.
 (4) 12 Ind. Cas. 587; 34 A. 106; 8 A. L. J. 1241.
 (5) 31 M. 333.
 (6) 33 C. 613; 10 C. W. N. 551; 3 C. L. J. 576.
 (7) 12 Ind. Cas. 607; 34 A. 102; 8 A. L. J. 1289.

(1) 16 Ind. Cas. 250; 39 I. A. 220; 16 C. W. N. 1009; 23 M. L. J. 321; 12 M. L. T. 338; (1912) M. W. N. 935; 10 A. L. J. 259; 14 Bom. L. R. 1034; 35 M. 607; 16 C. L. J. 596.

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appeals from decrees, dated respectively the 29th March 1909, of the High Court of Judicature at Allahabad. The two decrees appealed from were made in appeals in the same suit. The suit was brought in the Court of the Subordinate Judge of Jaunpur on the 29th November 1904 to enforce, by sale of the village Baragaon and other villages, the payment of Rs. 66,809 odd, due under a mortgage dated the 25th June 1892. The Subordinate Judge decreed the claim in part and in part dismissed it. Each side appealed to the High Court at Allahabad. The High Court dismissed the defendants' appeal, and in the plaintiffs' appeal gave them a decree for their claim.

When these consolidated appeals first came on for hearing before this Board, it was contended on behalf of the appellants that the mortgage upon which this suit was brought had not been attested by at least two witnesses, and as the amount secured by it exceeded one hundred rupees the alleged mortgage was ineffective and could not be given in evidence. That point had not been raised in either of the Courts below. Under the circumstances this Board remanded the case to the High Court in order to enable the parties to produce evidence on the question of attestation. Evidence on that subject has been taken and has been returned to this Board. On behalf of the appellants it has now been contended that the evidence which was given on the remand in proof of the attestation was unreliable, and, even if accepted as true, did not prove that the two attesting witnesses who gave evidence on the remand had seen the mortgagors sign their names to the mortgage.

The mortgagors were two *pardanashin* ladies who did not appear before the attesting witnesses, and consequently their faces were not seen by the witnesses. These two attesting witnesses were, however, well-acquainted with the voices of the ladies, and their Lordships are satisfied that these two attesting witnesses did identify the mortgagors at the time when the deed was executed. The mortgagors were, on the occasion of the execution of the mortgage-deed, brought from the *zenana* apartments of the house in which they were to an ante-room to execute the deed. In the ante-room the ladies seated themselves on the floor, and between them and these two attesting witnesses there was a *chick*,

which was not lined with cloth, hanging in the doorway. These two attesting witnesses recognised the ladies by their voices, and they say that they saw each lady execute the deed with her own hand, although owing to the *chick* they were unable to see the face of either of the ladies. On the other side an attempt was made to prove that a *tat*, through which nothing could be seen, was hanging in the doorway. Their Lordships accept the evidence of these two attesting witnesses as true, and hold it proved that the mortgage-deed of the 25th June 1892 was duly attested by at least two witnesses within the meaning of section 59 of the Transfer of Property Act, 1882. It is not disputed that the mortgage-deed was in fact the deed of the two *pardanashin* ladies, *Musammat Niamat Bibi* and *Musammat Kamar-un-Nisa Bibi*, the mortgagors.

The only other question to be considered in these appeals is the contention on behalf of the appellants that the plaintiffs in the suit have by reason of certain events, which will now be referred to, lost their right to enforce against Baragaon payment of a considerable part of the amount which they have claimed.

On the 8th August 1887 *Musammat Niamat Bibi* and *Musammat Kamar-un-Nisa*, who will be hereafter referred to as the mortgagors, mortgaged the villages Arghupur and Baragaon to Sarju Parshad and Ramanand to secure Rs. 12,000 and interest thereon. On the 19th February 1892 the mortgagors mortgaged Arghupur to Lukshmi Prasad and others to secure Rs. 30,000 and interest thereon. The mortgagees of the 19th February 1892 and their representatives-in-title will hereafter be referred to as the second mortgagees. On the 25th June 1892 the mortgagors by their deed of that date mortgaged Arghupur and Baragaon, together with three other villages, to Sarju Parshad and Ramanand to secure Rs. 32,000 and interest thereon. This sum of Rs. 32,000 included a sum of Rs. 18,000, principal and interest then due under the mortgage of the 8th August 1887. On the 20th May 1893 the mortgagors further mortgaged Arghupur to the second mortgagee to secure Rs. 21,324 and interest thereon. Sarju Parshad is dead; he is represented in this suit by his son, Ram Narain, who is one of the three plaintiffs. The other plaintiffs are Ramanand and his son, S. Narain.

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On the 14th December 1896 the second mortgagees brought a suit in the Court of the Subordinate Judge of Jaunpur upon their mortgages of the 19th February 1892 and the 20th May 1893 to obtain a decree for the principal moneys and interest due under the said mortgages, and they prayed that in default of payment on a date to be fixed by the Court, Arghupur should be sold by auction and the proceeds of the sale should be applied towards the satisfaction of their decree. To that suit the second mortgagees made *Musammât Kamar-un-Nisâ Bibi* as one of the mortgagors and as the heiress of *Musammât Niamat Bibi*, then dead, the other mortgagor, Sarju Parshad, Ramanand and one Indar Sen Singh, defendants. Indar Sen Singh was a subsequent mortgagee; he is a defendant to this suit, but is not an appellant. In their plaint the second mortgagees stated that Sarju Parshad, Famanand and Indar Sen Singh were mortgagees of Arghupur, and that they, the then plaintiffs, "were ready to pay the mortgage-money due to any of them who may be prior mortgagees and which they (the plaintiffs) may be legally bound to pay."

In their written statement in the suit of 1896, Sarju Parshad and Ramanand distinctly claimed their right as prior mortgagees and said, "If the plaintiffs be willing to get the hypothecated property sold, after paying in full the prior amount due to these defendants, they have no objection whatever to the plaintiffs' claim."

The then Subordinate Judge of Jaunpur, being obviously in confusion of mind as to the rights of the parties to the suit of 1896, by his judgment of the 19th January 1897, decided amongst other things that Arghupur should be sold by auction in the event of the defendants to the suit failing to pay, on or before the 19th May 1897, to the plaintiffs in that suit (the second mortgagees) Rs. 49,275-9, the principal and interest due under the mortgage of the 19th February 1892 and future interest, and that the proceeds of the sale should be applied first in payment of the amount due to the second mortgagees under their mortgage of the 19th February 1892, and that the balance, if any, should be "applied in payment of the sum which may be due to Sarju Parshad and Ramanand on that date with interest. Any surplus left to be

applied in payment of the sum due to the plaintiffs under the second document, dated the 20th May 1893." The Subordinate Judge apparently overlooked the rights of Sarju Parshad and Ramanand under their prior mortgage of the 8th August 1887. In accordance with the judgment a decree was made by the Subordinate Judge. Default having been made in payment on the date fixed, a decree absolute for sale of Arghupur was made by the Subordinate Judge of Jaunpur on the 4th September 1897. Under the decree of the 4th September 1897, Arghupur was sold. The proceeds of the sale were applied first in payment to the second mortgagees of the sum then due to them in respect of their mortgage of the 19th February 1892, and the balance of the proceeds of the sale was paid to the first mortgagees; that balance did not satisfy the amount then due to the first mortgagees under their mortgage of the 8th August 1887. If the proceeds of the sale of Arghupur had been first applied to the payment of the amount then due under the mortgage of the 8th August 1887, that mortgage would have been satisfied, and the amount due under the mortgage of the 25th June 1892 would have been to that extent reduced. As the proceeds of the sale of Arghupur did not satisfy the amount due to the second mortgagees under their mortgage of the 20th May 1893, they obtained a decree under section 90 of the Transfer of Property Act, 1882, and in execution of this decree the village of Baragaon was sold on the 20th April 1904, and was purchased by the appellants.

On behalf of the appellants it has been contended before this Board and in the Courts below that Baragaon was relieved of all liability in respect of the debt due under the mortgage of the 8th August 1887, by reason of the failure of Sarju Parshad and Ramanand to insist on their priority under that mortgage, it being alleged in support of the contention that Sarju Parshad and Ramanand had agreed to waive their priority as mortgagees of Arghupur, or had waived it, of which, if it were material, there is no proof, and that they were guilty of laches in not insisting on that priority. Their Lordships have found it difficult to follow the argument in support of the contention, as the appellants had no interest in Baragaon until they

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purchased Baragaon on the 20th April 1904, and what they then purchased was the interest of the mortgagors in that village.

It is true that had Sarju Parshad and Ramanand appealed against the decree of the Subordinate Judge, they could have had their interests as first mortgagees under the mortgage of 8th August 1887 protected, and would, on the sale of Arghupur, have obtained payment of the amount then due under that mortgage. Sarju Parshad and Ramanand did not, by an appeal, insist on their right as prior mortgagees, but the fact that they did not insist on having the amount due under the mortgage of the 8th August 1887 satisfied in priority to the claim of the second mortgagees does not disentitle the plaintiffs to recover the full amount of their claim in this suit, and does not entitle the appellants to relief. No other fact which would entitle the appellants to relief has been shown. The appeals fail.

Their Lordships will humbly advise His Majesty that these consolidated appeals should be dismissed.

The appellants must pay the costs.

Appeals dismissed.

Solicitor for the Appellants: Mr. Douglas Grant.

Solicitor for the Respondents: Messrs. Barrow, Rogers and Nevill.

MADRAS HIGH COURT.

FIRST CIVIL APPEAL NO. 160 OF 1913.

March 25, 1915.

Present:—Sir John Wallis, Kt., Chief Justice, and Mr. Justice Seshagiri Aiyar

CHANDU *alias* SHINIVASA PAI—

PLAINTIFF—APPELLANT

versus

KOAJA POOJARI AND OTHERS—DEFENDANTS
—RESPONDENTS.

Mortgage—Redemption—Right to redeem on or before certain date—Intention.

Ordinarily and in the absence of a special stipulation, the mortgagor is not entitled to redeem before the close of the period for which the mortgage was executed; but a provision in a mortgage-deed providing for payment by the mortgagor on or before a certain date is sufficient indication of an intention to allow him to redeem before that date, especially where a stipulation is made applicable only to the balance of the mortgage-debt. [p. 370, col. 2; p. 371, col. 1.]

Vadju v. Vadju, 5 B. 22; *Husaini Khanam v. Husain Khan*, 29 A. 471; A. W. N. (1907) 133; 4 A. L. J.

375; *Bakhtawar Begam v. Husaini Khanam*, 23 Ind. Cas. 355; 18 C. W. N. 586; 26 M. L. J. 474; 12 A. L. J. 473; 19 C. L. J. 477; (1914) M. W. N. 411; 15 M. L. T. 389; 16 Bom. L. R. 344; 1 L. W. 813; 36 A. 195 (P. C.), referred to.

Rose Ammal v. Rajarathnam Ammal, 23 M. 33; *Chinnasami Reddiar v. Krishna Reddy*, 16 M. L. J. 146, followed.

Bir Mahamed Rowther v. Nagoor Rowther, 25 Ind. Cas. 576; 16 M. L. T. 163; 27 M. L. J. 483, distinguished.

Appeal from the decree of the Court of the Subordinate Judge of South Canara, in Original Suit No. 47 of 1912.

Mr. B. Sitarama Row, for the Appellant.

Mr. K. Y. Adiga, for the Respondents.

JUDGMENT.—In the present case the mortgage provides for the re-payment of part of the mortgage-debt at the end of March 1910 and for the re-payment of the rest "within the end of March 1952" which, we think, must mean on or before the 31st March 1952. There has been some difference of opinion as to whether under a provision of this kind a mortgagor is entitled to redeem before the end of the period. It was held in *Vadju v. Vadja* (1) and in *Husaini Khanam v. Husain Khan* (2) that he was not. On the other hand it was held that he was, in *Rose Ammal v. Rajarathnam Ammal* (3) and in *Chinnasami Reddiar v. Krishna Reddy* (4) and in *Purna Chandra Sarma v. Peary Mohan Pal* (5). The recent decision of the Privy Council in *Bakhtawar Begam v. Husaini Khanam* (6), on appeal from *Husaini Khanam v. Husain Khan* (2), lays down that ordinarily and in the absence of a special stipulation the mortgagor is not entitled to redeem before the close of the period for which the mortgage was executed. Their Lordships observed that the language used in that case, "in nine years," was certainly ambiguous, and that much might be said in favour of the conclusion of the Allahabad High Court. It was, however, unnecessary to decide the point. Notwithstanding these observations, we think, we are at liberty

(1) 5 B. 22.

(2) 29 A. 471; A. W. N. (1907) 133; 4 A. L. J. 375.

(3) 23 M. 33.

(4) 16 M. L. J. 146.

(5) 15 Ind. Cas. 287; 39 C. 828; 17 C. W. N. 149.

(6) 23 Ind. Cas. 355; 18 C. W. N. 586; 26 M. L. J. 474; 12 A. L. J. 473; 19 C. L. J. 477; (1914) M. W. N. 411; 15 M. L. T. 389; 16 Bom. L. R. 344; 1 L. W. 813; 36 A. 195 (P. C.).

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to hold, following *Rose Ammal v. Rajarathnam Ammal* (3) and *Chinnasami Reddiar v. Krishna Reddy* (4), that a provision providing for payment by the mortgagor on or before a certain date is a sufficient indication of an intention to allow him to redeem before that date, especially where, as here, a stipulation is made applicable only to the balance of the mortgage-debt. In *Bir Mahamed Rowther v. Nagoor Rowther* (7), there appears to have been a fixed period for payment. We must accordingly reverse the decree and remand the case for disposal according to law. The costs will abide the result. The memorandum of objections is dismissed.

Decree reversed; Case remanded.

(7) 25 Ind. Cas. 5*6; 16 M. L. T. 163; 27 M. L. J. 483.

OUDE JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 100 OF 1913.

May 3, 1915.

Present:—Mr. Stuart, A. J. C., and
Mr. Kanhaiya Lal, A. J. C.

RUDRA SINGH—DEFENDANT—APPELLANT
versus

JANGI SINGH AND OTHERS—PLAINTIFFS—
RESPONDENTS.

Mortgage-debt, release of—Mortgagee's heirs, entire money paid to some of, effect of—Heirs, remaining, of mortgage, right of—Discharge of mortgage—Mortgagor's liability—Contract Act (IX of 1872), ss. 38, 45—Co-heirs.

A release of the mortgage-debt by some of the heirs of a deceased mortgagee, on payment to them of the entire mortgage-money, does not bind the other heirs of the mortgagee living separately from those to whom payment has been made. Such payment does not discharge the mortgagor from his liability to those heirs to whom payment has not been made. [p. 371, col. 2; p. 372, col. 1.]

Hans Singh v. Chet Singh, 8 Ind. Cas. 416; 14 O. C. 45; *Akinsa Bibi v. Abdul Kader Saheb*, 25 M. 26 at p. 38; *Sitaram Apaji Kode v. Shridhar Anant Prabhu*, 27 B. 292; 5 Bom. L. R. 91 and *Ram Chandra v. Rajjau Lal*, 5 Ind. Cas. 129; 7 A. L. J. 99; 32 A. 164, referred to.

Barber Maran v. Ramana Gounden, 20 M. 461; 7 M. L. J. 269, distinguished and dissented from.

Section 45 of the Contract Act applies to a case of co-heirs. [p. 372, col. 1.]

Appeal from the decree of the Subordinate Judge, Bara Banki, dated the 13th December

1912, modifying the order of the Munsif, Fatehpur, dated the 29th August 1912.

Mirza Sami Ullah Beg, for the Appellant.

Babu Ishri Dayal, for the Respondents.

JUDGMENT.—The question for determination in these appeals is whether the payment of the entire mortgage-money by the representative-in-interest of the mortgagor to some of the heirs of a mortgagee is binding on the other heirs of the deceased, who were living separately from the person to whom the payment was made. The learned Counsel for the defendant-appellant relies on section 38 of the Indian Contract Act and the decision of *Barber Maran v. Ramana Gounden* (1). The former, however, does not apply to the case, for it deals with the legal consequences of offers, made to one of several joint promisees, of money to which all of them were jointly entitled. Section 45 of the Act deals with the devolution of joint rights and declares that when a person has made a promise to two or more persons jointly, then, unless a contrary intention appears from the contract, the right to claim performance rests, as between him and them, with them during their joint lives, and, after the death of any of them, with the representative of such deceased person jointly with the survivor, or survivors, and, after the death of the last survivor, with the representatives of all jointly. If the promisee was a single individual, his right will similarly devolve under the ordinary law of inheritance on his heirs jointly. A payment to one of the heirs cannot, however, absolve the debtor from his liability to the other heirs, because as between the co-heirs the devolution is several, though the liability of the debtor to all of them continues to be joint. Where money is advanced to one person by several persons jointly, each person might be regarded by implication, in the absence of evidence of intention to the contrary, as authorized to act on behalf of the other. But no such inference can be made, where the persons entitled to the money are heirs of a single creditor. A release, therefore, of the mortgage-debt by one of the heirs of a deceased mortgagee on payment to him

(1) 20 M. 461; 7 M. L. J. 269

MULRAJULAKSHMI VENKAYAMMA RAO V. VENKATADRI APPA RAO.

the entire mortgage-money does not bind the other heirs of the mortgagee.

As regards the decision in *Barber Maran v. Ramana Gounden* (1), the correctness of which was doubted in *Hans Singh v. Chet Singh* (2) and elsewhere, its authority, so far as it was based on the Common Law of England, is considerably shaken by the later decision of the Chancery Division in *Powell v. Brodhurst* (3). That case was, moreover, of joint promisees, whereas we are concerned here with the case of co-heirs of a single creditor. Section 45 of the Indian Contract Act does apply to a case of co-heirs and, as I observed, in *Ahinsa Bibi v. Abdul Kader Sahab* (4), *Sitaram Apaji Kode v. Shridhar Anant Prabhu* (5) and *Ram Chandra v. Rajjan Lal* (6), a payment to one of several co-heirs does not discharge the debtor from his liability to the remainder. On the question of separation the defendant-appellant is concluded by the finding arrived at by the Court below. The plaintiff-respondent ought not, however, to have been allowed any costs in excess of the portion of the claim decreed.

We dismiss Appeals Nos. 101 of 1913 and 106 of 1914 accordingly with costs and allow Appeal No 100 of 1913, so as to confine the decree of the Court below in regard to costs proportionate to the amount of the costs payable to the plaintiff in regard to the claims decreed by the Court below. The plaintiff-respondent in appeal last mentioned will bear his own costs. The defendant-appellant will under the circumstances, bear his own costs in all the appeals throughout.

Appeal allowed.

(2) 8 Ind. Cas. 416; 14 O. C. 45.

(3) (1901) 2 Ch. 160; 70 L. J. Ch. 587; 84 L. T. 620; 49 W. R. 532; 17 T. L. R. 501.

(4) 25 M. 26 at p. 38.

(5) 27 B. 292; 5 Bom. L. R. 91.

(6) 5 Ind. Cas. 129; 7 A. L. J. 99; 32 A. 164.

MADRAS HIGH COURT.

CIVIL MISCELLANEOUS PETITION No. 723
OF 1915.

March 27, 1915.

Present:—Mr. Justice Sadasiva Aiyar and
Mr. Justice Napier.

Sri Raja MULRAJU LAKSHMI
VENKAYAMMA RAO BAHADUR—
APPELLANT—PETITIONER

versus

Sri Raja VENKATADRI APPA RAO
BAHADUR, MINOR, REPRESENTED
BY THE COLLECTOR OF KISTNA
ON BEHALF OF THE COURT OF
WARDS AND OTHERS—RESPONDENTS.

*Civil Procedure Code (Act V of 1908), s. 110, O XLV,
r. 3 (1)—Appeal to Privy Council—Leave—Lower
Court's decree only modified by High Court—Value
above ten thousand rupees—Substantial question of law
—Misconstruction of part of evidence.*

Where, as regards the subject-matter of a proposed appeal to Privy Council, a High Court has affirmed the decree of the Court of first instance (though it has made some modifications in the decree as regards another portion of the claim), it is essential for the grant of a certificate of leave to appeal to the Privy Council (even if the value of the subject-matter of the proposed appeal is above ten thousand rupees) that the appeal must involve some substantial question of law. [p. 373, col. 1.]

Misconstruction of a portion of the evidence relating to particular facts cannot be treated as a "substantial question of law" within the meaning of section 110, Civil Procedure Code. [p. 373, col. 2.]

Ravi Veeravagharulu v. Bomma Devara Venkata, 25 Ind. Cas. 305; 16 M. L. T. 262; (1914) M. W. N. 695; 1 L. W. 779; 27 M. L. J. 451; 20 C. L. J. 375; 37 M. 443; 19 C. W. N. 97; 16 Bom. L. R. 853, followed.

Gafur Khan v. Secretary of State for India, 23 Ind. Cas. 532; 26 A. 325; 12 A. L. J. 451, distinguished.

Petition praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to issue an order for leave to appeal to His Majesty in Council from the decree of the High Court in Appeal No. 142 of 1910.

FACTS.—*Sri Raja* Mulraju Lakshmi Venkayamma Rao brought a suit to recover jewels worth about Rs. 1,50,000 from the Estate of Nidadavole, on the ground that most of them had been given to her by the late Papamma Rao of Nidadavole under an oral gift and that some of them were her mother's jewels and also for the recovery of Rs. 16,000 cash, which was deposited with the late Papamma Rao from out of the income of two villages gifted to her absolutely by the late Papamma Rao. Defendants having denied the plaintiff's claim, the Subordinate Judge

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of Ellore dismissed the whole suit. On appeal the High Court modified the decree by allowing the Rs. 16,000 cash and jewels worth about Rs. 3,800, which were found to belong to plaintiff's mother. With regard to the rest of the plaintiff's claim, the decision of the Subordinate Judge was confirmed.

Messrs. *T. R. Ramachandra Aiyar* and *P. Nagabhushanam*, for the Petitioners, contended (1) that she was entitled to be given leave under the Code, because the decree was not an affirming decree and the value was admittedly more than Rs. 10,000; (2) that there was a substantial question of law relating to the construction of documents.

Dr. S. Swaminadhan and Messrs. *T. Prakasam* and *Purushotham Naidu*, for the Respondents, contended (1) that so far as the substantial matter that was sought to be taken in appeal was concerned, it was an affirming judgment and (2) the question of construction of document was not a question of law, when there was other evidence on which the finding was based.

ORDER.—It is argued for the petitioner that as our decree did not affirm the decision of the lower Court, and as the value of the contemplated appeal to the Privy Council is over ten thousand rupees, leave ought to be granted under section 110, Civil Procedure Code, and Order XLV, rule 3 (1).

We see no sufficient reason to dissent from the view of the Calcutta High Court [See *Rajah Sreenath Roy v. Secretary of State for India* (1)], that where as regards the subject-matter of the proposed appeal, the High Court has affirmed the decree of the Court of first instance (though it made some modifications in that decree in the appellant's favour as regards another portion of the plaintiff's claim) leave to appeal to the Privy Council ought not to be granted unless the proposed appeal involved some substantial question of law (last paragraph of section 110, Civil Procedure Code).

There seems to be no "substantial question" of law involved in the proposed appeal. It is, of course, possible by the

(1) 8 C. W. N. 294.

expenditure of much ingenuity to formulate in the appeal grounds some questions of law as arising on the facts or on the reasons given for the decisions on certain facts, but the questions so formulated in this case are not "sustainable" questions even taken at their highest. [See *Gafur Khan v. Secretary of State* (2) as to a "substantial question of law having to be involved."]

The decision in this case does not (in the language of a recent decision) involve any legal question "of general importance," does not affect any large body of persons and does not "threaten the religious or civil rights of any class of the community."

Assuming that in the judgment of this Court, some documents have been misconstrued, the conclusions on the facts are not based on those documents alone or even mainly.

The principle underlying their Lordships' decision in *Ravi Veeraraghavulu v. Bomma Devara Venkata* (3) seems to me to imply that such misconstruction of a portion of the evidence relating to particular facts cannot be treated as a "substantial" question of law.

We would therefore, refuse the certificate applied for with one set of costs.

Certificate refused.

(2) 23 Ind. Cas. 532; 36 A. 325; 12 A. L. J. 451.

(3) 25 Ind. Cas. 305; 16 M. L. T. 262; (1914) M. W. N. 695; 1 L. W. 779; 27 M. L. J. 451; 20 C. L. J. 375; 37 M. 443; 19 C. W. N. 97; 16 Bom. L. R. 853.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

REVENUE PETITION NO. 67 OF 1913-14
OF FYZABAD DISTRICT.
December 11, 1914.

Present:—Mr. Campbell, J. M.
Thakurain Sri RAM KUAR—
DEFENDANT—APPELLANT

versus

HANOMAN SINGH AND ANOTHER—
PLAINTIFFS—RESPONDENTS.

Under-proprietary right—Nankar, cash, .

MUHAMMAD KHAN v. BECHAN KHAN.

The fact that certain persons are entitled to a cash *nankar*, does not mean that they possess an under-proprietary right in any land in the village.

Appeal from the decree of the Commissioner, Fyzabad, dated the 25th February 1914, reversing that of the Assistant Collector, Fyzabad, dated the 23rd May 1913.

FACTS.—The defendant-landlord issued a notice of ejectment against the plaintiffs, which they contested on the ground that they were not ordinary but occupancy tenants. The defendant's reply was that the plaintiffs could not, by reason of the second proviso to section 5 of the Oudh Rent Act, set up occupancy rights inasmuch as they were entitled to receive a cash *nankar* and had, therefore, an under-proprietary right in the village. Thus the main question for determination was whether a right to receive a cash *nankar* meant an under-proprietary right.

Babu Jiban Krishna Banerjee, for the Appellant.

Babu Sita Ram, for the Respondents.

JUDGMENT.—I entirely agree with the Commissioner that the fact that respondents are still entitled to a cash "*nankar*" does not mean that they possess an under-proprietary right in any land in the village and are so deprived of rights of occupancy in the land which they cultivated or held in 1865.

I also agree with him that the respondents are not entitled to occupancy rights on those lands, which are not shown to have been in their possession at the Settlement before last.

I, therefore, uphold the Commissioner's order and dismiss this appeal with costs.

I also dismiss the cross-objection by respondents.

Appeal dismissed.

COURT OF THE BOARD OF REVENUE UNITED PROVINCES.

REVENUE PETITION No. 55 OF 1913-14

OF GONDA DISTRICT.

November 13, 1914.

Present:—Mr. Holms, J. M.

MUHAMMAD KHAN AND OTHERS—

PLAINTIFFS—APPELLANTS

versus

BECHAN KHAN AND OTHERS—DEFENDANTS
RESPONDENTS.

Appeal—Appellant not entitled to set up in argument fresh story different from that given in the grounds of appeal.

An appellant cannot, at the time of arguing the appeal, be allowed to set up a story different from that alleged in the grounds of appeal. [p. 375, col. 1.]

Appeal from the decree of the Commissioner, Fyzabad, dated the 17th July 1914, upholding that of the Assistant Commissioner, Gonda, dated the 17th January 1914.

FACTS.—The plaintiff contested a notice of ejectment on the ground that he was not an ordinary tenant but an under-proprietor of the plots entered in the notice. The Assistant Collector dismissed the plaintiff's suit as he could not establish his claim to under-proprietary rights. When the case came up in appeal before the Commissioner, he ordered the plaintiff to file the under-proprietary *khewat* of the village and the date of hearing was adjourned. When the appeal again came up for hearing on the adjourned date, the Commissioner dismissed it, stating in his judgment that the plaintiff failed to produce the required *khewat*, though he filed some other *khewat* which did not show to which year it referred. A further appeal was filed before the Board of Revenue and the first ground of appeal ran thus:—“(1) Because the lower Appellate Court has erred in holding that the document produced by the appellant is not the one he was required to produce by order dated 15th May 1914.” But in argument it was contended that the plaintiff had really produced the under-proprietary *khewat* before the Commissioner, but that it had by mistake been filed in another case.

Mr. P. N. Rozdon, for the Appellants.

Babu Surendra Nath Roy, for the Respondents.

JUDGMENT.—The appellant now urges that he did, as a matter of fact, produce

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the under-proprietary *khewat* which he was directed to produce by the Commissioner's order of 15th May 1914 and that it was filed in another case.

This allegation is not what is made in the grounds of appeal. I cannot allow the appellant to go beyond his grounds and change his story in this way.

Appeal dismissed with costs.

Appeal dismissed.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

REVENUE PETITION NO. 86 OF 1913-14 OF

FYZABAD DISTRICT.

November 13, 1914.

Present:—Mr. Holms, J. M.

SARFARAZ—PLAINTIFF—APPELLANT

versus

BABU RAM PANDE—DEFENDANT—

RESPONDENT.

Appeal, second—Finding of fact, when to be questioned in second appeal—Evidence, finding of fact not supported by, can be questioned in second appeal.

A second appeal from a finding of fact can be taken on the ground that it is not supported by any evidence on the record.

Appeal from the decree of the Officiating Commissioner, Fyzabad, dated the 20th July 1914, upholding the order of the Assistant Collector, Fyzabad, dated the 7th April 1914.

Mr. P. C. Bhattacharji, for the Appellant.
Babu Lackhman Prasad Varma, for the Respondent.

JDDGMENT.—The Commissioner has found as a definite fact that the identity of the land in the present suit with that in the previous decisions is not established. Against this finding of fact there is no definite ground of appeal, and there could be a ground of appeal on the allegation that there was no evidence to support the finding. No such allegation has been made.

I dismiss the appeal with costs.

Appeal dismissed.

MADRAS HIGH COURT.

FIRST CIVIL APPEAL NO. 75 OF 1914.

July 28, 1915.

Present:—Sir John Wallis, Kt., Chief Justice, and Mr. Justice Srinivasa Aiyangar.

GOPISETTI NARAYANASWAMI

NAYUDU GARU, RECEIVER OF

NIDADAVOLE AND MEDUR ESTATES—

PLAINTIFF—APPELLANT

versus

NALAM SUBRAHMANYAM—DEFENDANT

—RESPONDENT.

Madras Estates Land Act (I of 1908), ss. 3, sub-s. (2) cl. (d), 6—Estate—Grant of village described as rent-free—Presumption—Existence of minor inams in village, effect of—Grantee not owner of kudivaram on date of grant, effect of—Receiver, whether land-holder under the Act.

Where the grant of a village is described in various documents as a rent-free grant to a temple, the presumption is of a grant of the whole village and the existence of "minor inams" in the village will not affect that presumption unless it is proved that the grant was only of the revenue of a portion of the land in the village. [p. 376, cols. 1 & 2.]

Where the *inamdar* grantee was not the owner of the *kudivaram* at the time of the grant, the subject of grant is an estate within the meaning of clause (d) of section 3 of the Madras Estates Land Act. [p. 376, col. 2.]

A Receiver having the power of letting tenants into possession of lands in an estate is a "land-holder" within the meaning of section 6 of the Madras Estates Land Act. It is not necessary that the land-holder should also be a beneficial owner of the estate. [p. 376, col. 2.]

Appeal against the decree of the Court of the temporary Subordinate Judge of Ellore, in Original Suit No. 33 of 1913.

Mr. P. Nagabhushanam, for the Appellant.

Mr. P. Narayanamurthi, for the Respondent.

JUDGMENT.—Plaintiff, the Receiver of the Nidadaval Estate sues to recover possession of certain lands let to the defendant in *Fasli* 1320 together with mesne profits. His case is that the letting was for one year, and that the defendant is holding over after the expiry of the term. The defendant pleads that he has acquired the occupancy right to these lands under section 6 of the Estates Land Act. The lower Court has dismissed the suit, and the plaintiff appeals.

The principal question which arises for determination in the appeal is whether Venkatapuram Agraharam in which the suit lands are situate is an estate within the meaning of section 3, sub-section 2,

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clause (d) of the Estates Land Act. Venkatapuram Agraharam is an *inam* village belonging to Bala Venkateswara Swami and the grant seems to have been made by a former *zemindar* of Nuzvid. The plaintiff sues as trustee of the temple. The Venkatapuram Agraharam is described in the various documents filed in the case as the *sarva* or rent-free Agraharam of Sri Bala Venkateswara Swami, and this description occurs from the earliest times. (See Exhibit H, the *jamabandi* account for *fasli* 1268.) This would obviously mean that the whole village of Venkatapuram belonged to the temple as *inam*. However, there are certain minor *inams* in this village which appear to be of three classes; one class of *inams* being *archaka* service *inams*, the other class being village service *inams*, and the third *dharma dhaya inams*. It does not appear whether the grant to the temple of the village was made first or whether the minor *inams* were granted first.

The appellant contends that inasmuch as there are these minor *inams* in the same village it could not be said that the Venkatapuram Agraharam is a village of which the land revenue has been granted as *inam*, within the meaning of section 3 clause (2) (d) of the Act, his contention being that inasmuch as the land revenue on some of the lands in the village had been granted as *inam* to third parties, it cannot be said that the temple is the grantee of the revenue of that village. We are unable to agree in this contention. The definition in sub-section 2, clause (d), was obviously intended to exclude from the definition of "estate" what are known as "minor, *inam*" namely, particular extents of lands in a particular village as contrasted with the grant of the whole village by its boundaries. The latter are known as "whole *inam* villages."

The existence of 'minor *inams*' in whole *inam* villages is very common and if these *inam* villages do not come within the definition of "estate" almost all Agraharam, Shrotriem and Mokhasa villages will be excluded. This certainly cannot have been the intention of the Legislature. These minor *inams* are generally granted for services to be rendered to the village or to the owner. That seems to be the nature of the minor *inams* in this case. In all the documents the temple is described

as the owner of the whole village and in these circumstances the burden is upon the plaintiff to show that the grant was only of the revenue of a portion of the lands in the village, and he has not put in evidence the *inam* register which would have supported his case if true. We disallow this contention.

It is next contended that it is not shown that the *inamdar*, that is the temple, was not the owner of the *kudicaram* at the time of the grant, which again would take the case out of the definition of an estate. The evidence which is discussed in paragraphs 15 to 17 of the lower Court's judgment shows clearly that the *inamdar*, namely, the temple was not the owner of the *kudicaram* at the time of the grant. We, therefore, hold that the Venkatapuram Agraharam of which Sri Bala Venkateswaraswami is the *inamdar* or the Agraharamdar is an estate within the meaning of clause (d) of sub-section 2 of section 3 of the Estates Land Act.

Mr. P. Nagabushanam, for the appellant, also argued that the suit lands are not 'ryoti lands' but are 'old waste'. In the *muchilika*, Exhibit B, executed by the defendant, these lands are described as 'jeroyti lands' and in Exhibit IX, a previous lease of the same lands, they are described as 'mamool wet'. We hold, therefore, that these lands are not proved to be 'old waste'; but are 'ryoti lands'.

The appellant finally contended that the Receiver is not a land-holder within the meaning of section 6 of the Act. It is admitted that the definition of 'land-holder' in section 3 includes the plaintiff. But it is said that unless the land-holder is also a beneficial owner of the estate, he is not a land-holder within the meaning of section 6. We do not see any reason to put any such restricted construction on the word 'land-holder' in that section. A Receiver must have the same powers of management as an owner, and letting a tenant into possession of cultivable lands in the estate would ordinarily be included in the power of management. We agree in the conclusions of the lower Court and dismiss the appeal with costs.

Appeal dismissed.

MUHAMMAD SHER KHAN v. SWAMI DAYAL,

ODDH JUDICIAL COMMISSIONER'S
COURT.

FIRST CIVIL APPEAL NO. 126 OF 1914.

February 9, 1915.

Present:—Mr. Stuart, A. J. C., and

Mr. Kanhaiya Lal, A. J. C.

MUHAMMAD SHER KHAN—DEFENDANT

—APPELLANT

versus

Raja Seth SWAMI DAYAL—PLAINTIFF—

RESPONDENT.

Transfer of Property Act (IV of 1882), s. 98—Anomalous mortgage—Mortgages, simple and usufructuary, combination of—Redemption, right of—Possession, mortgagee's claim for.

Under the terms of a mortgage-deed, if the interest for four six-monthly instalments was not paid in full or if the entire amount due on the mortgage was not satisfied on a certain specified date, the mortgagee was to be given possession over the mortgaged property for a certain fixed term and redemption was not to take place until the mortgagee had remained in possession for that term. The mortgagor having occasionally paid something towards interest, but not having satisfied the entire amount on the specified date as agreed upon, the mortgagee brought a suit for possession of the mortgaged property. The mortgagor contended that the mortgage was not an anomalous mortgage and that the suit for possession was, therefore, not maintainable; that under the terms of the deed the only remedy open to the mortgagee was to sue for the amount due to date under the terms of the mortgage, and that a decree should be passed awarding possession in lieu of the payment of the amount due by the mortgagor within the specified time:

Held, that the mortgage was not an anomalous mortgage as defined in section 93 of the Transfer of Property Act, but was a combination of a simple and a usufructuary mortgage, so that the rights and liabilities of the parties were not to be determined by their contract as evidenced in the mortgage-deed. [p. 378, col. 1.]

Bisheshar Bakhsh Singh v. Debi Bakhsh Singh, 17 Ind. Cas. 329; 16 O. C. 56; and *Lalta Prasad v. Hori Lal*, 19 Ind. Cas. 748; 16 O. C. 90, referred to.

Held, further, that the mortgagor could not obtain a right of redemption, which would have the effect of defeating the mortgagee's claim for possession, by obtaining a decree stating the amount which would have to be paid as a condition precedent to redemption, inasmuch as he had legally no right to redeem otherwise than what he had agreed upon under the terms of the mortgage-deed. [p. 378, col. 1.]

Held, lastly, that the decree for possession would not affect any right of redemption exercised in the manner provided by law before the delivery of possession. [p. 379, col. 1.]

Appeal from the decree of the Subordinate Judge, Kheri, dated the 17th September 1914.

Mr. J. Jackson and Pandit Suraj Narain Dikshit, for the Appellant,

Pandit Gokaran Nath Misra and Babu Ishri Prasad, for the Respondent.

JUDGMENT.—Muhammad Sher Khan executed on the 9th June 1908 a deed of mortgage in favour of Raja Seth Raghubar Dayal for a consideration of Rs. 82,000. Under the terms of the deed interest was to be charged at $7\frac{3}{4}$ per cent. With six-monthly rests and the total amount of principal and interest was to become due on the 18th June 1913. If the interest for four six-monthly instalments was not paid in full or if the entire amount were not satisfied on the 18th June 1913, the mortgagee was to be given possession over the mortgaged property for 12 years and redemption was not to take place until the mortgagee had been in possession for the latter term. The mortgagor paid Rs. 7,060 towards interest on the 19th June 1910 and Rs. 8,000 towards interest on the 10th of June 1911.

Raja Seth Raghubar Dayal having died on the 26th March 1911, his son, Raja Seth Swami Dayal, instituted a suit on the 13th June 1913 for possession of the mortgaged property. The suit was resisted on various grounds but was decreed by the learned Subordinate Judge.

In the present appeal it has been argued that the mortgage is not an anomalous mortgage and that the suit for possession should have been dismissed. The learned Counsel for the appellant contends that under the terms of the deed the only remedy open to the mortgagee was to sue for the amount due to date under the terms of the mortgage and that a decree should have been passed awarding possession in lieu of the payment of the amount due by the mortgagor within the specified time. We find that the mortgage was not an anomalous mortgage as defined in section 93, Act IV of 1882. It is a combination of a simple mortgage and a usufructuary mortgage. It commenced as a simple mortgage, and it was agreed that on the occurrence of a certain event it should become a usufructuary mortgage. It has been held in *Bisheshar Bakhsh Singh v. Debi Bakhsh Singh* (1) that the existence of a clause in a mortgage-deed postpon-

(1) 17 Ind. Cas. 329; 16 O. C. 56.

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ing the delivery of possession to a future date does not necessarily show that it is, therefore, not a usufructuary mortgage and that an existence in a mortgage-deed of a condition postponing redemption until a certain period has elapsed after the date of the execution cannot convert what would otherwise be a usufructuary mortgage into an anomalous mortgage. It has also been held in *Lalta Prasad v. Hori Lal* (2) that where a mortgage-deed provided that the mortgage-money with interest at 2 per cent. would be paid in two instalments and in case of non-payment of the first instalment the mortgagee would be entitled to be put in possession of the mortgaged property, taking profits in lieu of interest and in case of failure to deliver possession, the mortgagee would be at liberty to take possession with the help of the Court, the mortgage was not an anomalous mortgage but the combination of a simple and a usufructuary mortgage, to which section 98 of the Transfer of Property Act does not apply.

Agreeing with the principles enunciated in these two decisions we find that this is not a case in which the rights and liabilities of the parties would be determined by their contract as evidence in the mortgage-deed. We do not, however, find that the appellant has been able to make out any case for the setting aside or the modification of the decree. There is nothing in the provisions of the Transfer of Property Act which will give him a right to redeem other than the right which he agreed to accept under the terms of the deed. It is not open to him to obtain a right of redemption which would have the effect of defeating the claim for possession by obtaining a decree in this case stating the amount which would have to be paid as a condition precedent to redemption. We are not concerned with the position that might have arisen had he made a tender before he received notice of intention to bring the suit or even had he made a tender after the suit was brought. He has, so far, made no tender although he has continued to assert his desire to deposit what may be found to be due. A case came

before the Judicial Commissioner last year in which the facts are not dissimilar to those in the present case. That was the unreported case of *Bhimma Singh v. Puttu Lal* (3). In that case a suit had been brought on a mortgage for possession of the mortgaged property. The deed provided for payment of the mortgage-money within a period of three years. In case of default the mortgagee was entitled to take possession and hold the land for a term of ten years. In that case the tender of the mortgage-money was made by the mortgagors after the period of three years had expired, although the amount tendered was not the full amount due under the provisions of the deed and in consequence the tender was both inadequate and beyond time. The learned Judicial Commissioner stated :— "The mortgage, therefore, as it now stands, must be treated as a deed of usufructuary mortgage, and I am unable to see on what ground the mortgagors can resist the mortgagee's claim for possession. It is not sufficient to point out that hardship is involved in the mortgagors having to surrender possession of this property for a period of ten years to the mortgagee. I take it that the mortgagors entered into this contract with their eyes open and I fail to see on what ground they can be relieved of their bargain."

These remarks have application to the present case. We agree with the conclusion of the learned Judicial Commissioner in that appeal. Granting that the mortgagor in this case has the right to assert that the deed is not an anomalous mortgage and that his position in meeting a claim for possession of the mortgaged property is the position of a mortgagor in the case of a usufructuary mortgage, we are unable to find any authority for the proposition that on the breach of conditions, which they proved to exist, the mortgagee can be defeated in his claim for possession while the mortgage subsists.

There were other points raised in the grounds of appeal, but none of those were referred to in argument and the learned Counsel stated that he withdrew all pleas other than those which we have decided.

(2) 19 Ind. Cas 748; 16 O. C. 90.

(3) Second Civil Appeal No. 274 of 1914, decided on 22nd October 1914.

SURENDRA NARAIN SINHA v. HAFIJUR RAHAMAN.

For the above reasons we dismiss this appeal. The appellant will pay his own costs and those of the respondent. The decree will not affect any right of redemption exercised in the manner provided by law before the delivery of possession.

Appeal dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM ORDER No. 91 OF 1915.

June 14, 1915.

Present:—Mr. Justice Sharfuddin and
Mr. Justice Mullick.

SURENDRA NARAIN SINHA—

DEFENDANT No. 2—APPELLANT

versus

Sheikh HAFIJUR RAHAMAN AND OTHERS

PLAINTIFFS—RESPONDENTS.

Valuation—Court-fees—Certain valuation arrived at by Court of first instance—Appeal not to be entertained without payment of Court-fee on that valuation—Civil Procedure Code (Act V of 1908), O. VI, r. 17, O. XII, r. 33—Amendment of plaint by Appellate Court—No amendment should be allowed to the prejudice of defendant.

A Court of Appeal should not entertain an appeal without its being stamped with a Court-fee calculated upon the valuation arrived at by the subordinate Court. [p. 379, col. 2.]

Order XII, rule 23, is subject to the general principle that no order for amendment of a plaint should be passed where it would deprive a party of a substantial right or privilege or otherwise prejudice a party. [p. 379, col. 2; p. 380, col. 1.]

Where but for an amendment a plaintiff's suit should fail and a fresh suit would be barred, the defendant acquires a substantial right and it would be unfair at an appellate stage to order an amendment of the plaint and deprive him of that right. [p. 380, col. 1.]

Appeal against the order of the District Judge of Purneah, dated the 18th of January 1915, reversing that of the Subordinate Judge of Purneah, dated the 8th of August 1914, and remanding the case to his Court for admitting the plaint and proceeding with the trial.

Dr. D. N. Mitter and Babu Rishendra Nath Sircar, for the Appellant.

Babu Giriya Prosana Sanyal, for the Respondents.

JUDGMENT.—This appeal is by the defendant in a suit in which the plaintiff sued

the principal defendants for a declaration of his title by adverse possession and for confirmation of possession.

It was the plaintiff's case that a cloud was thrown upon his title by an entry in the Record of Rights in favour of the principal defendants. The suit was lodged in the first instance before a Munsif. Upon an objection made by the defendants, the Munsif made an inquiry into the valuation of the property, and coming to the conclusion that the value was Rs. 3,000 he returned the plaint to the plaintiff for presentation to a proper Court. The plaintiff then filed the plaint before the Subordinate Judge with a Court-fee of Rs. 17-8. Valuing the relief for confirmation of possession at Rs. 100, he paid Rs. 7-8 as stamp-fee for that relief and for the relief in respect of the declaration he paid a fee of Rs. 10. The Subordinate Judge came to the conclusion that the plaint was insufficiently stamped and that the proper fee payable was on a valuation of Rs. 3,000. As the plaintiff failed to pay the full fee the Subordinate Judge rejected the plaint. There was an appeal against that order before the District Judge. The District Judge, while agreeing with the Subordinate Judge that the proper fee payable was upon a valuation of Rs. 3,000, allowed the plaintiff to strike out his prayer for confirmation of possession and convert the suit into one for mere declaration of title upon which a fee of Rs. 10 was sufficient. So, holding that the plaint was sufficiently stamped as amended he set aside the Subordinate Judge's order rejecting the plaint and directed the suit to be tried. Against that order the defendant now files the present appeal.

The first defect that we have to notice in the learned District Judge's proceedings is that he should not have entertained the appeal before him without a stamp-fee calculated upon the valuation which had been arrived at by the Subordinate Judge.

The second and main defect is that by allowing the plaintiff at the appellate stage to amend the plaint, he has seriously prejudiced the defendant. The learned District Judge relies upon Order XII, rule 33, Civil Procedure Code, in justification of the amendment; but that rule is subject to

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general principle that no order for amendment can be passed where it deprives a party of a substantial right or privilege or otherwise prejudice a party. In the present case a fresh declaratory suit would under Article 120 of the Limitation Act be admittedly barred. The defendant, therefore, has acquired a substantial right and it is manifestly unfair at the appellate stage to order an amendment of the plaint and deprive him of that right. The order of amendment, therefore, was, in our opinion, wrong.

In these circumstances, the appeal must succeed, the order of the learned District Judge is set aside and that of the Subordinate Judge restored with costs in all Courts. We assess the hearing-fee in this Court at one gold *mohur*.

Appeal allowed.

COURT OF THE BOARD OF REVENUE,
UNITED PROVINCES.

REVENUE PETITION No. 10 OF 1912-13

OF GONDA DISTRICT.

December 23, 1914.

Present:—Mr. Holms, J. M.

BECHU SINGH AND OTHERS—DEFENDANTS—

APPELLANTS

versus

BENI SINGH AND OTHERS—PLAINTIFFS—

RESPONDENTS.

Appellate Court, second, power of, to arrive at finding of fact—Fact, finding of, when to be questioned in second appeal—Evidence, finding not supported by, effect of.

A second Appellate Court can arrive at a finding of fact in case the Court of first instance comes to no definite finding on the point of fact, or even if it does, it has no evidence to support it and such finding is upheld by the first Appellate Court.

Appeal against the order of the Commissioner, Fyzabad, dated the 4th April 1913.

Babu Aditya Prasad, for the Appellants.

Babu Gokul Prasad, for the Respondents.

JUDGMENT.

HOLMS, J. M. (November 13th, 1914.)—Appellant admits that his grounds of appeal are badly drafted and wishes to substitute the following:—

“(1) That the Commissioner is wrong in holding that there is no proof of the

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thoks being equal either in area or value.

“(2) That in view of the concurrent findings of fact by the lower Courts he had no right to arrive at that finding.

“(3) That he overlooked the provisions of section 117 of the Land Revenue Act.”

As to (1), on appellant's own admission the Commissioner was perfectly right. Appellant admits that before partition the *thoks* were not equal in area. As to (2) the Assistant Collector came to no definite finding on this point and even if he had, he had no evidence to support it. As to (3) there is a definite agreement in the *wajib-ul-arz* that at partition the *thoks* should not be altered and that the *shamilat* land should be divided according to shares. Appeal should, therefore, be dismissed with costs.

One appellant has, however, died, and before passing final orders I adjourn the case for a month that any of the appellants or respondents or the deceased person's heirs who may wish to bring his heirs on the record as parties may make the necessary application. If at the expiry of a month, no such application is made, I will pass final orders without calling on parties again.

HOLMS, S. M.—No application has been put in, and the appellant Bansraj Singh apparently died over a year ago. I dismiss the appeal with costs, Rs. 16 Pleader's fee, for reasons given in my order of 13th November 1914.

Appeal dismissed.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 344 OF 1914.

APPEAL AGAINST ORDER No. 162 OF 1914.

July 13, 1915.

Present:—Mr. Justice Oldfield and

Mr. Justice Sadasiva Aiyar.

SRINIVASA MUDALI—PLAINTIFF—

APPELLANT—PETITIONER

versus

RAMASAMY MUDALI AND OTHERS—

DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXV, rr. 12,

SRINIVASA MUDALI v. RAMASAMY MUDALI.

14—Application to work out shares under a compromise decree, whether an application for execution or a step in the suit—Limitation—Mistake as to the character of a proceeding or suit—Appeal in erroneous character, whether competent.

Per Oldfield, J.—An application for the appointment of a Commissioner to work out the shares recoverable under a compromise decree for partition is not an application for execution, but a step in the suit and is not barred by any limitation. [p. 381, col. 1.]

Latchman Chetty v. Ramanathan Chetty, 28 M. 127; 14 M. L. J. 436; *Appadu v. Venkata Ranga Rau*, 18 M. L. J. 23; *Abdul Majid v. Jawahir Lal*, 23 Ind. Cas. 649; (1914) M. W. N. 485; 27 M. L. J. 17; 12 A. L. J. 624; 36 A. 350; 16 Bom. L. R. 395; 18 C. W. N. 963; 19 C. L. J. 626; 16 M. L. T. 44; 1 L. W. 483, followed.

Avula Charamudi v. Marriboyina Raghavulu, 28 Ind. Cas. 871; 18 M. L. T. 76; (1915) M. W. N. 596; 28 M. L. J. 471; distinguished.

Per Sadasiva Aiyar, J.—The character of a suit or proceeding is not altered by the mode in which the Court exercises its jurisdiction, and if the suit or proceeding is of such a character that no appeal lies from the decree or order passed in it, an appeal would not be entertained. [p. 382, col. 1.]

Therefore, if a Court erroneously treats a petition as a petition in execution, an appeal would not lie from its order as if it was an order passed on an execution petition [p. 381, col. 2.]

Latchman Chetty v. Ramanathan Chetty, 28 M. 127; 14 M. L. J. 436; *Shankarabhai v. Somabhai*, 25 B. 417; 3 Bom. L. R. 129, dissented from.

Indra Chandra Mukerjee v. Srish Chandra Banerjee, 21 Ind. Cas. 120; 40 C. 537, followed.

Petition, under section 115 of Act V of 1908 and appeal against the order of the District Court of Salem, in Interlocutory Appeal No. 142 of 1913, in Original Suit No. 37 of 1903.

Mr. K. S. Krishnasami Aiyangar, for Mr. T. Narasimha Aiyangar, for the Appellant.

Mr. C. V. Ananthakrishna Aiyar, for the Respondents.

JUDGMENT.

OLDFIELD, J.—The question before the learned District Judge was whether petitioner's application for the appointment of a Commissioner to work out the shares recoverable under a compromise decree for partition was an application for execution thereof or whether, the decree being merely preliminary, the application was a step in the suit and was not barred by any limitation.

As we shall decide for the latter alternative, we dismiss Appeal against Order No. 162 of 1914 and pass our decision on Civil Revision Petition No. 344 of 1914.

The provisions of the compromise are in every respect appropriate to a preliminary partition decree, such as is contemplated in *Latchman Chetty v. Ramanathan Chetty* (1) and *Appadu v. Venkata Ranga Rau* (2), and these two cases show that such an order, as petitioner asked for, could have been made by the lower Court at any time of its own motion, as a step in the disposal of the suit, and that there could be no question of any bar of limitation in connection with the application for it. The argument to the contrary is supported by reference only to cases in which applications for an order for sale in connection with preliminary mortgage-decrees were in question, [*Abdul Majid v. Jawahir Lal* (3) and *Avula Charamudi v. Marriboyina Raghavulu* (4)] and we do not think that they are in point nor can be applied generally to preliminary decrees of every description.

In these circumstances, we set aside the learned Judge's order and remand the case for re-admission and disposal in the light of the foregoing with reference to Order XXV, rules 13 and 14, Civil Procedure Code. Costs in the lower Court and here to date will be provided for in the lower Court's final decree. There will be no order as to costs in the appeal against order.

SADASIVA AIYAR, J.—I entirely agree on the question whether an appeal would lie, because the lower Court chose to treat the petition as a petition in execution. I respectfully dissent from the decision in *Latchman Chetty v. Ramanathan Chetty* (1). Suppose a Court chooses to pass a decree for possession of a house in a suit filed on its Small Cause side for recovery of money, and which suit is undoubtedly within its Small Cause jurisdiction, I do not think that an appeal will lie from such a decree and the proper remedy, I think, should be sought by revision under section 115 of the Civil

(1) 28 M. 127; 14 M. L. J. 436.

(2) 18 M. L. J. 23.

(3) 23 Ind. Cas. 649; (1914) M. W. N. 485; 27 M. L. J. 17; 12 A. L. J. 624; 36 A. 350; 16 Bom. L. R. 395; 18 C. W. N. 963; 19 C. L. J. 626; 16 M. L. T. 44; 1 L. W. 483.

(4) 28 Ind. Cas. 871; 28 M. L. J. 471; 18 M. L. T. 76; (1915) M. W. N. 596.

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Procedure Code or by invoking the powers given by the Letters Patent.

In *Shankarbai v. Somabhai* (5) it was held that "the character of the suit" (I would add, or of a proceeding) "was not altered by the mode in which" the Court "exercised jurisdiction" and that if the suit (or proceeding) was of such a character that no appeal lay, an appeal could not be entertained. Similar was the decision in *Indra Chandra Mukerjee v. Srisih Chandra Banerjee* (6).

Petition allowed; Case remanded.

(5) 25 B. 417; 3 Bom. L. R. 129

(6) 21 Ind. Cas. 120; 40 C. 537.

ODDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 76 OF 1915.

May 25, 1915.

Present:—Mr. Lindsay. J. C.

RAM NATH—PLAINTIFF—APPELLANT

versus

MAHADEO PRASAD AND OTHERS—

DEFENDANTS—RESPONDENTS.

Hindu Law—Mortgage—Joint family—Mortgage of joint family property by one member, suit on—Mortgagee, position of—Sale, decree for—Personal decree—Legal necessity for mortgage-debt to be proved—Surviving members of joint family, non-liability of.

In suits upon mortgages of joint Hindu family property, entered into by one member of the family, the mortgagee cannot get a decree for sale of the mortgaged property, or even a personal decree, against the surviving members, unless he proves that the money was borrowed for purposes which are binding on the joint family. [p. 383, col. 1.]

Appeal from the decree of the District Judge, Gonda, dated the 21st December 1914, upholding that of the Munsif, Utraula, dated the 23rd October 1914.

Babu Aditya Prasad, for the Appellant.

Chaudhri Ram Bharose Lal, for the Respondent No. 3.

JUDGMENT.—This appeal arises out of a mortgage suit brought by the plaintiff-appellant to enforce a simple mortgage which was executed on the 11th October 1907 by one Ganga Narain. Ganga Narain was the father of the first and second defendants and the grandfather of the third and fourth defendants. The fifth defendant was the mortgagee and in the fourth paragraph of

the plaint it was stated that he had transferred his interest under the mortgage to the present plaintiff on the 17th July 1913. The relief which was asked for in the plaint was that the money due on the mortgage might be realized by sale of the mortgaged property. The defence which was set up was to the effect that the property mortgaged was joint ancestral property belonging to the family of which Ganga Narain, the mortgagor, was a member. It was pleaded that Ganga Narain had no right to make a mortgage of this property. The defendants further pleaded that they were in possession of the property now by right of survivorship and were not the heirs of Ganga Narain. They pleaded, therefore, that the plaintiff was not entitled to have the property brought to sale. The Court of first instance dismissed the claim. The Munsif pointed out that there was no allegation in the plaint to the effect that the mortgage had been executed for legal necessity or for any other purposes which would be binding on the joint family property. Some attempt was made on the part of the plaintiff to produce evidence to show the purposes for which the money was borrowed but this evidence was discredited by the Munsif. The Munsif, therefore, held that as no legal necessity had been proved the property could not be brought to sale, nor could the surviving members of the joint family be made personally liable. He further stated in his judgment that as the plaintiff failed to ask for a personal decree he was unable to give him a decree of that kind. At the same time he was doubtful as to whether in the circumstances disclosed any personal decree could be given. The plaintiff went in appeal to the District Judge, where he pleaded first of all that he was a *bona fide* purchaser of the mortgagee rights from the fifth defendant, that the deed had been executed for purposes which were binding on the joint family and he claimed in any case that he was entitled to a simple money-decree. The learned Judge dismissed the appeal. He held that the plaintiff having failed to ask for a personal decree in the Court of first instance was not entitled to make that demand in appeal. He further pointed out that there being no proof that the

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execution of the deed had been made for any legal necessity, the property could not be made liable for sale under the mortgage. In appeal here it has been contended that the plaintiff was entitled to a personal decree. I think this contention cannot be allowed. The facts being as stated above it was incumbent upon the plaintiff, who asked in his plaint for realization of the mortgage-debt by sale of the mortgaged property, to prove that the sons and the grandsons of the original mortgagor were liable to discharge the debt and that the property in their hands was affected by the mortgage, so as to render it liable to sale. It is well understood now that the mortgagee in a case like this cannot get a mortgage decree for sale unless he proves that the money was borrowed for purposes which are binding on the joint family. There was no allegation to this effect in the plaint and there was, as the Munsif found, no proof of any such fact. To allow the plaintiff a personal decree against these defendants now would amount to giving him indirectly what he cannot obtain directly, for in execution of a personal decree against these defendants he would be entitled to bring the property in their hands to sale, and as it has not been shown that the money was borrowed for any purpose which would bind the family or its property, in my opinion it cannot be said that there is any right to a personal decree. I think the judgment of the Court below is perfectly correct. The appeal fails and is dismissed with costs.

Appeal dismissed.

MADRAS HIGH COURT.

CIVIL MISCELLANEOUS APPEAL No. 128 OF 1914.

CIVIL REVISION PETITION No. 269 OF 1914.

April 19, 1915.

Present:—Mr. Justice Oldfield and

Mr. Justice Seshagiri Aiyar.

MULLAPALI TARAVATHIL, MANAGER,

ITTUNNI RAMAN NAIR—PETITIONER—

APPELLANT

versus

GOPALA MENON AND OTHERS—

—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XL, r. 4—

Misappropriation by deceased—Receiver—Property in hands of his legal representatives, liability of—Execution—Procedure—Supreme Court Rules, O. L, rr. 15 (a) to 24.

Under Order XL, rule 4, of the Civil Procedure Code the proper procedure to bring to sale the properties of a deceased Receiver in the hands of his legal representatives is by way of execution and not by a separate suit. [p. 384, col. 1.]

The word "property" in Order XL, rule 4, and in the other clauses of the section is synonymous with estate and covers income from the property. [p. 384, col. 1.]

Order XL, rule 4, is a residuary provision intended to deal with all cases of loss to the estate not specially provided for and, therefore, applies to a case of misappropriation also. [p. 384, col. 1.]

Jenkins v. Briant, (1834) 4 L. J. Ch. 2; 7 Sim. 171; 58 E. R. 802; *Ludgater v. Channell*, (1847) 16 L. J. Ch. 248; 11 Jur. 273; 15 Sim. 479; 60 E. R. 705, referred to.

Appeal and civil revision petition against the order of the Court of the Subordinate Judge of Palghat, in Execution Petition No. 1319 of 1913, in Original Suit No. 28 of 1907, in Appeal Suit No. 20 of 1910, (Civil Miscellaneous Petition No. 293 of 1910), respectively.

IN C. M. A. No. 128 OF 1914.

Messrs. P. R. Srinivasa Aiyangar and G. S. Ramachandra Aiyar, for the Appellant.

Messrs. J. L. Rosario and P. Appu Nair, for the Respondents.

IN C. R. P. No. 269 OF 1914.

Messrs. P. R. Srinivasa Aiyangar and T. R. Ramachandra Aiyar, for the Petitioner.

JUDGMENT.—One Raman Nair brought a suit against the present appellant to remove him from the *karnavanship*. The first Court directed his removal. Pending the disposal of the appeal against the decree the said Raman Nair was appointed Receiver of the *tarwad* properties and he gave security for the proper management. The appeal was decided in favour of the *karnavan* in February 1913. Raman Nair, the Receiver, died in April 1913. The present application is by the successful *karnavan* for an order that the properties of the deceased Receiver in the hands of the respondents should be held liable for moneys misappropriated by him. The Subordinate Judge held that although an application of this kind might be entertained against the Receiver if he were alive, it is incompetent against his legal representatives and the proper procedure is to sue the latter in a regular suit. We think this order is wrong.

LEKHA SINGH v. BODIL SINGH.

Order XL, rule 4, provides that where a Receiver had occasioned loss to the property by his wilful default or gross negligence, the Court may direct his property to be attached and sold. Mr. Rosario raises two objections to the applicability of this clause. He contends that the word "property" only refers to what was actually entrusted to the Receiver and not the income derived therefrom. We are unable to agree with him. Property in this and in the other clauses of the section is synonymous with estate. In most cases it is for the collection of the income that Receiver is appointed. We are of opinion that the income from a property entrusted to the charge of a Receiver is covered by the word.

The learned Vakil also urges that by misappropriating the income it cannot be said that the Receiver committed wilful default or negligence. The clause is not very happily phrased. It is a residuary provision and is intended to deal with all cases of loss to the estate not specially provided for. One cannot say that a man who uses for his own benefit the money entrusted to him does not occasion loss by his wilful default. We must overrule this objection also.

The far more serious objection raised was that in a summary proceeding, the legal representatives should not be proceeded against. There is no question of the respondents being executors under the Will of the deceased. They are the original legal representatives of the deceased. The provision in rule 4 is that the property of the Receiver should be attached and sold. It does not necessarily involve the conclusion that the Receiver is alive. In section 50, clause (2) of the Code, where a provision is made for executing the decree against the legal representatives the language employed is "that the property of the deceased in his hand should be liable." We think that the Legislature has advisedly rendered the property liable in Order XL in order that execution may be levied against it in the hands of the legal representatives. If a suit has to be instituted, the same representatives would have to be impleaded as being in possession of the assets of deceased and we see no reason why the question which can be decided in a suit should not be disposed of in the execution application. Mr. Rosario

drew our attention to the cases reported as *Jenkins v. Briant* (1) and *Ludgater v. Channell* (2), in which it was held that the legal representatives of the defaulting Receiver should not be held liable in summary proceedings. In Order L, rules 15 (a) to 24 of the Rules of the Supreme Court, there is no provision directing the recovery of the money against the estate of the Receiver as we have in Order XL of our Code. We do not think that the cases cited affect the specific provisions of the Code of Civil Procedure. We agree with the learned Vakil that section 145 has no application. It contemplates proceedings against a third party who has given an undertaking for the due discharge of the obligations resting upon a party to the suit. The Receiver is not in that position. We think that provisions of rule 4, Order XL, are comprehensive enough to enable execution being had against the legal representatives of the deceased Receiver. We cannot accede to the contention that as the Receiver is an officer of the Court the respondents cannot be his legal representatives. In giving an undertaking to properly manage and in furnishing security in that behalf, he is rendering himself, and is, personally liable and in that capacity the respondents are his legal representatives.

For these reasons we must reverse the order of the Subordinate Judge and direct him to dispose of the petition. Costs will abide the result.

Order reverse.

(1) (1834) 7 Sim. 171; 4 L. J. Ch. 2; 58 E. R. 802.

(2) (1847) 15 Sim. 479; 16 L. J. Ch. 248; 11 Jur. 273; 60 E. R. 705.

ODDH JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS CIVIL APPEAL No. 40 OF 1914.

May 11, 1915.

Present:—Mr. Stuart, A. J. C., and
Mr. Kanhaiya Lal, A. J. C.

LEKHA SINGH AND OTHERS—PLAINTIFFS—
APPELLANTS
versus

BODIL SINGH AND OTHERS—DEFENDANTS—
RESPONDENTS.

Arbitration proceedings, defective—Award, invalidity

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of—Absence of one arbitrator at hearing, effect of—Parties not given opportunity of presenting their case, effect of—Arbitrators, improper action of, effect of.

Where the arbitrators, although prompted by the best motives, dispensed with the presence of the head arbitrator at the first sitting when some of the witnesses were examined, and the examination of the witnesses was not conducted in the presence of the parties and where the substance of the evidence was communicated to the head arbitrator and his opinion was obtained on the merits of the case without giving the parties an opportunity of presenting their respective cases before all the arbitrators:

Held, that the action of the arbitrators was improper and that the award could not be sustained.

Benode Lal Pakrasi v. Pran Chandra Pakrasi, 11 Ind. Cas. 898; 14 C. L. J. 143 and *Nga Hla Gyaw v. Mi Ya Po*, 27 Ind. Cas. 31; U. B. R. (1914) II, 26; 7 Bur. L. T. 279 referred to.

Appeal against the order of the Subordinate Judge, Hardoi, dated the 8th August 1914.

Pandit Gokaran Nath Misra and Babu Raghubir Sahai, for the Appellants.

Babu Basdeo Lal, for the Respondents.

JUDGMENT.—In this case some issues were remitted to the Court below for trial by our order dated the 22nd December 1914. The learned Subordinate Judge found that Tikam Singh, one of the arbitrators, was not present at the first sitting when some of the witnesses were examined, that the examination of the witnesses was not conducted in the presence of the parties and that, though the substance of the evidence taken by the arbitrators present at that sitting was communicated to Tikam Singh, the parties were given no opportunity to be present when that evidence was communicated. He also found that the defendants had not agreed to dispense with the presence of Tikam Singh and that they were materially prejudiced by the manner in which the proceedings were conducted.

It appears from the evidence of the arbitrators examined in this case, that the first sitting of the arbitrators took place on the 11th July 1914 at Maupore, where all the arbitrators, except Tikam Singh, had assembled. There is no reliable evidence to show that the parties had agreed to dispense with the presence of Tikam Singh at that sitting on account of his old age. He was appointed by the parties as a *sarpanch* or head arbitrator, and his presence at the time when the evidence was heard was absolutely essential. It is true that no oral evidence was adduced

by the parties at that sitting, but it is not disputed that some witnesses were examined by the arbitrators at the time of their own motion, and two documents, purporting to be bonds or mortgage-deeds in which Maharaj Singh was described as an adopted son of Nandan Singh, were read. It appears from the evidence of Shao Bakhsh Singh, Chatter Singh and Gajra Singh that the above witnesses were not examined in the presence of the parties and that the parties had no opportunity to cross-examine them or elicit facts for which the other side was contending. The next sitting of the arbitrators took place at Rasulpore on 13th July 1914 at the house of Tikam Singh. Whatever was done there was done in the absence of the parties, who had no opportunity to prosecute their cases in the presence of Tikam Singh before the final decision was arrived at. The award cannot, therefore, be sustained [*Benode Lal Pakrasi v. Pran Chandra Pakrasi* (1) and *Nga Hla Gyaw v. Mi Ya Po* (2)]. The arbitrators were unquestionably prompted by the best motives and dispensed with the presence of Tikam Singh at the first sitting in consideration of his old age and infirmity. But they acted improperly in taking evidence in absence of the parties, in communicating the substance of that evidence to Tikam Singh and obtaining his opinion on merits of the case without giving the parties an opportunity of presenting their respective cases before all the arbitrators.

We see no reason, therefore, to interfere with the order passed by the Court below and dismiss the appeal, but under the circumstances direct each party to bear his own costs throughout.

Appeal dismissed.

(1) 11 Ind. Cas. 898; 14 C. L. J. 143.

(2) 27 Ind. Cas. 31; U. B. R. (1914) II, 26; 7 Bur. L. T. 279.

SOUTH INDIAN MILLS CO., LTD. v. BURN & CO., LTD.

MADRAS HIGH COURT.

APPEAL AGAINST ORDER NO. 101 OF 1913.
CIVIL MISCELLANEOUS PETITIONS NOS. 1156
AND 1796 OF 1915.

July 19, 1915.

Present:—Sir John Wallis, Kt., Chief Justice,
and Mr. Justice Seshagiri Aiyar.

THE SOUTH INDIAN MILLS CO., LTD.,
TINNEVELLY, THROUGH ITS MANAGING
DIRECTOR, T. SRIMAN KANTHIMATHI
NATHA PILLAI—PETITIONER—APPELLANT

versus

BURN & CO., LTD., THROUGH MR. FULTON
AND OTHERS—RESPONDENTS.

*Companies Act (VI of 1882), s. 203—Scheme,
sanction of.*

Under section 203 of the Indian Companies Act (VI of 1882) the Court can sanction only a *bona fide* and workable scheme. [p. 387, col. 1.]

Appeal against the order of the District Court of Tinnevely, dated the 21st of February 1913, in Original Petition No. 116 of 1911.

Petition proposing a scheme for the conduct of the Company involved in the said Appeal against Order No. 101 of 1913.

Petition praying that in the circumstances the High Court will be pleased to sanction the said scheme and stay the winding-up of the Company.

Mr. S. T. Srinivasa Gopalachariar, for the Appellant.

Messrs. M. D. Devadoss, A. Sundaram, K. Pandalai and Messrs. King and Partridge, for the Respondents.

JUDGMENT.—In this case Ayling and Hannay, JJ., ordered the appeal against the winding-up order to be dismissed unless a scheme for the payment of creditors was put forward in six weeks' time. This was not done, but when the case came on in March of this year before Ayling and Tyabji, JJ., the 3rd respondent consented to the case being adjourned to allow of meeting of creditors and share-holders to approve a scheme. The meetings were held and a scheme approved, which came on for approval under section 203 of the Companies Act of 1882 before this Court, before which the appeal against the winding-up order is pending. On the materials before us we are not satisfied that the scheme was a *bona fide* or workable one, and we adjourned the case till after the vacation to enable the appellants to show that they were in a position to finance the scheme proposed by them. After a careful consideration of the case we have

come to the conclusion that the scheme should not be approved. The mills were acquired in 1909 for a price of over two lakhs. They worked for six months and were then closed in consequence of the mortgagee refusing to advance more money. According to the evidence of the Managing Director it would have required Rs. 1,000 a month to keep the machinery in proper order, but no such expenditure has been incurred for the last three years. It is, therefore, clear that the machinery must have most seriously deteriorated, even if we do not accept the affidavit of the 3rd respondent that it is only of the value of scrap iron. When the winding-up order was made in February 1913, various debts and establishment charges had not been paid although there was and still is Rs. 1,40,000 of uncalled capital. Nothing was done to meet the claims of creditors until the present scheme was put forward this year to give them, in full satisfaction, second debentures payable in five years which must, of course, be postponed to the rights of the mortgagee whose claim now amounts to more than four lakhs, against which this Company have a counter-claim against him for refusing to advance more money. In these circumstances the Company now comes forward with three affidavits from persons who profess to be willing, if the order is set aside and the scheme approved, to advance each Rs. 15,000 on terms to be hereafter agreed upon between themselves and the Company. We cannot regard this as a serious offer, as it does not appear how in the circumstances of the present Company, any business man could be willing to make such an advance subject to the claim of the mortgagee and of the existing unsecured creditors pursuant to the scheme we are asked to approve. We cannot attach any weight to the statements of the Manager in his affidavit about other lenders who have not filed affidavits. No serious attempt has been made to show that the sum of Rs. 45,000, even if available, would be sufficient to enable the Company to re-open and carry on their business. It is noteworthy that the only suggestion put before us is to carry on with borrowed money and that nothing has been said about the practicability of calling up the unpaid capital of the Company, a circumstance which we consider highly significant.

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As regards the creditors who support the scheme, we do not attach much importance to their opinion as they are mostly not business men and some of them are interested in opposing the winding-up order which would make them liable for calls. Messrs. Burn and Company's opinion would be entitled to great weight from a business standpoint, but they have not only got back their machinery but are to receive Rs. 1,500 down under the scheme, and it is, therefore, natural they should refrain from opposing it. On the whole we have come to the conclusion that the proposed scheme put forward at the very late stage is not a *bona fide* or a workable one and we accordingly refuse to sanction it and dismiss the appeal with costs of the 3rd respondent.

Appeal dismissed.

COURT OF THE BOARD OF REVENUE,
UNITED PROVINCES.

REVENUE PETITION NO. 15 OF 1913-14
OF PARTABGARH DISTRICT.

November 12, 1914.

Present:—Mr. Holms, J. M.

GANGA DIN SHUKUL—PLAINTIFF—
APPELLANT

versus

RAI KRISHNA PRASAD SINGH—
DEFENDANT—RESPONDENT.

Under-proprietor, rights of, not affected by execution of fresh qabuliat at enhanced rent—Kabuliat at enhanced rent, fresh, execution of, effect of—Enhanced rent, agreement to pay, effect of.

The mere fact that an under-proprietor executes a *kabuliat* agreeing to pay an enhanced rent does not affect his under-proprietary rights.

Debi Singh v. Bhaiya Ambika Dat Ram, Selected Decision No. 4 of 1912, referred to.

Appeal from the decree of the Commissioner, Fyzabad, upholding the order of the Assistant Collector, Partabgarh.

Syed Zahur Ahmad, for the Appellant.

Mirza Sami Ullah Beg, for the Respondent.

JUDGMENT.—The appellant has not a strong case. At the first Regular Settlement in only one plot was a member of his family shown in possession and the mere fact that the land is described as *muafi* in the *jamabandi* entry of 1277 *Fasl* is not enough to show

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that the *shankalup*-deed covered the land in suit.

I notice that the Commissioner in his judgment says there is clear evidence that the grant was resumed. Admitting for the time being that it is genuine and that it referred to this land, I can find no evidence of resumption at all. The mere fact that an under-proprietor executes a *kabuliat* agreeing to pay an enhanced rent does not affect his under-proprietary rights [*Debi Singh v. Bhaiya Ambika Dat Ram* (1) is analogous].

Appeal dismissed with costs.

Appeal dismissed.

(1) Selected Decision No. 4 of 1912.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL NO. 1515 OF 1914.

April 17, 1915.

Present:—Mr. Justice Shadi Lal.

MEHTAB ALI SHAH—PLAINTIFF—

APPELLANT

versus

IMDAD ALI SHAH—DEFENDANT—

RESPONDENT.

Appeal, second—Amendment of plaint, if allowed.

A Court of second appeal cannot order amendment of a plaint, specially when the plaintiff has not asked for it in both the lower Courts and such amendment, if allowed, would mean the trial of the case *de novo*. [p. 388, col. 1.]

Second appeal from the decree of the Divisional Judge, Jullundur, dated the 10th March 1914, affirming that of the Subordinate Judge, first Class, Jullundur, dated the 23rd July 1913, decreeing the claim in part.

Mr. Fazal-i Hussain, for the Appellant.

Mr. Monohar Lal, for the Respondent.

JUDGMENT.—After hearing arguments on both sides I have no hesitation in holding that the view taken by the lower Courts is correct and there is no sufficient reason for interfering with the decree of the learned Divisional Judge in second appeal. The plaint shows that the claim put forward by the plaintiff, which was referred to the decision of the arbitration, did not include a prayer for possession of any part of the yellow house. Further, it is to be noted that the appellant did not, either in the

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Court of first instance or in the Divisional Court, apply for the amendment of the plaint and it is manifest that a Court of second appeal cannot accede to a request of that kind which was never made in the Courts below and which, if accepted, would mean the trial of the case *de novo*.

It appears that according to the award, the plaintiff cannot recover one-half of the yellow house without paying his share of the costs of the improvements effected by the defendant. It is, therefore, clear that an amendment of the plaint, if allowed at this late stage, would involve a trial of the issue as to compensation, and, in view of what the learned Divisional Judge has said about the conduct of the appellant, I do not think he is entitled to any indulgence. I must, therefore, affirm the decree appealed against and dismiss the appeal with costs.

Appeal dismissed.

ODDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 474 OF 1912.
April 9, 1915.

Present:—Mr. Kanhaiya Lal, A. J. C.
GAJADHAR LAL AND ANOTHER—
DEFENDANTS—APPELLANTS

versus

Musammatt GULABA—PLAINTIFF
AND ANOTHER—DEFENDANT
—RESPONDENTS.

Estoppel—Hindu widow allowed to represent herself as owner, effect of—Heir, position of—Invalidity of mortgage by widow, plea as to, when not maintainable—Attestation, effect of—Priority—Registration and non-registration of prior and subsequent mortgage-deeds, effect of, as to priority.

The heir of a deceased Hindu, deliberately allowing the widow to represent herself as the owner of the deceased's estate and attesting the mortgage-deed executed by her in respect of that estate, is estopped by reason of the attestation from setting up the invalidity of the mortgage and depriving the mortgagee of the money advanced on the faith of that representation. [p. 388, col. 2.]

Sarat Chunder Dey v. Gopal Chunder Laha, 20 C. 296; 19 I. A. 203 and *Wazir Mohammad v. Har Prasad*, 13 Ind. Cas. 613; 15 O. C. 67, referred to.

No priority can be claimed in respect of an unregistered mortgage-deed when the subsequent mortgage-deed is registered. [p. 289, col. 1.]

Appeal from the decree of the Additional Judge, Hardoi, dated the 31st July 1912, reversing that of the Munsif, Purwa, dated the 29th February 1912.

Babu *Salig Ram*, for the Appellants.

Syed *Zahur Ahmad*, for Respondent No. 1.

JUDGMENT.—This was a suit for foreclosure on foot of a mortgage effected by *Musammatt Puna* in favour of *Musammatt Gulaba* on the 26th November 1908. The mortgage purported to have been made to satisfy a decree held by *Sat Narain* against *Musammatt Puna* and *Kalidin*. *Kalidin* attested the mortgage-deed. The main question for consideration in the appeal is whether *Kalidin* is estopped by reason of the attestation from setting up the invalidity of the mortgage.

It appears that the mortgaged property belonged to a joint family comprising *Dhonkal*, the husband of *Musamma Puna*, and *Kalidin*, his nephew. On the death of *Dhonkal* the name of *Musammatt Puna* was entered in the revenue papers though according to the Hindu Law *Kalidin* was the sole proprietor of the entire estate. *Kalidin* nevertheless allowed *Musammatt Puna* to represent herself as the owner of the grove in suit and on the strength of that representation to obtain a loan of Rs. 82 from *Musammatt Gulaba*. The lower Appellate Court has found that the loan was taken to pay a joint debt due by *Musammatt Puna* and *Kalidin* and under the circumstances the case falls within the purview of section 115 of the Indian Evidence Act. *Kalidin* attested the mortgage after its contents were read over to him, and, as observed in *Sarat Chunder Dey v. Gopal Chunder Laha* (1) and *Wazir Mohammad v. Har Prasad* (2), having deliberately allowed *Musammatt Puna* to hold herself out as the owner of the grove and attested the mortgage-deed in proof of his consent, he cannot be allowed to resile from that position and deprive the mortgagee of the money she had advanced on the faith of that representation. The defendants-appellants claim to be prior mortgagees of the property mortgaged under a deed dated the 6th November 1899. But the execution of that deed was not proved in the opinion of the Court below by any reliable evidence

(1) 20 C. 296; 19 I. A. 203.

(2) 13 Ind. Cas. 613; 15 O. C. 67.

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and in view of the fact that the deed was unregistered while that in favour of the plaintiff-respondent was registered no priority can be claimed in respect of the former. *Musammatt Puna* had been served in this case at the original hearing of the appeal before an issue was remitted to the lower Appellate Court. She did not then appear and no further service on her is, therefore, necessary.

The appeal is dismissed with costs. The time for payment of the mortgage-money is extended till the 9th September 1915.

Appeal dismissed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 1472 OF 1912.

May 25, 1915.

Present:—Mr. Justice Shah Din and
Mr. Justice Le Rossignol.

JIWAN SINGH *alias* JIWAN—PLAINTIFF—

APPELLANT

versus

ACHHAR SINGH AND ANOTHER—

DEFENDANTS—RESPONDENTS.

Mortgage—Joint estate—Mortgage by all joint-holders severally—Redemption by one joint-holder of all land mortgaged by all joint owners severally—Objection by one joint owner's widow—Priority of right of redemption—Transfer of Property Act (IV of 1882), s. 91.

In a joint holding, where each co-sharer has mortgaged his specific share separately, though technically each has an interest in every inch of the joint estate, its joint character may be regarded as in a state of suspension till the respective mortgages have been redeemed.

The interest contemplated by section 91 of the Transfer of Property Act is an interest derived directly or indirectly from the mortgagor since the making of the mortgage.

A mortgagor or his heir in possession has the preferential right to redeem the mortgage over the other joint owners of the estate who are merely reversioners.

Second appeal from the decree of the Additional Divisional Judge, Jullundur Division at Ludhiana, dated the 13th May 1912, modifying that of the Munsif, first Class, Jullundhur, dated the 17th January 1912, decreeing the claim in part.

Lala Ganga Ram, for the Appellant.

Mr. Nehal Chand Mehra, for the Respondent.

JUDGMENT.—The land in dispute was comprised in one joint estate owned by three brothers.

Though the estate was and still is joint, each brother appears to have dealt in practice with specific portions as his own share, for each one effected separate mortgages.

The present contest is now between the one surviving brother and the widow of another brother.

The plaintiff has been given a decree for the redemption of the areas mortgaged by himself and of those mortgaged by his deceased brother, Waryama, but the object of this second appeal is to secure a decree for redemption of the areas mortgaged by *Mihan Singh*, the third brother, and by his widow, *Musammatt Partapi*, who is in possession on the usual widow's tenure of her late husband's share.

She resists the plaintiff's claim and contends that it is brought merely to molest her.

The question for decision is whether the plaintiff merely by reason of the fact that he is a co-sharer in the joint holding has a right to redeem against the wishes of the mortgagor, who admittedly had a prior right to redeem?

No authority in point has been cited before us, but it has been urged that section 91 of the Transfer of Property Act confers the right to redeem on any person holding an interest in the property mortgaged.

The interest contemplated by the section, however, must be an interest derived directly or indirectly from the mortgagor since the time of the making of the mortgage.

Moreover, though technically the plaintiff has an interest in every inch of the joint estate, it is clear from the manner in which the brothers have treated the estate that in fact its joint character may be regarded as in a state of suspension, at any rate till the mortgages have been redeemed.

The appellant has not established his right to the relief prayed for and we dismiss the appeal with costs.

Appeal dismissed

MUNICIPALITY OF RATNAGIRI *v.* VASUDEV BALKRISHNA LOTLIKAR.

BOMBAY HIGH COURT.

APPEAL FROM ORDER No. 19 OF 1914.

JUNE 24, 1915.

Present:—Sir Basil Scott, Kt., Chief Justice,
and Mr. Justice Shah.

THE MUNICIPALITY OF RATNAGIRI—
DEFENDANT—APPELLANT

versus

VASUDEV BALKRISHNA LOTLIKAR

—PLAINTIFF—RESPONDENT.

Bombay District Municipalities Act (III of 1901), ss. 46, 167,—Duty and power to dismiss officers and servants of Municipality—Dismissal of Secretary—Act done "in pursuance of" the Act—Suit for damages for wrongful dismissal barred if instituted more than six months after dismissal.

As section 46 of the Bombay District Municipalities Act and the statutory rules made thereunder impose the duty and confer the power upon a Municipality to dismiss its officers and servants in proper cases, a dismissal of its Secretary by a Municipality is an act done in pursuance of the Act within the meaning of section 167 and a suit claiming damages for such dismissal on the footing of its being a wrongful dismissal is barred if instituted more than six months after the date of dismissal. [p. 391, col. 1.]

Appeal from an order passed by the District Judge of Ratnagiri, in Appeal No. 328 of 1913, reversing the decree passed by, and remanding the suit to, the Assistant Judge of Ratnagiri, in Civil Suit No. 74 of 1913.

Mr. D. A. Khare, for the Appellant.

Mr. G. K. Parekh, for the Respondent.

JUDGMENT—This was a suit filed by the plaintiff, who was formerly the Municipal Secretary of the Ratnagiri Municipality, against that Municipality, claiming damages for wrongful dismissal. The learned Assistant Judge held that the suit was barred by limitation under the provisions of section 167 of the District Municipalities Act. That section provides that:—

"No suit shall be commenced against any Municipality...for anything done, or purporting to have been done, in pursuance of this Act, without giving to such Municipality... one month's previous notice in writing of the intended suit and of the cause thereof, nor after six months from the date of the act complained of."

The suit was instituted more than six months after the dismissal of the plaintiff by the Municipality, and the question raised in the preliminary issue was whether the dismissal was something done, or purporting to have been done, in pursuance of the Act. The learned Assistant Judge held that it was

done in pursuance of the District Municipalities Act, and that, therefore, the suit was out of time.

On appeal to the District Judge that decision was reversed and the case was remanded for hearing on the merits. The learned District Judge said:

"I hold that section 167 of the District Municipalities Act does not cover this case. That section is applicable in cases relating to anything done, or purporting to have been done, in pursuance of the Act. The test to be applied is not the nature of the suit or the subject-matter, but whether the cause of action was or was not connected with the exercise of the statutory powers conferred upon the Municipality. The employment and dismissal of servants are not acts done in pursuance of the Act within the meaning of this section."

We are unable to agree with that decision. Section 46 of the District Municipalities Act (Bom. Act III of 1901) provides that—

"Every Municipality shall, as soon as conveniently may be after the constitution thereof, make and may from time to time alter or rescind rules, but not so as to render them inconsistent with this Act, ... determining ... the staff of officers and servants to be employed by the Municipality and the respective designations, duties... etc., of such officers and servants, ... subject to the provisions of section 184, determining the mode and conditions of appointing, punishing or dismissing any such officer or servant."

Section 2 of the Act provides that all Municipalities constituted and rules made under the repealed District Municipalities Acts of 1873 and 1884 shall, so far as may be, be deemed to have been constituted and made under this Act. Therefore, the rules which were in force at the time of the dismissal, which were rules made under the Act of 1884, must be deemed to have been made in pursuance of the duty cast upon the Municipality under section 46 of the District Municipalities Act of 1901.

Now rule 98 of the Rules of 1884 provides that "the Municipality alone shall have power to appoint, reduce or dismiss the Municipal Secretary," and certain earlier rules, namely, 77 and following rules, prescribe that the Secretary shall be one of the staff of officers to be employed by the Municipality, and define

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his duties. The Municipality, therefore, have the power and the duty in a proper case to dismiss the Municipal Secretary. That duty is imposed upon them, and that power is given to them by the Act or the statutory rules deemed to be made under the Act. That being so, when they exercised such power by purporting to dismiss this Secretary, that is, in our opinion, an act done or purporting to have been done in pursuance of the Act within the meaning of section 167. It does not appear to us that the decisions referred to in argument, namely, *Myers v. Bradford Corporation* (1) or *Lyles v. Southend-on-Sea Corporation* (2), give us any assistance in the decision of the particular question before us. We, therefore, set aside the order of remand, and restore the decree of dismissal passed by the Assistant Judge with costs throughout.

Order reversed.

- (1) (1915) 1 K. B. 417; 84 L. J. K. B. 306.
 (2) (1905) 2 K. B. 1; 74 L. J. K. B. 484; 92 L. T. 586; 69 J. P. 193; 3 L. G. R. 691; 21 T. L. R. 889.

MADRAS HIGH COURT.

APPEAL AGAINST ORDER NO. 216 OF 1912.

December 2, 1913.

Present:—Mr. Justice Bakewell and

Mr. Justice Spencer.

GADIGEREMULA SUNKI REDDI—

DEFENDANT—APPELLANT

versus

VENGAL REDDI, MINOR, BY NEXT FRIEND AND
BROTHER, NAGI REDDI—PLAINTIFF

—RESPONDENT.

Will—Evidence—Intention of testator—Proof—Oral evidence; admissibility of—Amendment of plaint.

Oral evidence of a testator's intention is inadmissible but oral evidence is admissible to prove the surrounding circumstances of the testator and the beneficiaries. [p. 392, col. 1.]

A plaint cannot be allowed to be so amended as to set up a totally different title and cause of action. [p. 392, col. 1.]

Appeal against the order of the Court of the Subordinate Judge of Kurnool, in Appeal Suit No. 276 of 1910, preferred against that of the Court of the District Munsif of Kurnool, in Original Suit No. 375 of 1909.

FACTS of the case appear fully from the judgment,

Dr. Swaminadhan, for the Appellants:—The question is whether the daughter took a limited estate or absolute estate, when the testator says, "I agree that my two daughters and two sons shall take my properties in three shares."

It is against all general principles to send back a case in order to ascertain by oral evidence what the testator meant. Oral evidence as to the intentions of the testator has been let in. The daughter is not a party to the suit. The general principle is that the Will must be construed from the words in the Will and not by oral evidence.

[BAKEWELL, J.—What evidence you have?]

Mr. L. A. Govindaraghava Aiyar, for the Respondent:—The terms of the Will under which the daughter would take would be very cogent evidence.

[BAKEWELL, J.—You did not tender any evidence and how can you give it now?]

In the Munsif's Court, beyond the document none was produced. Paragraph 10 is clear; it says that no oral evidence is necessary. There is nothing to show whether any witnesses have been summoned. The point was taken before the lower Court, but he refused to allow it. The Will also deals with the ancestral property of the testator. The question arises clearly upon the document itself.

[BAKEWELL, J.—You set up a Will and claimed under it. How can you now say that the dispositions are invalid?]

Sreemutty Soorjeemoney Dossee v. Denobundoo Mullick (1) shows that the intention is to be determined; but the meaning must be gathered from the surrounding circumstances and it may displace any presumption arising from law. *Bhuggobutty Prosonno Sen v. Gooroo Prosonno Sen* (2) shows that when the testator's intention is to be considered, both the terms of the Will and the surrounding circumstances ought to be taken. *Allgood v Blake* (3) shows that the Will must be understood according to the surrounding circumstances. There is no final decision in regard to the construction of the Will.

In *Thakur Unvrao Singh v. Thakur Lachh-*

(1) 4 W. R. 114 (P. C.); 6 M. J. A. 526 at p. 557; 1 Ind. Jur. (N. S.) 37; 1 Boulr. Rep. 228; 1 Suth. P. C. J. 291; 1 Sar. P. C. J. 583; 19 E. R. 198.

(2) 25 C. 112 at p. 124.

(3) (1873) 8 Ex. 160 at p. 163.

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man Singh (4) it was held by the Judicial Committee that a party is not precluded from questioning the invalid portion of the Will.

JUDGMENT.—The plaintiff's case is founded upon the Will of Papi Reddi, and the plaint alleges that the testator gave only a life-interest to his daughter, and that upon her death the plaintiff took an absolute interest in her share, and prays that his right may be declared and for recovery of property in the possession of the husband of the deceased's daughter. The cause of action is alleged to have arisen on her death.

No evidence was called by either party, and the District Munsif gave judgment upon the construction of the Will. The Subordinate Judge has remanded the case for evidence as to whether the testator intended to give an absolute interest to his daughter or merely a life-interest.

The learned Vakil for the respondent was unable to specify what evidence he wished to adduce, and apparently it is oral evidence of the testator's intention simply. This is clearly inadmissible. Evidence would, no doubt, be admissible as to all the surrounding circumstances of the testator and the beneficiaries, but no such evidence was tendered at the trial of the suit, nor was it a ground of appeal to the lower Appellate Court that the District Munsif improperly refused to take evidence on behalf of the plaintiff: no reason has been given why the parties should be allowed to adduce further evidence, and have a re-trial of the suit. We cannot allow the plaintiff now to amend his plaint, and allege that the Will does not affect the suit property because it is ancestral, and passed to the plaintiff by survivorship; that would be to set up a totally different title and cause of action.

The order of remand must be set aside, and the District Judge of Kurnool will dispose of the appeal on the evidence before him. The appeal is allowed with costs.

Appeal allowed.

(4) 10 Ind. Cas. 285; 15 C. W. N. 497 (P. C.); 8 A. L. J. 465; 13 C. L. J. 519; 9 M. L. T. 507; 13 Bom. L. R. 404; 14 O. C. 133; 21 M. L. J. 637; 23 A. 344; (1911) 2 M. W. N. 242.

COURT OF THE BOARD OF REVENUE,
UNITED PROVINCES.

REVENUE PETITION NO. 19 OF 1913-14

OF RAI BARELI DISTRICT.

November 14, 1914.

Present:—Mr. Holms, J. M.

Lala GANESH PRASAD—PLAINTIFF—
APPELLANT

versus

SHEODAYAL—DEFENDANT—RESPONDENT.

Wajib-ul-arz, entry in, weight of—Attestation by asamis and not by muafidars, effect of—Local custom—Land held rent-free at pleasure of grantor—Resumption.

A mere entry in a *wajib-ul-arz*, attested by the *asamis* but not by the *muafidars* of the village, that the land is held rent-free, by local custom at the pleasure of the grantor, does not, in the absence of any other evidence to that effect, establish the said custom.

Appeal from the decree of the Commissioner, Lucknow, dated the 7th May 1914, reversing that of the Deputy Commissioner, Rai Bareli, dated the 1st August 1913, modifying that of the Assistant Collector, Rai Bareli, dated the 13th May 1913.

Babu *Hargobind Das*, for the Appellant.

Chaudhri *Ram Bharose Lal*, for the Respondent.

JUDGMENT.—Appellant's first point is that the land is liable to resumption as it is held by local custom at the pleasure of the grantor. The only evidence of custom is the *wajib-ul-arz* which, appellant now points out was attested by the *asamis* of the village. There is nothing to show that the *muafidars* themselves attested the *wajib-ul-arz*, and in the absence of any other evidence of local custom I find that it is not established.

The second point urged is contained in the fourth ground of appeal. The two lower Courts had not come to concurrent findings of fact as to under-proprietary rights and the Commissioner was entitled to do come to a finding on the facts, but in a third appeal his finding of fact cannot be questioned.

Appeal dismissed with costs.

Appeal dismissed.

DHANI SAHU v. RAJ MAHAL KUNWARI.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 704 OF 1914.

May 4, 1915.

Present:—Mr. Justice Chamier.DHANI SAHU—DEFENDANT—APPELLANT
*versus*RAJ MAHAL KUNWARI—PLAINTIFF—
RESPONDENT.*Ex-proprietary right, relinquishment of, effect of.*

The effect of the relinquishment of ex-proprietary rights is as if the ex-proprietary rights had never come into existence at all. The person in whose favour the relinquishment of ex-proprietary rights is made cannot subsequently claim those rights.

Second appeal from a decree of the Additional Judge of Gorakhpur.

Mr. A. P. Dube (with him Mr. Jang Bahadur Lal), for the Appellant.

Mr. Haribans Sahai, for the Respondent.

JUDGMENT.—Sheo Dihal made a simple mortgage of a two-annas share in a village in favour of the respondent. Seven years later he made a usufructuary mortgage of nine-pies out of the two-annas shares in favour of the appellant. A few days after this mortgage the mortgagor executed a deed of relinquishment in respect of his ex-proprietary rights in certain plots of land aggregating 18 *bighas* or so. The first mortgagee brought a suit upon her mortgage impleading the second mortgagee. She obtained a decree, brought the property to sale, and purchased it herself. She obtained formal delivery of possession of the entire 2-annas share. But the appellant declined to give up possession of the 18 *bighas* odd, the ex-proprietary rights in which had been relinquished by the mortgagor. This is a suit for possession of the nine-pies share including the 18 *bighas* odd. The first Court decreed the claim for the share but dismissed the claim for possession of the plots. On appeal the Additional District Judge gave the respondent a decree for possession of 9 *bighas* 6 *biswas* 5 *dhurs* and for mesne profits of the same. He dismissed the claim of the respondent as regards the remaining 9 *bighas*, on the ground that she had failed to prove that the appellant held possession of those 9 *bighas*. On behalf of the defendant-appellant it is contended that the respondent is not entitled to possession of any portion of the land, in which the mortgagor became entitled to

ex-proprietary rights on the making of the usufructuary mortgage, and that the relinquishment of his ex-proprietary rights by the mortgagor operated for the benefit of the appellant only. In my opinion the learned Judge has taken a correct view of this matter. The mortgagor became entitled to ex-proprietary rights but deliberately relinquished them. No one could prevent him from doing so. The result of the relinquishment was to improve the security held by the mortgagees. In the first instance, no doubt, the relinquishment operated more for the benefit of the second mortgagee than for that of the first mortgagee, because it enabled the second mortgagee to obtain actual possession of land which he could not otherwise have obtained; but, in my opinion, when the property was sold in execution of the decree on the first mortgage the purchaser became entitled to proprietary rights in the whole two annas. The ex-proprietary rights had been carved out of the two-annas share by the law but subsequently ceased to exist. To my mind it is as if the ex-proprietary rights had never come into existence at all, and there is no more ground for refusing to give the purchaser possession of these plots than for refusing to give him possession of any other plot included in the usufructuary mortgage. The appeal, therefore, fails. Cross-objections have been filed by the respondent to the effect that the Court should have decreed possession of the entire 18 *bighas* and mesne profits of the same. I have been referred to a number of *rubkars* recorded by the first Court. None of them show that the appellant held actual possession of the whole 18 *bighas*. They show that the parties elected not to give oral evidence and they state the result of an examination of some of the documentary evidence. No attempt has been made to show me that the documentary evidence proves that all the plots specified at the end of the plaint were in fact in possession of the appellant. The District Judge finds that it is not proved that the appellant held possession of all the plots. I accept his finding. The result is that the cross-objections also fail. Both the appeal and the cross-objections are dismissed with costs.

Appeal dismissed.

SWARNAMOYI DEBI v. SECRETARY OF STATE.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL ORDER NO. 110
OF 1915.

CIVIL RULE NO. 438 OF 1915.

August 10, 1915.

Present:—Justice Sir Asutosh Mookerjee, Kt.
and Mr. Justice Newbould.

Srimati SWARNAMOYI DEBI—

APPELLANT

versus

SECRETARY OF STATE FOR INDIA

IN COUNCIL—RESPONDENT.

Court Fees Act (VII of 1870), ss. 19C, 19-I—Probate—Succession-duty—“Full fees chargeable under the Act,” meaning of—No further fee in second grant—English Law—No new devolution of property, no new succession-duty—Legislature, intention of—Probate and Administration Act (V of 1881), s. 86—Appeal.

Once a Probate has been granted on payment of succession-duty in accordance with the scale of Court-fee then in force, no further Court-fee can be levied for granting a second Probate in respect of the same estate, if the scale of Court-fee has, in the meantime, been revised and raised. [p. 395, col. 1.]

Section 19-I of the Court Fees Act requires the fee chargeable upon a Probate to be paid before the order for grant of Probate is made: and so what constitutes “the full fee chargeable under this Act” must be determined by reference to the point of time when the grant of Probate is made. [p. 395, col. 1.]

The full fee chargeable must not be determined with reference to the point of time when the second grant is sought. [p. 395, col. 1.]

The expressions “under the Act” and “under the same Act” refer to the Court Fees Act and not the subsequent Acts amending the Court Fees Act. [p. 395, col. 1.]

It is the intention of the Legislature that when the full fee chargeable under the Court Fees Act on a Probate, at the time it is granted, has been paid, no further fee shall be chargeable when a second grant is made in respect of that property as comprised in that estate. [p. 395, col. 1.]

In the goods of Chalmers, 6 B. L. R. App. 137; 21 W. R. 243 note and *In the goods of Gasper*, 3 C. 733; 2 C. L. R. 436, followed.

In England all second and subsequent grants of Probate and Administration in respect of property on which the full duty has been already paid upon a previous grant, are exempted from further stamp duty by section 3 of 41 Geo. III, c. 86. [p. 395, col. 2.]

When an executor to whom Probate has been granted dies, leaving a part of the testator's estate unadministered and a new representative is appointed for the purpose of completing the administration, there is no new succession, no new devolution of the estate and no fresh succession duty should be levied. [p. 396, col. 1.]

In the goods of Samuel Balthazar, 4 L. B. R. 255; *In the goods of Ameerum*, 15 W. R. 496; *Webster v. Spencer*, 3 B. & Ald. 360; 22 R. R. 427; 106 E. R. 694; *Cummins v. Cummins*, 3 Jo. & Lat. 64; 8 Ir. Eq. R. 723; 72 R. R. 29 and *In the goods of Bell*, (1871) 2 P. & D. 247; 40 L. J. P. 67; 25 L. T. 163, referred to.

An order refusing to issue a Probate till a sum of

money, which is not legitimately leviable under the law, is paid as succession-duty, refuses in effect the application for Probate and is, therefore, appealable under section 86 of the Probate and Administration Act. [p. 395, col. 1.]

Appeal from the order of the District Judge of Mymensingh, dated the 18th of January 1915.

Babus Dwarkanath Chakravarti and Kalki Kinkar Chakravarti, for the Appellant.

Babu Ram Charan Mitra, for the Respondent.

JUDGMENT.—This appeal is directed against an order whereby the District Judge has in substance refused to issue a Probate to the appellant till a sum of Rs. 769-3-0 had been paid as succession duty. The facts are not in controversy and may be briefly recited. One Prasunna Kumar Bhattachariya died on the 28th October 1908. He had previously made a testamentary disposition of his properties on the 24th March 1907. The Will provided that during the minority of his son, Amulya Kumar Bhattachariya, his estate would be administered, first, by his eldest sister, Gobinda Sundari Debi, and, next, upon her death, by his widow, Swarnamoyi Debi; the ladies were thus constituted the two successive executrices. On the 29th April 1909 Probate was granted to Gobinda Sundari Debi under section 21 of the Probate and Administration Act, 1881, though it was not explicitly stated that the grant was made *durante minore ætate*. The executrix died on the 17th July 1914. As the sole residuary legatee had not yet attained his majority, the second executrix named in the Will applied for Probate on the 9th September 1914. An order was recorded on that date that no Probate duty appeared necessary as it had been paid already, and the case was fixed for disposal on the 7th November 1914. On that date the Court directed that the original Probate produced by the applicant be cancelled and that a fresh Probate with a copy of the Will annexed be granted to the petitioner. On the 21st December 1914, the Court re-considered the matter and held that as the scale of Probate duty on estates valued at above Rs. 50,000 had been raised from 2 to 3 per cent. by Act VII of 1910 and as duty had been paid at the rate of 2 per cent. on the first Probate, the petitioner should be called upon to pay the difference between the duties calculated at 2 per cent. and 3 per cent, respectively. The petitioner

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was heard on the 18th January 1915, and contended that under section 19 of the Court Fees Act, 1870, as amended by Act XIII of 1875, no further duty was payable. This contention was overruled and she was called upon to pay the additional sum named before the Probate could be issued to her. The petitioner has appealed to this Court and has also obtained a Rule in the alternative, should a question be raised as to competency of the appeal. It is plain that the order, in effect, refuses the application for Probate and is appealable under section 86 of the Probate and Administration Act.

Section 19C of the Court Fees Act, 1870, which was inserted therein by section 6 of Act XIII of 1875, is in these terms: "Whenever a grant of Probate or Letters of Administration has been or is made in respect of the whole of the property belonging to an estate, and the full fee chargeable under this Act has been or is paid thereon, no fee shall be chargeable under the same Act when a like grant is made in respect of the whole or any part of the same property belonging to the estate." It is plain that as the fee chargeable upon a Probate is required by section 19-I to be paid before the order for grant of Probate is made, what constitutes "the full fee chargeable under this Act" must be determined by reference to the point of time when the grant of Probate is made. We are unable to accept the contention that the full fee chargeable under this Act must be determined with reference to the point of time when the second grant is sought. We are further unable to accept the contention that the expressions "under the Act" and "under the same Act" refer to, not the Court Fees Act, but the subsequent Acts amending the Court Fees Act. What the Legislature appears to have intended is that where the full fee chargeable under the Court Fees Act on a Probate at the time it is granted has been paid, no further fee shall be chargeable when a second grant is made in respect of that property as comprised in that estate. If this interpretation were not accepted, and if the contention of the Government Pleader were to prevail, the anomalous result would follow that section 19C would have no application where, as in the case before us, the scale of Probate duty has been raised in the

interval between the grant of the first and the second Probates, and consequently, the entire Probate duty in the enhanced scale would be payable without deduction of the duty previously paid. This could hardly have been the intention of the Legislature. The second paragraph of section 19C would be of no avail, as it is restricted to grants in respect of property forming part of an estate. In our opinion, the interpretation put upon the first paragraph of section 19C by the appellant is reasonable and is undoubtedly consistent with the language used. We hold accordingly that as the full fee chargeable under the Court Fees Act on the first Probate granted in this case on the 29th April 1909 was paid thereon, no fee is now chargeable under the Court Fees Act on the second grant. This view does not militate against the decision of Couch, C. J., in *In the goods of Chalmers* (1) and of Garth, C. J., in *In the goods of Gasper* (2). In the former case, the first grant had been made and a fixed duty paid thereon under the Indian Succession Act, 1865, while the second grant was made after the Court Fees Act, 1870, had come into force. In the latter case the circumstances were similar with this difference that section 19C had meanwhile been inserted in the Court Fees Act, but that section could not avail, as it refers expressly to cases where both the first and the second grants had been made after the Court Fees Act had come into force. Nor is any assistance derived from the decision of Norman, C. J., in *In the goods of Peter Innes* (3), which merely recognises the principle subsequently embodied in the second paragraph of section 19C. We may add that the view adopted by us places the law in this country in a line with what has long been the law in England. There, all second and subsequent grants of Probate and Administration, in respect of property on which the full duty has been already paid upon a previous grant, are exempted from further stamp duty by section 3 of 41 Geo. III, c. 86: section 36 of 5 and 6 Vict., c. 82, contains a corresponding provision for Ireland. It may further be observed that if the question be

(1) 6 B. L. R. App. 137; 21 W. R. 246 note.

(2) 3 C. 733; 2 C. L. R. 436.

(3) 16 W. R. 253; 8 B. L. R. App. 43.

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considered as one of principle, the rule as formulated in England and as interpreted by us is evidently just. When an executor to whom Probate has been granted dies, leaving a part of the testator's estate unadministered and a new representative is appointed for the purpose of completing the administration, there is no new succession, no new devolution of the estate and it is difficult to appreciate why a fresh succession duty should be levied. A good illustration is afforded by the case of *In the goods of Samuel Balthazar* (4); there, Letters of Administration had previously been issued in respect of the whole property, and the full fee chargeable on the property at the value then placed upon it had been levied. It was ruled that when a new grant had to be made under section 229 of the Indian Succession Act on the death of the first Administrator, no further Court-fee was leviable although the value of the property had increased in the meantime. This is consistent with the decision of Norman, C. J., in *In the goods of Ameerun* (5) that no duty is payable on a double Probate which recites and in fact proceeds upon the first. Reference may in this connection be made to the following passage from Williams on Executors, 10th Edition, Volume I, page 295; "Probate granted to one of several executors enures to the benefit of all. *Webster v. Spencer* (6), *Cummins v. Cummins* (7). Where there are several executors, upon the grant of Probate to one of them, it is usual to reserve power of making a like grant to the others. But this appears to be unnecessary, both because the Probate already granted enures to their benefit, and because they have a right to the grant, whether the power be reserved or not. The practice is to take out what is called a double Probate, which is in this manner. The first executor that comes in, takes Probate in the usual form, with reservation to the rest. Afterwards if another comes in, he also is to be sworn in the usual manner and an engrossment of the original Will is to be annexed to such Probate in the same manner as the first, and in the second grant such first grant is to be recited;

and so on, if there are more that come in afterwards. 4 Burn. E. Law 310, Philimore's Ed.: *In the goods of Bell* (8). If there be several executors appointed with distinct powers, as one for one part of the estate and another for another, yet there being but one Will to be proved, one proving of it suffices. Wentw. Off. Ex. 31, 14th Ed., Bacon's Abr. Exors. C4. So if *B* is made executor for 10 years and afterwards *C* is to be executor, and *B* proves the Will and the 10 years expire, *C* may administer without any further Probate. *Anon.* (9); *Anon.* (10); *Watkins v. Brent* (11)." In our opinion, we cannot reasonably hold that the appellant is bound to pay additional Probate duty.

The result is that this appeal is allowed, and the order of the District Judge dated the 18th January 1915 set aside. Probate will be granted to the appellant without payment of fresh Probate duty.

The Rule will stand discharged.

Appeal allowed; Rule discharged.

(8) (1871) 2 P.&D. 247; 40 L. J. P. 67; 25 L. T. 163.

(9) 1 Freeman 313; 89 E. R. 231.

(10) 1 Ch. Case, 265; 22 E. R. 793.

(11) 1 Myl. & Cr. 97; 7 Sim. 512; 5 L. J. Ch. 49; 40 E. R. 313; 43 R. R. 149.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 167 OF 1914.

June 21, 1915.

Present:—Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Shah.

RAMCHANDRA VENKAJI NAIK—

DEFENDANT No. 7—APPELLANT

versus

KALLO DEVJI DESHPANDE—

PLAINTIFF—RESPONDENT.

Hereditary Offices Act (Bom. III of 1874), s. 5—Mortgage by watandar—Adverse possession by mortgagee after mortgagor's death—Presumption—Dekkhan Agriculturists' Relief Act (XVII of 1879), s. 13—Redemption suit—Mesne profits after date of suit—Resumption.

Held, in a suit for redemption, under the Dekkhan Agriculturists' Relief Act, in respect of certain *watan* property, (1) that the mortgagee remains a mortgagee for the purpose of redemption, even assuming that he has been in possession for more than 12 years since the death of the original mortgagor; [p. 397, col. 1.]

(2) that mesne profits, that is, the net receipts from the property, cannot be decreed against the mortgagee from the date of the suit. [p. 397, col. 1.]

The presumption is that unless there is some definite indication on the part of the person in possession that he will, from a certain date, claim as absolute owner and not as mortgagee, he can only

(4) 4 L. B. R. 255.

(5) 15 W. R. 496.

(6) 3 B. & Ald. 360 at p. 363; 22 R. R. 427; 106 E. R. 694.

(7) 3 Jo. & Lat. 64; 8 Ir. Eq. R. 723; 72 R. R. 29.

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acquire by adverse possession the limited interest to which he was entitled at the mortgagor's death, namely that of a mortgagee. [p. 397, col. 1.]

The Dekkhan Agriculturists' Relief Act makes no provision with reference to profits after the date of the institution of a redemption suit, and no presumption arises that the mortgagee is, apart from the provisions of the Act, not entitled to retain possession after the date of the institution of the suit. [p. 397, col. 2.]

Second appeal from the decision of the District Judge of Belgaum, in Appeal No. 223 of 1910, confirming the decree passed by the Subordinate Judge of Gokak, in Civil Suit No. 150 of 1909.

Messrs. *Nilkarth Atmaram* and *J. G. Rele*, for the Appellants.

Mr. S. R. Bakhle, for the Respondents.

JUDGMENT—Two points have been argued in this appeal; *first*, that the mortgagee, who is sued for redemption under the Dekkhan Agriculturists' Relief Act in respect of certain *watan* property, must be taken to have been in adverse possession, and to have acquired an absolute title by reason of the provisions of section 5 of the Watan Act, which render the mortgage invalid after the death of the original *watandar*-mortgagor. But the Indian Limitation Act cannot be invoked to enforce any such conclusion, for the presumption is that unless there is some definite indication on the part of the person in possession that he will, from a certain date, claim as absolute owner and not as mortgagee, he can only acquire by adverse possession the limited interest to which he was entitled at the mortgagor's death, namely, that of a mortgagee. He, therefore, remains a mortgagee for the purpose of the redemption suit, even assuming that he has been in possession for more than 12 years since the death of the original mortgagor.

The *second* point is that the learned Judge has decreed mesne profits, that is, the net receipts, from the property as from the date of suit against the mortgagee. It is to be observed in the first place that no such claim has, so far as the industry of the Pleaders has been able to discover, ever been allowed since the passing of the Dekkhan Agriculturists' Relief Act in 1879. If allowed, it must be based on the assumption that the mortgagee has, from the date of suit, been in

possession of property which he is not entitled to retain in his possession under the contract between the parties, for the Dekkhan Agriculturists' Relief Act itself makes no provision with reference to profits after the date of the institution of the suit. But the plaintiff, by filing a suit under the Dekkhan Agriculturists' Relief Act, and claiming an account on the footing of section 13, which gives the go-by to the provisions of the mortgage contract, renders those provisions irrelevant and it is, therefore, impossible for the Court to discover whether the mortgagee would, if the contractual relations were preserved, be entitled to remain in possession between the date of suit and the date of the decree. Speaking generally, the enforcement of the provisions of section 13 places the mortgagor in a much more favourable position than he would be in if he relied upon the terms of the contract and no presumption arises that the mortgagee is, apart from the provisions of the Dekkhan Agriculturists' Relief Act, not entitled to retain possession after the date of the institution of the suit. It appears to us that this is a case in which we ought to apply the principle laid down by Sir Charles Sargent in *Janoji v. Janoji* (1), in which he says: "Remembering that the Act encroaches on existing legal rights, it should, on general principle, not be construed to extend beyond the particular object which the Legislature had in view in passing the Act, and which in the preamble is said in express terms to be to relieve the agriculturist in the Dekkhan from indebtedness. That object is effected when the agriculturist is enabled to discharge his debt and recover his land on far easier terms than those which he has contracted for..."

We, therefore, vary the decree of the lower Appellate Court by deleting the provisions with regard to the payment of mesne profits. The appellant has partly succeeded and partly failed; therefore, each party must bear his own costs in this Court and in the lower Appellate Court.

Decree varied.

(1) 7 B. 185 at p. 187.

SHAIKH NURA v. BAIKUNTHA NATH RAY.

CALCUTTA HIGH COURT.

LETTERS PATENT APPEAL No. 40 OF 1910.

June 30, 1913.

Present:—Sir Lawrence Jenkins, Kt., Chief Justice, and Justice Sir Asutosh Mookerjee, Kt.

SHAIKH NURA—DEFENDANT No. 2—

APPELLANT

versus

BAIKUNTHA NATH RAY AND OTHERS—

PLAINTIFFS - RESPONDENTS.¹

Ejectment, suit for—Documents not filed, admission of, how far valid—Appellate Court's power to admit—Oral evidence following documentary one—No objection to its admission.

Evidence which becomes relevant because of the discovery of some documents previously out of the reach of parties, can be admitted by an Appellate Court. [p. 399, col. 2.]

Where oral evidence is admitted as a natural consequence of the admission of a documentary evidence, there can be no legal objection to its admission. [p. 399, col. 2.]

Letter Patent Appeal against the following judgment of Mr. Justice D. Chatterjee, in Appeal from Appellate Decree No. 1108 of 1908, against that of the Judicial Commissioner of Chota Nagpur, dated the 5th February 1908, reversing that of the Munsif of Ranchi, dated the 15th July 1907.

D. CHATTERJEE, J.—The plaintiff purchased the disputed lands in execution of a decree against one Harihar in 1899 and took delivery of possession, but was resisted in the actual possession of the same by the defendants who claim the same under a *zar-i-peshgi* deed executed by one Kripal Narain in 1892. The defendants in their written statement pleaded that the lands were not the lands of Harihar and the plaintiff had, therefore, no right to the same. The main issues, therefore, were whether the disputed land formed part of the lands purchased by the plaintiff and whether the defendants held the same under a *zar-i-peshgi* from Kripal Narain. It appears that Kripal Narain with Harihar and others formed a joint family. Harihar brought a suit for partition in 1888 in which Kripal filed his written statement in 1889; pending the suit the *zar-i-peshgi* was executed by Kripal Narain, who was evidently the managing member of the family, before the partition suit which was decreed in 1893, the disputed lands falling to the share of Harihar. The Court of first instance held that the principle of *lis pendens* applied and the *zar-i-peshgi* being

executed pending the suit for partition could not prevail against the ultimate decree. The defendants never pleaded that the *zar-i-peshgi* was executed by Kripal Narain as the *karta* of the family and even if they had taken such a plea it would be at once met by the fact that after the suit for partition Kripal could not be said to be the *karta* and in fact Kripal, so far from stating in the *zar-i-peshgi* deed that he was granting it as the *karta*, stated that he was entering into the transaction for his own necessity. The learned Judicial Commissioner, however, raised the plea in appeal and called upon the parties to adduce evidence as to the transaction being on behalf of the family for family necessity. Two previous *zar-i-peshgi* leases, one executed by Kripal, Anant and Birinchi for Rs. 100 and another executed by Kripal for Rs. 50, were put in and a co-sharer examined as a witness. As the defendant had been misled as to the existence of these documents when the case was in the first Court, the admission of these documents may have been competent and also the examination of any witness as to the formal proof of these documents. That would not have materially affected the case as originally made, but the learned Judge relies on the evidence of the co-sharer witness as proving that the debt was for meeting family necessity and in doing so I think he has gone beyond what the law authorises him to do. Section 568 of the Civil Procedure Code does authorise him to admit evidence in appeal when on hearing the case he thinks that such evidence is required to enable him to pronounce judgment; it does not authorise him to make a new case not justified by the pleadings. See *Kessowji Issur v. Great Indian Peninsular Railway Company* (1). The evidence of Beni Narain, therefore, so far as it goes beyond making out a formal proof of the new documents must be left out of consideration. Then the documents proved show that a part of the consideration was borrowed jointly by Kripal, Anant and Birinchi at a time when the family was admittedly joint. That alone, however, does not affect Harihar who was not a party to the same, and the very fact that Kripal took the whole debt upon himself after the partition suit shows that the debt was not treated as

(1) 31 B. 321 (P. C.); 6 C. L. J. 5; 11 C. W. N. 721; 17 M. L. J. 347; 4 A. L. J. 461; 9 Bom. L. R. 671; 34 I. A. 115; 2 M. L. T. 435.

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a joint family debt. Apart from the question of *lis pendens*, therefore, the *zar-i-peshgi* of 1892 could not bind the share of Harihar. Coming to the question of *lis pendens* it is contended on the authority of *Khan Ali v. Pestonji Eduljee Guydar* (2) that the principle is not attracted by a partition suit in which there is no dispute as to shares. This case has been distinguished in *Joy Sankari Gupta v. Bharat Chandra Birdhan* (3) and *Jogendra Chunder Ghose v. Fulkumari Dassi* (4), and it may be distinguished here as limited to the facts of the case which related to a lease pending a partition suit in which the existence of the lease may have been taken into consideration in making the allotments. The present is a case of mortgage. In the case of *Byjnath Lall v. Ramoodeen Chowdhry* (5), their Lordships of the Privy Council held that a person taking a mortgage from one co-sharer takes the security subject to the right of other sharers to enforce a partition and thereby to convert what was an undivided share of the whole into a defined portion held in severalty. He would take the subject of the pledge in the new form which it had assumed (by the partition). The same principle was followed in the cases of *Hem Chunder Ghose v. Thako Moni Debi* (6), *Lakshman v. Gopal* (7), *Joy Sankari Gupta v. Bharat Chandra Birdhan* (3). If that be the law in respect of mortgages before a partition suit is put in, there can be no doubt that a mortgage executed during a partition suit must be followed against the share allotted to the mortgagor and cannot affect the share of a non-mortgagor. The judgment of the lower Appellate Court, therefore, is set aside and the decree of the first Court restored with costs.

Babu Joges Chandra Dey and Mouli Nurdin Ahmed, for the Appellant.

Babu Nagendra Nath Ghose, for the Respondents.

JUDGMENT.—The sole point in this case is a very simple one and it is whether the learned Judge of the lower Appellate Court was justified in admitting evidence which

became relevant because of the discovery of two documents which had previously been out of the reach of defendant No. 2, who is the appellant before us. We can entertain no doubt that the Judge was entitled to admit the documents. Indeed that is conceded before us. The oral evidence that was admitted was a natural consequence of the admission of the documentary evidence, and we think there can be no legal objection to its admission. If that be so, it is conceded that the findings of the lower Appellate Court are conclusive.

We must, therefore, reverse the judgment of Mr. Justice Digambar Chatterjee, and restore the decree of the Judicial Commissioner. The respondent before us must pay the costs of both appeals in the High Court.

Appeal allowed.

BOMBAY HIGH COURT.

APPEAL FROM ORDER No. 59 OF 1914.

June 30, 1915.

Present:—Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Shah.

ACHYUT RAYAPA SHANBHAG—

DEFENDANT—APPELLANT

versus

GOPAL SUBBAYA SHANBHAG—

PLAINTIFF—RESPONDENT.

Limitation Act (IX of 1908), Sch. I, Art. 93—Attempt to enforce—Unsuccessful attempt to have lease recorded under Record of Rights, whether attempt to enforce—Recovery of rent under lease, whether attempt to enforce.

In August 1908, a landlord applied to the *mamlatdar* of his District for recording a lease under the Record of Rights. The lessee challenged the document as a forgery, and upon this the *mamlatdar* returned it to the applicant without recording it. The lessor then applied to the Collector who, in August 1909 ordered the lease to be recorded. On the strength of that record the landlord sued and recovered from the lessee a part of the rent due under the lease. Within three years of that recovery the lessee brought a suit to recover back the rent he had paid on the footing of the alleged lease being a forgery:

Held, that under Article 93 of the Limitation Act, the suit was within time, inasmuch as the words "attempt to enforce" in the Article were applicable to the attempt to recover rent under the lease and not to the unsuccessful attempt to have it recorded. [p. 400, col. 2.]

(2) 1 C. W. N. 62.

(3) 26 C. 434; 3 C. W. N. 209.

(4) 27 C. 77.

(5) 1 I. A. 106; 21 W. R. 233.

(6) 20 C. 533.

(7) 23 B. 385.

EAST INDIAN RAILWAY v. M. K. ROY.

Appeal from the decision of the District Judge of Kanara, in Appeal No. 173 of 1913, reversing the decree passed by, and remanding the suit to, the Subordinate Judge at Kumta, in Civil Suit No. 144 of 1912.

Mr. S. M. Kaikini, for the Appellant.

Mr. Nilkanth Atmaram, for the Respondent.

JUDGMENT.—The defendant in this case, who is now the appellant, applied to the *mamlatdar* of the District in which the land in suit is situate for record, under the Record of Rights Act, of a lease under which he claimed to be entitled to a rent of 400 cocoanuts. That application was made in or about the beginning of August 1908, and upon notice being given to the respondent-plaintiff, who was the alleged lessee, the plaintiff complained that the document was a forgery. The *mamlatdar*, thereupon, declined to record it and returned it to the applicant. The applicant was not satisfied and applied to the Collector to have the document recorded. That application was not disposed of until the following year, and on the 11th of August 1909, the Collector ordered that the lease should be recorded, and from that date, it was recorded in the Record of Rights in effect that the defendant was the landlord of the plaintiff. On the strength of that record, the defendant sued in the *Mamlatdar's* Court for enforcement of the terms of the alleged lease and recovered on various occasions cocoanuts of the value of upwards Rs. 40. Within three years of the recovery of those cocoanuts the plaintiff brought this suit to recover back the value on the footing of the alleged lease being a forgery. It is contended that the suit is barred under Article 93 of the Indian Limitation Act, on the ground that it is filed more than three years after the date of an attempt to enforce it against the plaintiff. Now the attempt to enforce it for the purpose of recovering the rent under it was made well within three years. So the appellant is driven to the contention that an attempt took place at an earlier date.

The attempt to have it recorded under the Record of Rights which is relied upon was made in August 1908 and failed, and it is contended that although the plaintiff had nothing to fear for upwards of a year

owing to the success of his contentions before the *mamlatdar*, he nevertheless ought to have sued to have that instrument declared to be a forgery. It appears to us that an attempt, such as that made by the defendant, to have the instrument recorded under the Record of Rights Act cannot be put higher than an attempt to have a document registered in a case in which registration is necessary and the particular attempt relied on in the present case cannot be put higher than an unsuccessful attempt to register. Now cases of registration of forged documents, or documents which, the plaintiff contends, are forged, are dealt with by Article 92, and limitation for the purpose of a suit to declare the forgery of the instrument runs from the date when the registration, not the attempted registration, becomes known to the plaintiff. We do not think that it can be contended that an attempt to register is an attempt to enforce, otherwise there would be no object in a special Article with reference to issue and registration as distinct from the Article relating to attempts to enforce, and if registration is not an attempt to enforce, it is clear, we think, that the attempt to record is not an attempt to enforce. In their ordinary and natural meaning the words "attempt to enforce" would be applicable to an attempt to recover rent under a lease, and the first attempt of that kind took place within three years of the institution of the suit. We are, therefore, of opinion that the suit is within time. We affirm the order of the lower Appellate Court and dismiss the appeal with costs.

Appeal dismissed.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 469 OF 1914.

May 17, 1915.

Present:—Mr. Justice Tudball and
Mr. Justice Chamier.

EAST INDIAN RAILWAY—DEFENDANT—
APPELLANT
versus

M. K. ROY—PLAINTIFF—RESPONDENT.

Railways Act (IX of 1890), s. 75—Passenger's luggage booked, loss of—Liability of Company.

EAST INDIAN RAILWAY CO. v. M. K. ROY.

The luggage of a passenger which is booked is a package within the meaning of section 75 of the Railways Act. If the luggage contains silver and silk as regards which the passenger does not make any declaration at the time of booking, the Railway Company is not liable for its loss. [p. 40, col 2.]

Second appeal from the decree of the First Additional Judge of Aligarh.

Mr. W. Wallach, for the Appellant.

Dr. Surendro Nath Sen, for the Respondent.

JUDGMENT.—This appeal arises out of a suit brought by the plaintiff-respondent under the following circumstances:—The plaintiff travelled on the 3rd of July 1912 as a passenger from Howrah to Khurja by the up Umballa express train on the East Indian Railway. He had three parcels of luggage: two bundles and a steel trunk. These were weighed and delivered by him to the Railway administration and placed in the luggage van. Only two bundles were delivered at the end of his journey. The steel trunk was lost. He, therefore, sued the Railway for Rs. 461-8, the value of the box and its contents, plus Rs. 40 damages, total Rs. 501. At the time the luggage was booked he did not declare the nature of the contents. According to his plaint the trunk contained besides ordinary clothing some silk articles the value of which comes to over Rs. 300 and also some silver articles of the value of about Rs. 60. These are all articles which are mentioned in the second Schedule of the Railways Act. The Railway Company pleaded that as the plaintiff had not declared these articles, it, the Company, was not liable in view of the terms of section 75 of the Railways Act. The Courts below did not accept this plea and decreed the suit in favour of the plaintiff. The Railway Company appeals and the same point is raised before us. The point is one which is covered by the rulings to be found in *Muhammad Abdul Ghaffar v. Secretary of State for India in Council* (1) and *Aiwaz v. Simla Kalka Railway Co.* (2). The Court below has relied on a decision of the Calcutta High Court in *Veleyat Hossein v. Bengal and North-Western Railway Company* (3). In this case no question of the

(1) 56 P. R. 897.

(2) 73 P. R. 1907; 15 P. L. R. 1908.

(3) 3 Ind. Cas. 470; 13 C. W. N. 847; 36 C. 8:9.

applicability of section 75 arose. The articles which were in dispute therein were *durries*, which do not come within the second Schedule of the Act. The Railway Company had sought to free itself of its liability in that case by pleading a certain rule made by itself which the Court held to be in conflict with the terms of section 72 of the Act and, therefore, of no force. However, even in that judgment there is a remark which is in favour of the appellant before us. At page 823 the judgment runs as follows:—"A rule made under the Act is not a provision of the Act, and the words have an obvious reference to section 73 relating to the carriage of animals, and to section 75 relating to the carriage of articles of special value, which are expressly framed to place certain restrictions on the full operation of section 74." It is clearly an expression of opinion that section 74 of the Act is governed by section 75. The argument on behalf of the respondent is that section 74 is the only section in the Act which governs the case of passengers' luggage, and that section 75 has nothing to do with luggage whatsoever. In our opinion there is no force in this contention. The steel trunk was no less a package or parcel because it was booked as luggage. The language of section 75 is general. It provides: "When any articles mentioned in the second Schedule are contained in any parcel or package delivered to a Railway administration for carriage by Railway, and the value of such articles in the parcel or package exceeds one hundred rupees, the Railway administration shall not be responsible for the loss, destruction or deterioration of the parcel or package, unless the person sending or delivering the parcel or package to the administration caused its value and contents to be declared, or declared them at the time of the delivery of the parcel or package for carriage by Railway, etc." In the present case the plaintiff delivered a package to the Railway administration for carriage by railway. That package contained articles mentioned in the second Schedule of value over Rs. 100. The facts of the present case are clearly and distinctly within the meaning of the language of section 75, which is a section of general application to all classes of goods. In our opinion the appeal

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is well founded. The plaintiff having failed to declare the articles the value of which he seeks to recover, the Railway Company is not liable for the loss of the trunk and its contents. We allow the appeal and set aside the decrees of the Courts below. The plaintiff's suit will stand dismissed with costs in all Courts.

Appeal decreed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 819 OF 1911.

September 11, 1912.

Present:—Mr. Justice Sundara Aiyar and
Mr. Justice Sadasiva Aiyar.

AMBUJA AMMAL—PLAINTIFF—APPELLANT

versus

APPADURAI MUDALI AND OTHERS—

DEFENDANTS — RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XLI, r. 27 (b) — Appellate Court, power of, to admit additional evidence—Test—“Any other substantial cause,” force of.

The test laid down in clause (b) rule 27 of Order XLI of the Civil Procedure Code to enable an Appellate Court to admit additional evidence is not, whether any tribunal would be unable to pronounce any judgment without the production of the additional evidence in question, but, whether the mind of the Appellate Judge is in such a condition on the evidence on record that he requires any document to be produced or any witness to be examined to enable him to pronounce judgment. [p. 402, col. 2; p. 403, col. 1.]

Where an Appellate Court states explicitly that the additional evidence was required in order to enable the Court to pronounce its opinion on the merits of the contest between the parties:

Held, that the evidence was admissible under rule 27 of Order XLI of the Civil Procedure Code, 1908, inasmuch as a wide discretion is given to the trying Judge, when he feels a difficulty himself or when he considers it proper in the interests of justice, to admit evidence which as a matter of discipline between party and party might be rejected. [p. 403, col. 2.]

The words “any other substantial cause” in rule 27, Order XLI, of the Civil Procedure Code, give a wide, discretion to the Appellate Court to admit additional evidence when the ends of justice require it to be done. [p. 404, col. 1.]

Second appeal against the decree of the Temporary Subordinate Judge of North Arcot, in Appeal No. 120 of 1910, preferred against that of the District Munsif of Ranipet, in Original Suit No. 909 of 1907.

Messrs. T. R. Ramachandra Aiyar and T. R. Krishnaswami Aiyar, for the Appellant.

The Hon'ble Mr. L. A. Govindaraghava Aiyar, for the Respondents.

JUDGMENT.

SUNDARA AIYAR, J.—In this case, there is no ground for interference in second appeal unless we are prepared to adopt the appellants' contention that the Subordinate Judge acted illegally in admitting certain additional documents in evidence in appeal. The appeal was first heard on the 14th September 1910. The Subordinate Judge then observed: “I think it is necessary to have the documents described as 1 and 2 in the list attached to the petition, and also the Will of the original mortgagee before the Court to enable it satisfactorily to pronounce its judgment.” On that ground, he allowed the additional evidence to be received. It is contended that in doing so he acted in excess of his powers. The Appellate Court's right to receive additional evidence in appeal is restricted by Order XLI, rule 27, of the Code of Civil Procedure, 1908. The rule is in substantially the same terms as section 568 of the repealed Civil Procedure Code. It runs as follows:—“The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the Appellate Court. But if [clause (b)] the Appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause, the Appellate Court may allow such evidence to be produced, or document to be received or witness to be examined”. Considering the clause apart from the decided cases, it appears to me that the test laid down in clause (b), “if the Appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce judgment,” is one relating to the state of mind of the Appellate Court and not an external standard. In other words, the test is not, whether any Tribunal would be unable to pronounce any judgment without the production of the

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additional evidence in question, but, whether the mind of the Appellate Judge is in such a condition on the evidence on record that he requires any document to be produced or any witness to be examined to enable him to pronounce judgment. The object appears to me to be to enable the Appellate Judge to satisfy his own mind, when he entertains a doubt; the test proposed is, therefore, not an external one, *viz.*, whether some other mind or an average mind would require additional evidence to be produced in order to pronounce some judgment or other.

In this case the Subordinate Judge states explicitly that he wished to have the additional evidence in order to be able to pronounce his opinion on the merits of the contest between the parties. But it is argued for the appellant that there are authorities which we cannot disregard, which compel us to hold that the power to admit additional evidence does not exist in such a case. The most important decision is that delivered by the Judicial Committee of the Privy Council in *Kessowji Issur v. Great Indian Peninsular Railway Company* (1). In that case the application for the admission of additional evidence was made prior to the hearing of the appeal and so far as the report shows, the appeal had not been heard before permission was given for the admission. The Appellate Tribunal, therefore, did not feel it to be necessary to have additional evidence in order to enable it to pronounce judgment. Their Lordships of the Privy Council held that the additional evidence should not have been admitted. So far the case presents absolutely no analogy to the present one. It is the duty of the Appellate Court, according to the section, to give its reasons for admitting further evidence. No reasons had been stated in the judgment of the Bombay High Court, nor does it appear that any difficulty was felt by the Appellate Court in coming to a proper conclusion on the case without the help of the additional evidence admitted. Their Lordships lay stress on the fact that no reason was given for allowing further evidence to be adduced. They then go on to say that the Appellate

Court was merely reviewing and reversing Tyabji, J.'s refusal of a review and they point out that further evidence was ordered, not after the appeal had been heard on the merits and the evidence as it stood had been examined, but on special and preliminary application. They then make the observation on which stress is laid: "The legitimate occasion for section 568 is when, on examining the evidence as it stands, some inherent *lacuna* or defect becomes apparent, not where a discovery is made, outside the Court, of fresh evidence and the application is made to import it." I do not understand the expression 'defect' as meaning a defect which makes it impossible to come to any conclusion at all; but a defect which makes it difficult for the Appellate Judge to come to a conclusion satisfactory to his own mind. Nor do I think the expression '*lacuna*' carries the case any further. The general principle applicable to a Court of Appeal having plenary jurisdiction over a cause is that it has got all the powers of the Court of first instance. See section 107 of the Code of Civil Procedure, 1908. Rule 27 of Order XLI is a restriction placed on the powers of the Court of first instance itself in admitting evidence at a late stage of the case. It appears to me that a wide discretion is given to the trying Judge; when he feels a difficulty himself or when he considers it proper in the interest of justice, to admit evidence which as a matter of discipline between party and party might be rejected. I think that rule 27 of Order XLI embodies no more than the same principle. I may observe, further, that in addition to a case where the Appellate Court feels a difficulty in coming to a satisfactory conclusion on the evidence on record, additional evidence may be admitted also "for any other substantial cause." In *Subba Naidu v. Ethirajammal* (2), Abdur Rahim, J., was inclined to hold that that phrase must be interpreted as meaning a cause of a nature similar to the classes of cases referred to in the preceding clause. I find it difficult to understand what a cause of the same kind as is referred to in the preceding clause would be. In my opinion, the object of

(1) 31 B. 381 (P. C.); 6 O. L. J. 5; 11 C. W. N. 721; 17 M. L. J. 347; 4 A. L. J. 461; 9 Bom. L. R. 671; 34 L. A. 115; 2 M. L. T. 435.

(2) 12 Ind. Cas. 673; 22 M. L. J. 14; 10 M. L. T. 409; (1911) 2 M. W. N. 440.

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adding "any other substantial cause" was to give a wide discretion to the Appellate Court to admit additional evidence when the ends of justice should require it to be done. In *Krishnama Chariar v. Narasimha Chariar* (3), no interpretation was put on "any other substantial cause." On the other hand in *Andiappa Pillay v. Muthukumara Thevan* (4), a more liberal interpretation was put on the powers of the Appellate Court to admit additional evidence. My learned brother Sadasiva Aiyar, J., referred there to the powers given to the Court of first instance in order to enable the Court to do justice. In my opinion similar powers are vested in the Court of Appeal although a restriction is placed, in the interests both of discipline and of preventing concoction of evidence, on the discretion vested in the Appellate Court. I am of opinion that there are no grounds for holding that the additional evidence was wrongly admitted in this case. I dismiss the second appeal with costs.

SADASIVA AIYAR, J.—I concur in the judgment of my learned brother.

Appeal dismissed.

(3) 31 M. 114; 3 M. L. T. 308.

(4) 14 Ind. Cas 140; 36 M. 477; (1912) M. W. N. 450; 11 M. L. T. 241.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 459 OF 1913.

May 19, 1915.

Present:—Sir Henry Richards, Kt., Chief Justice, and Mr. Justice Tudball.

RAM NATH—DEFENDANT—APPELLANT
versus

HARAIN—PLAINTIFF AND OTHERS—

DEFENDANTS—RESPONDENTS.

Bundelkhand Land Alienation Act (II of 1903 Local), ss. 3, 14, applicability of—Collector's sanction—Sale after mortgage—Pre-emption—Right of subsequent purchaser—Redemption.

Certain property situate in Bundelkhand was sold. The defendant brought a pre-emption suit and obtained a decree, but the sale was not sanctioned by

the Collector as required by Act II of 1903 and the name of the pre-emptor was recorded as a usufructuary mortgagee for 20 years under section 14 of the Act. The mortgagors then sold the property to the plaintiff who sued to redeem it from the defendant who was in possession as a mortgagee:

Held, that the plaintiff was entitled to redeem the property. [p. 405, col. 2.]

Section 3 of the Bundelkhand Land Alienation Act applies to all "permanent alienations" even though the alienation is brought about by the exercise of a right of pre-emption. [p. 405, col. 2.]

The policy of the Bundelkhand Land Alienation Act is to prevent persons, who are not members of an agricultural tribe, acquiring property. [p. 405, col. 2.]

Second appeal from a decree of the District Judge of Jhansi, dated 29th January 1913.

FACTS of the case appear fully from the judgment.

Mr. Haribans Sahai, for the Appellant:—The provisions of the Bundelkhand Land Alienation Act apply to voluntary transfer and not when there is a decree of the Court. The Collector had no power to change the operation of the decree of the Civil Court. Sections 3, 5 and other sections of the Act clearly show that the permission of the Collector is not necessary for such alienations and his order changing the nature of the alienation is *ultra vires*.

[RICHARDS, C. J.—Under section 9, clause (3), reference to the Collector was necessary.] The Collector ordered that for 20 years the equity of redemption should be vested in Ramnath Kayastha.

In this view of the case the plaintiff has no right to sue for 20 years.

Moreover the original sale was to a member of the agricultural tribe and the mortgagors having sold the property, they had no right in it and could not convey any right to the plaintiff.

The statement of the *mukhtar-i-am* cannot constitute a transfer in favour of the plaintiff.

The Hon'ble Dr. Tej Bahadur Sapru, for the Respondents:—The pre-emption decree had the effect of substituting Ram Nath for Jagannath. Jagan Nath's name was wiped off from the sale-deed and the sale would be considered as made to Ram Nath. The Collector had clearly the right not to sanction such an alienation in favour of a man not a member of the agricultural body.

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¶ The plaintiff has the right to sue. The transactions of sale to Jagan Nath together with the pre-emption decree having been converted into a mortgage, the original mortgagors had the right in the property and could transfer it. The Collector's order gave the defendant Ram Nath Kayastha the right to redeem the mortgage and the mortgagor could also redeem and hence the plaintiff has a right to sue.

Mr. *Haribans Sahai*, for the Appellant in reply:—The original sale was to a member of the agricultural tribe. This could not be interfered with by the Collector. His order had the effect of not recognizing the decree of the Civil Court which he could not disregard. If the Collector's order were disregarded, the plaintiff would have no right.

JUDGMENT.—This appeal arises out of a suit to redeem a mortgage, dated the 18th of February 1892. Ram Nath, the appellant, is one of the original mortgagees. He contends that the plaintiff has no right to maintain the suit. It appears that after the date of the mortgage the mortgagors sold their equity of redemption to one Jagan Nath Ahir. Ram Nath Kayastha (to whom we shall hereafter refer as "the pre-emptor") brought a suit for pre-emption against Jagan Nath Ahir, and obtained a decree which became final. When Ram Nath, the pre-emptor, applied to have his name recorded the Collector under the provisions of Act II of 1903 made an order in November 1910 refusing to sanction the permanent alienation in favour of the pre-emptor. By a later order he pointed out that all that he could do for the pre-emptor was to make him a usufructuary mortgagee for twenty years under the provisions of section 14 of the Act. But seeing that there was already a usufructuary mortgagee in possession, he pointed out that the only way in which the pre-emptor could get possession would be by redeeming the mortgage of the 18th of February 1892. On the 29th of January 1912 the representatives of the original mortgagors sold the property to the plaintiff. The plaintiff then instituted the present suit, which was met by the defence that the vendors of the plaintiff had no interest left of which they could make a transfer. It seems to us that this contention is not sound. The result of the pre-emption

suit was that Jagan Nath Ahir ceased to have any interest in the property. The pre-emptor was substituted for him and the latter under the Collector's order was only a mortgagee. The consequence was that the ultimate right of redemption remained in the representatives of the original mortgagor. This right they were entitled to transfer to the plaintiff.

It is contended that having regard to the terms of the Collector's order the only person who could redeem the mortgage was Ram Nath, the pre-emptor. No doubt Ram Nath was given a right of redemption but that did not and could not take away the ultimate right of redemption which must have been left as we think in the representatives of the original mortgagors. The mortgage of the appellant is a mortgage which can be redeemed at any time. It is quite unnecessary for us in the present case to decide whether or not Ram Nath, the pre-emptor, could have insisted upon remaining in possession for the whole of the twenty years even if the representatives of the mortgagors were ready to redeem it, nor is it necessary for us to express any opinion as to the effect of the consent which appears to have been given in open Court by the pre-emptor to the redemption of the property by the plaintiffs.

It is lastly contended that section 3 does not apply to alienations by pre-emption. We think that the section applies to all "permanent alienations" even though the alienation is brought about by the exercise of a right of pre-emption. The policy of the Act is to prevent persons who were not members of an agricultural tribe acquiring property. This would apply just as much to a person who was acquiring a permanent title by pre-emption as by voluntary alienations. We dismiss the appeal with costs including in this Court fees on the higher scale.

Appeal dismissed.

BASIR ALI v. NAZIR ALI.

CALCUTTA HIGH COURT.

ORIGINAL CIVIL SUIT NO. 238 OF 1906.

April 30, 1915.

Present:—Mr. Justice Chaudhri.

BASIR ALI—PLAINTIFF

versus

Hafiz NAZIR ALI—DEFENDANT.

Civil Procedure Code (Act V of 1908), O. XL, r. 1 cl. (d)—Receiver, what powers may be conferred on—Partition—Sale—Receiver, if can be authorised to convey properties.

Under Order XL, rule 1, clause (d), of the Civil Procedure Code, 1908, the Court may confer on a Receiver all such powers for the realization of properties and the execution of documents as the owner has. [p. 407, col. 1.]

Therefore, in a partition action in which a Receiver is authorized to sell properties he may be directed to convey the properties. [p. 407, col. 1.]

JUDGMENT.—Formerly it was the practice of this Court to grant sale certificates in respect of sales by Receivers under orders of the Court. In the case of *Minatoonnessa Bibee v. Khatoonnessa Bibee* (1), Salā, J., held after a careful consideration of the earlier cases that a sale by the Receiver was a sale by the Court. In *Golam Hossein Cassim Arif v. Fatima Begum* (2) Fletcher, J., disallowed an application for confirmation of such a sale and for sale certificate, drawing a distinction between "sales by the Court" and "sales under the Court." Owing to this decision great difficulties have arisen and sales effected by Receivers or Commissioners of Partition under orders of the Court have in many instances not yet been completed. The difficulty has been in purchasers obtaining proper conveyances. In this particular case by the decree in Appeal No. 56 of 1910, dated the 11th May 1911, it was amongst other things ordered that one Shaikh Mahboob Ali should be appointed Receiver of certain properties which included the premises No. 2, Royd Street, and he was directed as such Receiver to sell the said premises by private treaty or public auction at a price not less than the valuation which was directed to be made by a well-known firm of Engineers in Calcutta. Liberty was given to the parties to the suit other than Hafiz Nazir Ali to buy the said property. The Receiver had the property valued as directed and on the 2nd May 1913 at a meeting of the parties accepted the offer of the petitioner, who is the plaintiff in this

case, to purchase the premises for Rs. 95,000. An agreement for sale was executed and a draft conveyance was prepared. Some of the parties to the suit being infants, a question arose as to who was to approve the draft conveyance on their behalf and execute the conveyance. An application was made to me on the 8th January last praying for an order that the Registrar of this Court do settle the draft conveyance and execute same on behalf of the infants-defendants. Following what I thought was the established practice of this Court I made the order. This was a partition action. An inquiry as to the parties interested was unnecessary, in view of the fact that the order for sale was made in their presence and there was no contest as to the share of the infant in respect of which there was a decree passed. The only question was who was to execute the conveyance on behalf of the infant. When the order came before the Registrar for settlement, a question was raised about the effect of a conveyance if executed by him on behalf of the infants, as to whether it would pass good title to the purchaser. The Registrar thereupon submitted a note to me. The following passage occurs in Trevelyan's Book on Minority, 3rd Edition, page 294 "when a sale is ordered by the Court, the Court may itself execute or may direct one of its officers to execute a transfer in the name of the minor." The authority for this is given as sections 261–262 of the Civil Procedure Code, 1882 (Order XXI, rule 34 of the present Code). The Registrar correctly points out that that rule refers to a judgment-debtor who has been ordered to execute a document but has refused or neglected to do so. It was held by Kennedy, J., that the corresponding section (section 202) of the Code of 1859 did not apply to minors, and our present rule 28, Chapter 17, does not appear to be applicable. The Registrar also correctly points out that there is difficulty in applying the provisions of Chapter 28, rule 51, of our new rules. They refer to sales by the Registrar and not to sales by Receivers. In England when a sale is ordered in a partition action, for the purpose of effecting the sale, infants who are interested are declared trustees of their shares for the purchaser, within the meaning of the Trustees Act, 1893, and

(1) 21 C. 479.

(2) 6 Ind. Cas. 300; 16 C. W. N. 394.

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persons are appointed by the Court to convey their shares to the purchaser [see Halsbury's Laws of England, Volume 17, page 82, and *Davis v. Ingram* (3), where the next friend of the infant was appointed to convey]. Under the Indian Trustees Act by virtue of section 8 the High Court may make a vesting order having the effect of a conveyance with regard to property held by a minor trustee or mortgagee, and sections 20 and 32 may be used in the same way as similar sections in the English Act. The Indian Act, however, is only applicable to cases as governed by the English Law. There may be certainly cases as between Hindus or Muhammadans where the provisions of the Indian Act may be held not inapplicable, but a general order following the English practice in the case of Hindus and Muhammadans may lead to complications. Having regard to the decision of Mr. Justice Fletcher and the break in the practice in consequence, I have carefully considered the matter. I have also had the advantage of discussing the question with the learned Chief Justice with the assistance of the Registrar's note. I think that in a partition action in which a Receiver is authorised to sell properties, there can be no difficulty in directing him to convey the properties. Under Order XL, rule 1, clause (d), of the Code, the Court may confer on a Receiver all such powers for the realization of properties and the execution of documents as the owner has.

In England a sale under an order of Court includes a sale "with the approbation of the Judge" where it proceeds throughout under the directions of the Court, and also a sale "out of Court" in which case Order XLI, rule 1 (a), applies. Careful provision has been made in the English Judicature Act and the orders and rules thereunder relating to sales, conveyances and sale certificates, but our Code is silent except as to execution and mortgage sales. In the High Court, mortgage sales are held by the Registrar and sale certificates are granted. I have compared the form of such certificate with that which was used in respect of sales by the Receivers under orders of Court. It is practically the same form. I do not see

why a certificate reciting the order of the Court authorising the Receiver to sell and stating that the sale has been effected thereunder and also reciting that the sale has subsequently been confirmed by the Court, when so confirmed, cannot be granted, when the purchaser applies for it and is content to take it as evidence of his title without asking for conveyance. It saves considerable costs and trouble, and I feel disposed to encourage it. One of the grounds for refusal in *Golam Hossein Cassim Arif's* case (2) was that in sales "under the Court" the Court does not guarantee any title to the purchaser. But a sale certificate merely records an already accomplished fact, and states what has been sold. In execution sales there is no warranty by the Court that the title is good. The quantity and nature of the right and interest existing in the debtor at the time of attachment and advertisement of sale, alone pass by the sale. In mortgage suits, the right, title and interest both of the mortgagor and the mortgagee pass. In all sales whether by the Court or under the Court or by direction of the Court out of Court, the purchaser is bound to satisfy himself of the value, quantity and title of the thing sold just as much as if he were purchasing the same under private contract. I do not see what the difference is. The sale certificate does not transfer the title. It is evidence of the transfer. But since the question is of some considerable importance, it is desirable to adopt a course which seems to me to be sanctioned by Statute, and not merely to follow a practice in which there has been a break as above stated, however recent. In this case I authorise the Receiver and direct him to execute the conveyance. I think that if this course is followed the difficulty which I have mentioned will be avoided. Cases may arise where it may be considered expedient to follow the English procedure and apply the Indian Trustees Act where it may not be inapplicable, but it is unnecessary to deal with the question on this application. I have referred to it as the point has been raised in the Registrar's note. Sales by Commissioners of Partition are eventually confirmed by the Court when the final decree is made and formal conveyances may

(3) (1897) 1 Ch. 477; 66 L. J. Ch. 386; 45 W. R. 459.

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not be at all necessary. To get a guardian of an infant's property first appointed authorising him to sell, in order to effectuate a sale in a partition action, is a dilatory and expensive procedure and should, in my opinion, be discouraged unless imperatively necessary.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL NO. 1522 OF 1912.

September 24, 1913.

Present:—Mr. Justice Sadasiva Aiyar and
Mr. Justice Spencer.

CHIDAMBARA CHETTIAR, BY HIS
AUTHORIZED AGENT, RAMASAMI IYER—
PLAINTIFF—APPELLANT

versus

VAIDILINGA PADAYACHI AND OTHERS

—DEFENDANTS NOS. 1 TO 6—RESPONDENTS.

*Transfer of Property Act (IV of 1882), ss. 54, 55
(6) (b), 118—Exchange of land of value over one
hundred rupees, how created—Registration, if neces-
sary—Estoppel, if created against Statute Law—
Exchange, if charge created in a transaction of.*

A transfer of property by way of exchange can be made only by a registered instrument under sections 118 and 54 of the Transfer of Property Act if the value of the property is Rs. 100 or upwards. [p. 408, col. 2.]

Kurri Veerareddi v. Kurri Bapireddi, 29 M. 336 (F. B.); 16 M. L. J. 395; 1 M. L. T. 153, followed.

Ram Baksh v. Mughlani Khanam, 26 A. 266; A. W. N. (1903) 8 and *Karalia Nanubhai v. Mansukhran*, 24 B. 400; 2 Bom. L. R. 220, dissented from.

No estoppel can be pleaded against the directions and prohibitions enacted by the Statute Law and against the rights accruing to any party by reason of such directions and prohibitions. [p. 409, col. 1.]

As in a transaction of exchange no question of money or purchase-money is involved, the charge created for purchase-money under section 55, clause 6 (b), of the Transfer of Property Act, cannot arise in such a transaction. [p. 409, col. 2.]

Second appeal against the decree of the Subordinate Judge of Mayavaram, in Appeal No. 17 of 1912, presented against that of the District Munsif of Shiyali, in Original Suit No. 304 of 1910.

Mr. T. R. Venkatarama Sastriar, for the Appellant.

Mr. S. Muthia Mudaliar, for the Respondent.

JUDGMENT.

SADASIVA AIYAR, J.—The plaintiff is the appellant before us. He sued for a declara-

tion that the judgment-debtor, the sixth defendant, was the owner of the plaint property and that the plaint property was, therefore, liable to be attached and sold in execution of the decree which the plaintiff has obtained against the sixth defendant. The defendants Nos. 1 to 5 plead that the sixth defendant had lost his title to the plaint property by reason of the sixth defendant having orally transferred the plaint land, worth much more than Rs. 100, to one Arumuga Padayachi in 1900, the sixth defendant having obtained from the said Arumuga Padayachi Arumuga Padayachi's own land by way of exchange. The land which the sixth defendant so obtained in exchange had been conveyed by him to strangers in 1901 (see Exhibits I and III). The present suit was brought about ten years after the exchange transaction of 1900. The plaintiff contended that the oral exchange, by which the sixth defendant is alleged to have lost title to the plaint lands in favour of Arumuga Padayachi, did not validly transfer the sixth defendant's title to Arumuga Padayachi (whose brother's nephew and sons are the defendants Nos. 1 to 5). The plaintiff relied upon section 118 of the Transfer of Property Act, which provides that a transfer of a property by way of exchange can be made only in the manner provided for the transfer of such property by sale in section 54, which section requires a registered instrument for sale of immoveable property of the value of Rs. 100 and upwards. The defendants Nos. 1 to 5 tried to meet this objection of the plaintiff by contending that as the sixth defendant is unable now to give back the lands which he himself got by oral exchange from Arumuga Padayachi owing to the sixth defendant having conveyed them away to strangers under Exhibits I and III, the sixth defendant is estopped from pleading that the oral exchange is invalid; as the sixth defendant is so estopped, his decree-holder (the plaintiff) is, it is contended, similarly estopped. The Munsif decreed the plaintiff's suit, relying upon the Full Bench decision in *Kurri Veerareddi v. Kurri Bapireddi* (1). That case decided that the provisions of section 54 of the Transfer of Property Act are imperative and

(1) 29 M. 336 (F. B.); 16 M. L. J. 395; 1 M. L. T. 153.

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cannot be disregarded on grounds based upon mere equitable considerations. The Appellate Court (the Subordinate Judge of Mayavaram), relying upon *Ram Bakhsh v. Mughlani Khanam* (2), *Karalia Nanubhai v. Mansukhram* (3), on section 40 of the Transfer of Property Act, section 91 of the Trusts Act section 120 of the Transfer of Property Act, and section 55, clause (b), of the Transfer of Property Act, held that the sixth defendant had no attachable interest in the property and dismissed the plaintiff's suit with costs.

The contention in second appeal is that the Subordinate Judge was wrong in his view of the law. I think that *Ram Bakhsh v. Mughlani Khanam* (2) and *Karalia Nanubhai v. Mansukhram* (3) cannot be treated as good law in the Madras Presidency, having regard to the decision of the Full Bench case in *Kurri Veerareddi v. Kurri Bapireddi* (1). *Karalia Nanubhai v. Mansukhram* (3) might also be distinguished on the ground that in that case the vendee, the person who had entered into a contract of purchase with the judgment-debtor, had not lost his right to enforce specific performance on the date of the attachment. The contract was then an existing contract in the words of section 91 of the Trusts Act.

As regards estoppel, no estoppel can be pleaded against the directions and prohibitions enacted by the Statute Law and against the rights accruing to any party by reason of such directions and prohibitions. As regards section 55, clause 6 (b) of the Transfer of Property Act, it, no doubt, gives a charge for the purchase-money paid in favour of the purchaser under a contract of sale on the property contracted to be sold, if the sale goes off without default on the part of the purchaser. It is argued that as section 120 of the Transfer of Property Act gives to a party to an exchange transaction similar rights as if he was a seller or buyer in a sale transaction, the defendants Nos. 1 to 5 have a charge upon the plaintiff property to the extent of the price of that property at the time of the exchange transaction, and that if this suit is decreed in the

plaintiff's favour, that is, if the plaintiff is declared to have the right to attach and bring the plaintiff property to sale in execution of the decree against the sixth defendant, it should be further declared in favour of defendants Nos. 1 to 5 that they have got a charge upon the plaintiff property to the extent of the price of such property on the date of the exchange transaction in 1900.

In the first place, it seems to me that having regard to the definition of exchange in section 118 of the Transfer of Property Act, no question of money or purchase-money is involved in a transaction of exchange and hence the charge created for purchase-money under section 55, clause 6 (b), of the Transfer of Property Act cannot arise in the case of an exchange transaction.

In the next place, defendants Nos. 1 to 5 did not make any claim in their written statement to this alternative relief of a charge being declared in their favour if the exchange transaction be held invalid by the Courts, nor have they raised this point in the memorandum of appeal to the Subordinate Court.

In the third place, it is very doubtful whether they could be allowed now to amend their pleadings so as to raise that question of charge as their right to enforce the said charge is probably now barred by limitation, because if any legal charge which could be relied on was ever created it must have been created in 1900 and we are now in 1913.

Lastly, I am not sure that to a suit forejectment the defendant could plead a mere charge, and whether the defendant who has got a mere charge ought not to be relegated to his own suit to enforce the charge after paying proper Court-fees on his plaint instead of being allowed as defendant to impose conditions on the plaintiff as a preliminary to the plaintiff's being given a decree in ejectment. As regards the last point, however, I must admit that there are observations in the case of *Mutta Venkatachalapathy v. Pyinda Venkatachalapathy* (4) which are in the defendant's favour. However, on the grounds Nos. 1 to 3 which I have enunciated above, the defendants Nos. 1 to 5 cannot obtain a declaration in their

(2) 26 A. 266; A. W. N. (1903) 8.

(3) 24 B. 400; 2 Bom. L. R. 220.

(4) 17 Ind. Cas. 987; 23 M. L. J. 652; 12 M. L. T. 579.

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favour of a charge for any money, that is, for the probable price (unsatisfactorily and roughly ascertained by evidence after ten years) on the date of the exchange in 1900. In the result the lower Appellate Court's decree will be set aside and the Munsif's decree restored. As this is a hard case for the defendants Nos. 1 to 5, I would make no order as to costs in the lower Appellate Court and in this Court.

SPENCER, J.—I agree with the conclusions of my learned brother. I have only to add that the decisions on which the lower Appellate Court relied can be distinguished from the present case. *Ram Bakhsh v. Mughlani Khanam* (2) was a case in which certain immoveable property was delivered in satisfaction of a Muhammadan widow's decree for dower. The Allahabad High Court has in several cases shown a reluctance to apply the provision of section 54 of the Transfer of Property Act strictly to sales between Muhammadans, knowing that under Sunni Law payment of price accompanied by delivery of possession constituted a complete transfer without the execution of any document, *vide* section 820 of Gour's Law of Transfer in British India.

In *Karalia Nanubhai v. Mansukhram* (3) the Court treated the judgment-debtor as holding the property in trust for the person who had purchased from him. A conveyance was executed and registered under a decree for specific performance, thereby perfecting the purchaser's title before the suit for declaration of the judgment-creditor's right to attach was decided in the Court of first instance.

Section 55 of the Indian Transfer of Property Act being founded mainly on the provisions of the English Conveyancing Act of 1881, I doubt if clause 6 (b), which deals with the buyer's lien, can properly be applied to an exchange of immoveable property notwithstanding sections 119 and 120. In *Volkart Brothers v. Vettivelu Nadan* (5) a claim based on an agreement to exchange goods in the shape of cotton was allowed on the ground of trade usage, but usages and custom of trade are specially excepted by section 1 of the Indian Contract Act, and

(5) 11 M. 459.

the property in dispute in that case being moveable was governed by Chapter VII of the Indian Contract Act, which deals with the sale of goods and corresponds with the provisions of the Sale of Goods Act in England.

Decree set aside.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 144 OF 1914.

May 14, 1915.

Present:—Mr. Justice Chamier and
Mr. Justice Piggott.

JANAK SINGH—DEFENDANT—APPELLANT
versus

WALIDAD KHAN AND ANOTHER—PLAINTIFFS
—RESPONDENTS.

Sale—Purchaser not put in possession—Suit for recovery of purchase-money—Limitation Act (IX of 1908), Sch. I, Arts. 62, 97, 116.

The plaintiffs purchased certain property on 17th November 1905 and got mutation of names effected in their favour on 7th February 1906. The sale-deed contained a recital that the vendor had placed the purchasers in possession and if the purchasers were disturbed or dispossessed by any person proving himself to be entitled to the property, they would be entitled to recover from the vendor the price paid by them for the property. But the purchasers did not obtain possession in fact of the property. In 1907, certain persons brought a suit against the vendor and the purchasers to have the sale set aside and obtained a decree which was finally upheld by the High Court on 28th May 1909. The plaintiffs instituted the present suit for the recovery of the purchase-money on 18th of April 1911:

Held, that the suit was not governed by Article 116 of Schedule I of the Limitation Act 1908 but was governed either by Article 62 or Article 97 of the Act, and was barred by time. [p. 411, col. 2.]

Second appeal from a decree of the District Judge of Farrukhabad, dated the 3rd November 1913.

Mr. *Gulzari Lal*, for the Appellant.

Dr. *Surendro Nath Sen*, for the Respondents.

JUDGMENT.—On November 17th, 1905, the respondents purchased a share in a *zemindari* village from the appellant. The sale-deed contained a recital that the vendor had placed the purchasers in possession of the property and an undertaking that the vendor would cause mutation of names to be effected in favour of the purchasers. It also contained a provision to the effect that if the purchasers were disturbed or dispossessed by any person

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proving himself to be entitled to the property, they would be entitled to recover from the vendor the price paid by them for the property. Mutation of names appears to have been effected in favour of the purchasers on February 7th, 1906. But it is clear that they did not obtain possession in fact of the share. In 1907 Mahbub Khan and others brought a suit against the vendor and the purchasers to have the sale-deed set aside and for a declaration of their title to the property. Their claim was decreed in July 1907. The present respondents appealed to the District Court. Their appeal was dismissed and they filed a second appeal in this Court which was dismissed on May 28th, 1909. The present suit was instituted on April 18th, 1911. The question for decision in this appeal is whether the suit was brought within time. The respondents' contention is that the suit is within time, (1) because it is governed by Article 116 of Schedule I to the Limitation Act, and (2) because if Article 97 be held to be applicable, time did not begin to run against them until their appeal to this Court was dismissed in May 1909, less than three years before the present suit was brought. It seems to us quite clear that Article 116 does not apply to the present suit. That Article provides for a suit for compensation for the breach of a contract in writing registered. The respondents contend that the deed of sale contains a contract on the part of the vendor to put the purchasers in possession. The sale-deed, however, contains no such contract. As already stated it recites as a fact, though it was not a fact, that the vendor had placed the purchasers in possession. The other provision contained in the deed, to the effect that the purchasers would be entitled to recover the price paid by them, in case they were disturbed or dispossessed by persons proving themselves entitled to the property, does not apply because the purchasers never did get possession. The lower Appellate Court seems to have been of opinion that the purchasers might be regarded as having obtained possession of the property because mutation of names was effected in their favour. It relies upon section 201 of the Tenancy Act,

Local Act II of 1901, as showing that the respondents, as the recorded proprietors of the share purchased, could have sued for the profits of that share in the Revenue Court. It does not appear, however, that they ever brought a suit for profits. They certainly did not obtain a decree for profits of the share, and as a matter of fact Mahbub Khan and others who had been in possession of the property for many years prior to the sale in question retained possession and were content to bring a suit for declaration of their title. They were under no necessity to bring a suit for possession. It is, therefore, quite clear that the purchasers never did get possession of the share. We are, therefore, of opinion that Article 116 of Schedule I to the Limitation Act does not govern this case. The case appears to us to be governed either by Article 62 or Article 97 of the same Schedule. In all probability there, was a total failure of consideration from the very beginning. If so, the suit is barred by limitation under Article 62. But even if there was not an initial failure of consideration, the consideration must have failed very soon afterwards certainly more than three years before the present suit was brought. More than three years before the suit the respondents failed to get possession of the property and were sued by Mahbub Khan and others, who had been in possession for many years. In our opinion whether Article 62 or Article 97 applies, the suit is barred by limitation. The purchase was clearly a speculative purchase of property for the purpose of endeavouring to oust persons who had been in possession of the property for many years. We allow this appeal, set aside the decrees of the Courts below and dismiss the suit of the respondents with costs in all three Courts. Costs in this Court will include fees on the higher scale.

Appeal decreed.

DURGA MOHUN v. SUKUMAR DAS.

CALCUTTA HIGH COURT.

LETTERS PATENT APPEAL No. 125 OF 1913.

May 4, 1915.

Present:—Sir Lawrence Jenkins, KT., Chief Justice, and Mr. Justice N. Chatterjea.
DURGA MOHUN GANGOPADHYA AND
OTHERS—PLAINTIFFS—APPELLANTS

versus

SUKUMAR DAS AND OTHERS—DEFENDANTS
—RESPONDENTS.

Rent suit—Commutation—Bengal Tenancy Act (VIII of 1885), s. 40—Revenue Courts, competence of, if can be questioned by Civil Courts—Jurisdiction—Presumption.

Per Jenkins, C. J.—The Civil Courts can consider the competence of the Revenue Courts in commutation proceedings, where a suit is brought for recovery of arrears of rent as determined by these proceedings. [p. 413, col. 1.]

Kali Krishna v. Ram Chandra, 29 Ind. Cas. 896; 21 C. L. J. 487; 19 C. W. N. 823, followed.

Per N. Chatterjea, J.—The exercise of jurisdiction by a Revenue Court presupposes that the *raiyat* is an occupancy *raiyat* and the rent is payable in kind as indicated in section 40 of the Bengal Tenancy Act. [p. 413, col. 1.]

Letters Patent Appeal against the following decision of the Hon'ble Mr. Justice Roy, dated the 8th August 1913, in Appeal from Appellate Decree No. 2102 of 1911, against the decree of the Additional District Judge of Backergunge, dated the 24th April 1911, affirming that of the Officiating Munsif of Barisal, dated the 22nd December 1910.

Roy, J.—This appeal arises out of a suit for arrears of rent. The defence was that the rent payable had been commuted by the Revenue Officer under section 40 of the Bengal Tenancy Act and that the plaintiff could recover only at the rate fixed by the Revenue Officer. Both the lower Courts have held that the Civil Court is not competent to go against the decision of the Revenue Officer in proceedings under section 40 of the Bengal Tenancy Act. In second appeal it has been urged that the decision is not binding upon the plaintiff. It is said that the plaintiff is competent to have it determined in the Civil Court that the proceeding was without jurisdiction. The points on which the want of jurisdiction is urged are the points which the Revenue Officer had to decide. And if it were possible to raise the same question in a Civil Court, then the result would be, as was observed in the case of *Lalla Saligram Singh v. Mohunt Amir* (1): "The plaintiff would

practically make the Civil Courts Courts of Appeal. This was certainly not intended.' I agree with the judgment in the case referred to and in holding that the scope of the section clearly indicates exclusive jurisdiction in the Revenue Officer.

The appeal is, therefore, dismissed with costs.

Babu Gunada Charan Sen, for the Appellants.

Babu Surendra Chandra Sen, for the Respondents.

JUDGMENT.

JENKINS, C. J.—This is a suit for rent; and the plea advanced by the defendants is that there has been a commutation under section 40 of the Bengal Tenancy Act. As regards the years 1315 and 1316, if that plea is good it furnishes an answer. But the plaintiffs take exception to the commutation proceedings or at any rate to their finality; for he says under section 40 there can be no commutation unless the tenant is an occupancy *raiyat* and unless he pays for the holding rent in kind, or on the estimated value of a portion of the crop or at rates varying with the crop, partly in one of those ways and partly in another, or partly in any of those ways and partly in cash. The plaintiffs say that this question must be decided in this suit and that it is open to the Civil Court to question the jurisdiction of the Revenue Authority.

The judgments of the Munsif as also of the Subordinate Judge and of Mr Justice Roy are all against the plaintiffs. The judgment of the Munsif is to the effect that the tenant was an occupancy *raiyat* and that the rent was payable in kind, so that the learned Judge affirmed the competence of the Revenue Court's proceedings. The other two Courts, however, did not follow this procedure but treated the matter as concluded by the decision of the Revenue Court and on that ground have upheld the defendants' plea.

I do not wish to say that there is nothing to be said in support of that view. But whether it be right or whether it be wrong, I consider we are bound by a decision of an Appellate Bench of this Court in *Kali Krishna v. Ram Chandra* (2) which directly

(1) 29 Ind. Cas. 896; 21 C. L. J. 487; 19 C. W. N. 823.

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decides the point in discussion before us, and determines that Civil Courts can consider the competence of the Revenue Courts in commutation proceedings where a suit is brought for recovery of arrears of rent as determined by these proceedings. I, therefore, accept that decision as binding on me. In view of that decision it is manifest that the judgment of Mr. Justice Hari Nath Roy cannot stand, nor can that of the lower Appellate Court. We must, therefore, in deference to the decision I have cited, vary the judgment of Mr. Justice Roy so far as it relates to the rent for the years 1315 and 1316 and also set aside the decree of the Subordinate Judge as regards these two years and send back the case in order that it may be determined whether the commutation proceedings were competent. The case must, therefore, go back to the lower Appellate Court for the determination on the record as it stands, and the costs of the litigation hitherto incurred will be dealt with in the lower Appellate Court and the Judge will in this connection have regard to the extent to which the plaintiffs' claim is conceded.

N. CHATTERJEA, J.—I agree with the view taken in *Kali Krishna v. Ram Chandra* (2). I think the exercise of jurisdiction by a Revenue Court presupposes that the *raiya*t is an occupancy *raiya*t and the rent is payable in kind, as indicated in section 40 of the Bengal Tenancy Act.

Appeal partly allowed: Case remanded.

MADRAS HIGH COURT.
ORIGINAL MATRIMONIAL SUIT No. 1 OF 1913.
July 29, 1913.

Present:—Mr. Justice Wallis.
J. S. BATTIE—PETITIONER
versus

G. E. BROWN, FALSELY CALLED G. E.
BATTIE—RESPONDENT.

Divorce Act (IV of 1869), ss. 19, 57—Divorce—Decree absolute, marriage within six months of, if valid—Previous marriage how long in force—Jurisdiction to declare marriage null and void.

Section 57 of the Indian Divorce Act does not completely dissolve the tie of marriage until the

lapse of six months after the decree absolute [p. 414, col. 1.]

Where, therefore, a new marriage was solemnized within six months of a decree absolute for divorce of a party:

Held, that the marriage was not only void on the date when it was solemnized but also that the previous marriage was still in force within the meaning of section 19 (4) of the Divorce Act so as to give jurisdiction to a Court under section 19 of the Act to pronounce a decree of nullity [p. 414, col. 2.]

Mr. D. Chamier, for the Petitioner.

JUDGMENT.—This is a case of a very unusual character, in which the petitioner seeks a declaration of the nullity of the marriage which he contracted with the respondent in the year 1891, on the ground that the marriage was null and void as having been contracted within six months of the date on which a decree absolute had been passed dissolving the earlier marriage of the respondent. Now I may observe that this marriage was performed by "license." I do not know if the authorities issuing the license were aware that the previous marriage of the respondent had been so recently dissolved, but if they were so aware, clearly the license ought not to have been issued, and this case illustrates the necessity that the licensing authority, when it is brought to its notice that the marriage of one of the parties has been dissolved, should satisfy itself, before issuing the license, that the marriage had been dissolved by a decree absolute six months before the celebration of the new marriage; and it is, of course, equally incumbent on ministers of religion and others who solemnize such marriages so to satisfy themselves. The present suit is unopposed and, therefore, may be taken to be really by consent. But it is easy to conceive what serious and lamentable results might follow from carelessness of this kind. However, in the present case the only thing I have to do is to see whether the petitioner has made out a case for the declaration of nullity which he prays for. Now the prohibition in section 57 of the Divorce Act against re-marriage within six months of the making of the decree absolute, or the determination of an appeal if one has been preferred, is express and differs very little from the similar statutory provision of the English law. The English section

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has been held to render a marriage contracted in defiance of its provisions void as in *Chichester v. Mure* (1) cited by Mr. Chamier, and the Indian section has been construed in the same way by Sir James Hannen in *Warter v. Warter* (2). The question there was as to the validity of a Will and not as to declaration of nullity. But there is an exactly similar decision to this of Chamier, J., in *Jackson v. Jackson* (3). The only difficulty I felt in regard to this case is not as to the nullity of the marriage which is forbidden in the plainest terms by section 57, but as to the jurisdiction of this Court to pronounce a decree of nullity, because section 19 which deals with the grounds upon which decrees of nullity may be pronounced gives, as one of the grounds, "that the former husband or wife of either party was living at the time of the marriage, and marriage with such former husband or wife was then in force." It strikes one, at first, as strange to talk of a marriage being "in force" after it has been dissolved by a decree absolute; but as was pointed out in the case, by the earlier law as administered in the Ecclesiastical Courts marriage was indissoluble, and when marriages were dissolved by Act of Parliament, it was considered necessary to insert a special power of re-marriage, so that, as Sir James Hannen said, the result of pronouncing a decree absolute was not completely to dissolve a marriage. "The Indian Law," he says in a passage cited by Chamier, J., "like our own, does not completely dissolve the tie of marriage until the lapse of a specified time after the decree." In other words the former marriage is to be considered still in force at any rate to the extent of preventing a subsequent marriage during the life-time of the other party to such marriage until the prohibition resulting from the survival of such other party is removed by virtue of the section. Now the prohibition is not removed by virtue of the section till the lapse of six months, or the happening of the other event therein mentioned. Consequently, I hold that not only was this

marriage void on the date when it was solemnized, but also that the previous marriage was still "in force" within the meaning of section 19 (4), so as to give me jurisdiction under section 19 to pronounce a decree of nullity. I accordingly make the decree prayed for.

Order accordingly.

CALCUTTA HIGH COURT.

LETTERS PATENT APPEALS NOS. 80 AND 81
OF 1912.

April 1, 1914.

Present:—Sir Lawrence Jenkins, Kt., Chief Justice, and Mr. Justice N. Chatterjea.

SAFARUDDI AND OTHERS—DEFENDANTS—
APPELLANTS
versus

A. K. FAZAL HUQ AND OTHERS—

PLAINTIFFS—RESPONDENTS.

Bengal Tenancy Act (VIII of 1885), ss. 105, 188, scope of—Co-sharer landlord, tenant under, position of—Separate tenancy—Kabuliat, by tenant, to co-sharer landlord, effect of—Fair rent, settlement of.

Section 105 of the Bengal Tenancy Act provides that a landlord or a tenant may make an application within a certain time for settlement of rent and upon such application the Settlement Officer is to settle a fair and equitable rent of the lands held by the tenants. [p. 415, col. 2.]

Where the tenant of a co-sharer landlord has executed a *kabuliat* in favour of that landlord in respect of his share of the lands in his holding and enters into a separate agreement with him for the purpose of a tenancy, such co-sharer landlord is not to be considered as joint landlord with his co-sharer in respect of the tenancy under the *kabuliat* but as a separate landlord. [p. 415, col. 2.]

Gobind Chandra Pal v. Hamidulla Bhuian, 7 C. W. N. 670 and *Saitendra Nath Mitter v. Karali Charan Singh*, 2 C. L. J. 534, referred to.

A share of an undivided holding cannot be called a holding. [p. 415, col. 2.]

Hurry Churn Bose v. Raja Runjit Singh, 1 C. W. N. 521, referred to.

Section 188 of the Bengal Tenancy Act is no bar to the maintenance of an application by a co-sharer landlord, who has got from the tenant a *kabuliat* in respect of his share of the lands in his holding, to settle fair rent under section 105. [p. 415, col. 2.]

(1) 3 Sw. & Tr. 223; 32 L. J. Mat. 146; 9 Jur. (N. S.) 779; 8 L. T. 676; 11 W. R. 990.

(2) (1890) 15 P. D. 152; 59 L. J. P. 87; 63 L. T. 250; 24 J. P. 531.

(3) 13 Ind. Cas. 958; 34 A. 203; 9 A. L. J. 108.

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Letters Patent Appeals against the following decision of Mr. Justice D. Chatterjee, dated the 16th August 1912, in Appeal from Appellate Decree No. 2552 of 1910, against that of the Special Judge of Backergunge, dated the 22nd April 1910, reversing that of the Assistant Settlement Officer of Backergunge, dated the 24th July 1909.

D. CHATTERJEE, J.—The defendants owned an occupancy holding. The interest of the landlord passed to two persons in two moiety shares. Each of the new owners of land in suit took separate *kabuliats* from the defendants in respect of his share of the holding. These *kabuliats*, however, are not in respect of equal areas but of areas differing slightly in quantity, the reason assigned being that one of the landlords had made a measurement according to which the land was a little more than that for which rent had been originally paid. In any case there were these two *kabuliats* and by each *kabuliat* the defendants agreed to pay separate rent to their new landlords and to allow them to treat them as separate tenants in respect of measurement and other proceedings. During the cadastral survey under Chapter X of the Bengal Tenancy Act each of these two landlords made an application under section 105 for the settlement of fair rent in respect of his eight-anna share covered by the *kabuliats* of the defendants. An objection was taken that the application could not be made separately. Upon that the two landlords applied that if their applications could not be dealt with separately, they might be dealt with together and assessment of fair rent might be made. The Settlement Officer, however, treated the two applications as separate applications and made assessment of fair rent separately in respect of the lands covered by the two *kabuliats*. There was an appeal to the Special Judge and he has reversed the order of the Settlement Officer on the ground that the application could not be entertained under section 105 by reason of the provisions of section 188 of the Bengal Tenancy Act. In order to determine whether this view of the learned Judge is right I have to look to the provisions of section 105 of the Bengal Tenancy Act. That section

provides that a landlord or a tenant may make an application within a certain time for settlement of rent and upon such application the Settlement Officer is to settle a fair and equitable rent of the lands held by the tenants. The question is whether each of the two landlords can be said to be a landlord in respect of the lands covered by the *kabuliat* executed in his favour. The point was before the Court in other connections and it has been held that when a tenant of a co-sharer landlord has executed a *kabuliat* in favour of that landlord in respect of his share of the lands in his holding and enters into a separate agreement with him for the purpose of a tenancy, such co-sharer landlord is not to be considered as joint landlord with his co-sharer in respect of the tenancy under the *kabuliat* but as a separate landlord. That has been decided in the case of *Panchanan Banerji v. Raj Kumar Guha* (1); *Gobind Chandra Pal v. Hamidulla Bhuiyan* (2); *Sailendra Nath Mitter v. Karali Charan Singh* (3) and also in other cases. It is contended, however, that those cases apply to suits under contracts and not to proceedings under section 105. I do not see, however, any reason to distinguish the cases on this ground in so far as they decide that the execution of the *kabuliat* creates a separate tenancy in favour of the co-sharer landlord.

The next question that arises is, whether the share of the land covered by each *kabuliat* can be said to be the land held by the tenant. It has been held in respect of holdings that a share of an undivided holding cannot be called a holding: See *Hurry Churn Bose v. Raja Runjit Singh* (4). The word 'holding' does not occur in section 105. The word occurring there is 'land held by the tenant.' The word 'land' has not been defined in the Bengal Tenancy Act. I do not see any reason why the share of the land held under a particular landlord should not come within the purview of the word 'land' used in the section. In this view of the case I think that section 188 of the Bengal Tenancy Act is no bar to the maintenance of this application.

(1) 19 C. 610.

(2) 7 C. W. N. 670.

(3) 2 C. L. J. 534.

(4) 1 C. W. N. 521.

IDUBILLY SIYYADI GARU v. VISWESWARA NISSANKA.

The judgment and decree of the Special Judge are set aside and the case is sent back to him for the decision of such questions on the merits as may arise.

Costs will abide the result.

Babu Bhupendra Nath Guha, for the Appellants.

Babu Kumar Sankar Roy and Ramtaran Chatterjee, for the Respondent.

JUDGMENT.

JENKINS, C. J.—This case has been decided favourably to the plaintiffs by Mr. Justice Digambar Chatterjee on the footing that there were separate tenancies, and we think that if there were separate tenancies then in the circumstances of this case there was a compliance with the provisions of section 105 of the Bengal Tenancy Act. Even if there had not been separate tenancies, we think it a possible view in the peculiar circumstances of this case that there was a sufficient application by the landlords, but it is not necessary for us to go into that point. In our opinion the judgment of Mr. Justice Digambar Chatterjee should be upheld.

We must, therefore, dismiss the appeal with costs.

N. CHATTERJEE, J.—I agree.

Appeal dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEALS NOS. 257, 258 AND 1573 AND 1574 OF 1914.

April 21, 1915.

Present:—Mr. Justice Spencer and

Mr. Justice Coutts-Trotter.

IDUBILLY SIYYADI GARU AND OTHERS

—DEFENDANTS—APPELLANTS

versus

Sree Raja VISWESWARA NISSANKA
BAHADUR GARU AND OTHERS—

PLAINTIFFS—RESPONDENTS.

Service grant—Jirayati land in occupation of grantee—Grant in shape of reduction of list—Resumption, meaning of—Eviction from land—Burden of proof.

Where subsequent to the Permanent Settlement the occupants of certain *jirayati* lands were granted by the *zemindar* a *darmilla inam* for personal service in the shape of a reduction of the *kist* which they were liable to pay but for such grant:

Held, on *zemindar's* suit for resumption of the service *inam* lands,

(1) that the onus lay on the plaintiff to show that he had a right to evict the occupants; [p. 416, col. 2.]

(2) that though the plaintiff had a right to resume the grant, he was not entitled to evict the occupants from the lands, inasmuch as resumption did not imply dispossession from the lands but meant only a taking back of that which was once given. [p. 417, col. 2.]

Second appeals against the decrees of the District Court of Vizagapatam, in Appeal Suits Nos. 302, 304, 303 and 358 of 1913, preferred against those of the Court of the District Munsif of Parvatipur, in Original Suits Nos. 10, 12, 11 and 9 of 1913.

The Hon'ble Mr. B. N. Sarma, for the Appellants.

Mr. B. Narasimha Rao, for the Respondents.

JUDGMENT.—These appeals relate to certain "*gadaba tirastu*" lands held by tenants for discharging personal services, such as carrying the *zemindar's* palanquin on condition of paying an annual *kattubadi* or favourable rent of Rs. 10. The 1st plaintiff is the *zemindar* of Sangamvalasa and the relief claimed in the plaints was a declaration that these service *inam* lands are resumable and a decree for possession, with mesne profits for 1912 and costs and subsequent profits till delivery of possession. The District Munsif granted the plaintiff's decrees accordingly and the District Judge confirmed them on appeal. The question is whether they were right in doing so. Accepting the findings of both the lower Courts that these *inams* are "*darmil a*" *inams*, in other words, *inams* granted subsequent to the Permanent Settlement and that they were granted for doing personal service to the *zemindar* in lieu of wages, which, being findings of fact, are binding on us in second appeal, the question still remains whether the plaintiffs can do more than impose the full assessment on the lands.

The plaintiffs having come into Court with a prayer to be put in possession of the lands which have been in defendants' occupation for a number of years, the onus lay on them to establish that they had a right to evict the occupants. Vide *Yeddampudi Lakshmi Narsimha Row v. Repalli Sitaramaswami* (1).

(1) 19 Ind. Cas. 440; 24 M. L. J. 289; (1913) M. W. N. 282.

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Resumption means no more than a taking back of that which was once given, and, therefore, the plaintiffs cannot succeed in evicting the defendants unless they are able to show that what was originally granted was not merely a slice of the *melvaram* or landlord's share of the produce but the land itself. The plaintiffs in these suits negative any presumption in plaintiff's favour on this point. It is stated therein that the lands concerned in these suits were "taken out of the class of *jirayati*" lands and a *kattubadi* of Rs. 10 was fixed on them in lieu of the *cist* of Rs. 125 which they were capable of paying. In other words, the difference between Rs. 10 and Rs. 125 represented what was granted to the holders of the *inam* as a recompense for the services to be rendered by them. In their written statements the defendants pleaded that, even though plaintiffs had a right to resume the plaintiff lands, they had no right whatever to claim the *kudivaram* or *ryot's* share. We have not been referred to anything in the evidence tending to show that any right was reserved at the time when the *inams* were granted beyond the right of resuming the grant. The District Munsif referred to the acquiescence of the defendants in the enhancement of the *kattubadi*. This implied no more than a readiness on the part of the *inamdars* to accept a lower rate of remuneration for their services than they had been receiving originally. He refers to certain authorities for the proposition that tenants holding lands on service tenure cannot acquire occupancy rights. This point was not decided in *Hurrogobind Raha v. Ramrutro Dey* (2), quoted by the District Munsif, but it is unnecessary to go beyond section 3, clause 16 (c) of Madras Act I of 1908, which is referred to by the District Judge to show that land held on service-tenure is not included in the definition of '*ryoti*' land in the Act so long as the service-tenure continues. This is immaterial for the purpose of these suits. The defendants' case is not so much that they have acquired occupancy rights under the Act, as that they possessed such rights when the *inams* were granted and that they have never lost

them since. The plaintiffs brought these suits in a Civil Court to establish and enforce the general rights belonging to them by virtue of the contract subsisting between them and the defendants as to the terms on which the lands were held. If they had sued to eject their *ryots* on any of the grounds for which ejectment is allowed in the Madras Estates Land Act, they would have been under the necessity of launching their suits in a Revenue Court. In similar cases relating to the resumption of "*darmilla*" *inams* Ayling and Tyabji, JJ., in *Karupamaya Ananga Bheema v. Sondi Prahaladha Bissoyi Ratno* (3) held that the *zemindar* of Peddakimidi was not entitled to eject the grantees from the lands as a result of such resumption.

There the lands were waste and covered with jungle when granted, yet the learned Judges applied the ordinary presumption as to occupancy right which was recognised before the passing of the Madras Estates Land Act in the leading case of *Cheekati Zemindar v. Ranasooru Dhora* (4). If there was proof that the lands at the time of the grant were already in occupation of the tenant or their predecessors-in-title as ordinary *jirayati ryots*, the correctness of the decision would have been in the opinion of the learned Judges self-evident. Here there is an admission that the lands were once ordinary *jirayati* lands and a total absence of proof that the character of the enjoyment, which the then occupants had in the lands, was at any time lost or altered in the course of its devolution to the present occupants.

We cannot, therefore, accept the contention of the respondents' Pleader that the case of *Karupamaya Ananga Bheema v. Sondi Prahaladha Bissoyi Ratno* (3) was wrongly decided, nor can we regard the decisions in *Sanniyasi Razu v. Zemindar of Salur* (5), in *Visweswara Nissanka v. Gorla Budaradu* (6) and in *Forbes v. Meer Mahomed Tuquee* (7) as authorities for the view that

(3) 21 Ind. Cas. 833; (1914) M. W. N. 179; 14 M. L. T. 562.

(4) 23 M. 318.

(5) 7 M. 268.

(6) 7 Ind. Cas. 401; (1910) M. W. N. 436; 8 M. L. T. 82.

(7) 14 W. R. 28 (P. C.); 13 M. L. A. 438; 5 B. L. R. 529; 2 Suth. P. C. J. 358; 2 Sar. P. C. J. 588; 20 E. R. 614.

(2) 4 C. 67.

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resumption implied dispossession from the land, as the point was not expressly raised and decided in those cases and even if it had been raised, it is obvious that the question must depend on what was the contract between the landholder and his tenant in each particular case. In *Vadisapu Appandora v. Vyricherla Veerabhadraraju* (8) and in Second Appeal No. 2103 of 1913 (unreported), there was a denial by the tenant of his landlord's title, which altered the case.

We allow the appeal and direct in modification of the decree of the Court of first instance that the plaintiff in each case be granted a declaration as prayed for and a decree for payment of Rs. 40; being the difference between *kattubadi* of Rs. 10 and Rs. 50, the *cist* found by the District Munsif to be payable in the event of the lands being fully assessed, and that the prayer for possession and subsequent profits be rejected. The parties will give and receive proportionate costs throughout.

*Appeal partly allowed;
Decree modified.*

(8) 12 Ind. Cas. 487; (1911) 2 M. W. N. 406; 10 M. L. T. 391.

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CALCUTTA HIGH COURT.
SECOND CIVIL APPEAL 2220 OF 1908.
December 20, 1910.

Present:—Mr. Justice Caspersz and
Mr. Justice N. R. Chatterjea.
BROJONATH SAHA AND OTHERS—
PLAINTIFFS—APPELLANTS

versus
DINES CHANDRA NEOGI AND OTHERS—
DEFENDANTS—RESPONDENTS.

Khamar lands, sale of, by one co-sharer to another—Estates Partition Act (V of 1897 B. C.), ss. 4, 99—Anomalous burden—Sale with a condition—Butwara authorities, power of—Vendee's power.

Where one co-sharer sells *khamar* lands to another with a condition for the payment of Government revenue by the vendee to the vendor, it becomes an anomalous burden and not an incumbrance; and in default of the vendee's being registered no notice of the interest claimed by the vendee can be taken by the *butwara* authorities. [p. 419, cols. 1 & 2.]

When the other co-sharers secure the land purchased, the vendee is entitled to get equivalent land from his vendor or his legal representative. [p. 419, col. 1.]

Appeal against the decree of the Subordinate Judge of Dacca, dated the 24th July 1908, reversing that of the Munsif of Manikgunge, dated the 24th January 1908.

Babus *Dwarka Nath Chakrabarti* and *Ramani Mohan Chatterjee*, for the Appellants.

Babus *Basanta Coomar Bose*, *Harendra Narayan Mitter* and *Umes Chandra Ghose*, for the Respondents.

JUDGMENT.—The plaintiffs and defendants Nos. 1 to 4 are co-sharers in a certain revenue-paying estate. On the 23rd *Chaitra* 1292, Annada Sundari Dasya, the mother of defendant No. 4, executed what is headed as a "*kobala* or out-and-out sale of land" in favour of the plaintiffs. These lands were *khamar* lands and they were specified by the vendor, who described herself as owner in possession with power and right to make gift or sale of a certain fractional share in the *mahal* within which the *khamar* lands were included. Towards the end of the conveyance, there is a stipulation that the vendees would pay annually $5\frac{1}{4}$ annas as *rajashya*, Government revenue, of the land conveyed into the vendor's *sarkar*; in other words, the vendees would pay a certain sum of money which the vendor would be bound to remit to the Collector as revenue payable in respect of the land so conveyed. The plaintiffs were not registered as proprietors of the lands in question. Thereafter, a partition was effected under the provisions of Act V of 1897 (B.C.) the proceedings ending in the year 1901. The plaintiffs did not secure their *kobala* lands in those partition proceedings, nor any land equivalent to those *kobala* lands. In fact, they were allotted to the share of defendants Nos. 1, 2 and 3. The plaintiffs brought their present suit to obtain either those identical lands or, in lieu of them, the lands which had been allotted to defendant No. 4.

The first Court decreed the suit, giving the plaintiffs the lands which had been given to defendant No. 4 in lieu of the *kobala* lands. Various questions of fact were decided by the Munsif but on appeal to the Subordinate Judge, the case turned on a simple issue, whether the *kobala* was or was not an out-and-out sale, and in the opinion of the Subordinate Judge, the conveyance being of that description, the plaintiffs' suit failed.

BROJONATH SAHA v. DINES CHANDRA NÈOGI.

In second appeal, the substantial argument of the learned Vakīl on behalf of the plaintiffs is that on general principles the defendant No. 4 cannot be allowed to retain a two-fold benefit and that in any case, the Munsif's decision is one which is in accordance with justice, equity and good conscience.

We have read the *kobala* of the 23rd *Chaitra* 1292, and, in our opinion, though it is an out-and-out conveyance, it is impossible to ignore the peculiar condition for the payment of Government revenue by the vendees to the vendor. As a result of that stipulation the plaintiffs (vendees) were unable to represent themselves as proprietors of the land purchased. They were proprietors, but they were not registered proprietors. That being so, the *butwara* authorities could not take notice of the interest they claimed in the land conveyed (section 4 of Act V of 1897, B. C.). Our attention has been called to section 99 of the Act. It runs thus:—"If any proprietor of an estate held in common tenancy and brought under partition in accordance with this Act has given his share or a portion thereof in *putni* or other tenure or on lease, or has created any other encumbrance thereon, such tenure, lease or encumbrance shall hold good as regards the land finally allotted to the share of such proprietor and only as to such lands." It will be observed that the *kobala* of the 23rd *Chaitra* 1292 was not a conveyance of a share. It was in respect of certain specified lands. But, in some respects, the burden imposed upon the share of the vendor was an encumbrance. It is not necessary to discuss the cases which have been decided on some cognate questions under section 37 of Act XI of 1859. We may, however, mention the case of *Thakoor Dass Roy Chowdhry v. Nubeen Kishen Ghose* (1). In *Joy Sankari Gupta v. Bharat Chandra Birdhan* (2), an application was made in accordance with the equitable principles originally recognised and given effect to by the Privy Council in the case of *Rajynath Lall v. Ramoodeen Chowdhry* (3). We may usefully quote a passage in the judgment of the Judicial Committee

where their Lordships said:—"It is, therefore, clear that the mortgagor had power to pledge his own undivided share in these villages; but it is also clear that he could not, by so doing, affect the interest of the other sharers in them, and that the persons who took the security took it subject to the right of those sharers to enforce a partition, and thereby to convert what was an undivided share of the whole into a defined portion held in severalty."

But, as we have already said, this case is not one of an encumbrance strictly so called; it is rather a case of an anomalous burden imposed by the widow on her share, in that she allotted certain *khamar* lands to the plaintiffs and pledged herself to pay Government revenue on receipt of a sum from the plaintiffs. For the purposes of the partition proceedings, the widow represented her vendees, and, although it might be difficult to describe her position as being that of a trustee for the vendees, that would be the practical result of the attitude adopted by her in consequence of the conveyance.

Under these circumstances, we are unable to agree with the Subordinate Judge in altogether dismissing the plaintiffs' action. We must apply those general principles of equity that always govern cases which are not precisely covered by a particular section of a particular Statute.

There remain, however, questions which must be gone into by the lower Appellate Court. The first of these is whether the interest of the widow, Annada Sundari, was an absolute interest, as she described it. The plaintiffs' suit was based on the existence of such an absolute interest. If she had any absolute interest, we think the plaintiffs are entitled to follow the lands allotted to defendant No. 4 in lieu of, and corresponding to the lands conveyed under the *kobala* of the 23rd *Chaitra* 1292. If, however, Annada Sundari held a mere Hindu widow's estate, the question would arise as to whether there was any legal necessity for raising Rs. 300, the purchase-money mentioned in the conveyance. The first Court observed that no issue had been raised as to legal necessity in this case, and that the defendants did not say, in their defence, that there was no legal necessity for creating the *kobala*. But on

(1) 15 W. R. 552.

(2) 26 C. 434; 3 C. W. N. 209.

(3) 1 I. A. 106; 21 W. R. 233.

NOGENDRA MOHAN RAY v. PYARI MOHAN SAHA.

reference to the written statement of defendant No. 4 (paragraph 9), we find that various pleas were raised going to the root of the matter, and it was said that any act done by Annada Sundari without any authority is not binding upon the defendant No. 4. It will be necessary to frame an issue as to this. Of course, if Annada Sundari was under no legal necessity to raise the money, her conveyance to the plaintiffs would not operate after the death of the Hindu widow.

The only other question remaining in the case is as to the tenancy of defendant No. 11, Ram Chandra Bose. As to this also, there must be a distinct finding by the lower Appellate Court.

With these observations, we allow this appeal and direct that the case be sent down to the lower Appellate Court for a decision of the points indicated by us.

If the evidence, as recorded, is not sufficient to enable the lower Appellate Court to arrive at findings on the further points indicated, it will be at liberty to require both parties to adduce additional evidence. Such evidence may be taken by the lower Appellate Court or by the first Court.

Costs will abide the result.

The defendant No. 1 respondent is entitled to his costs of this appeal.

Appeal allowed; Case remanded.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL NO. 3841 OF 1912.

April 28, 1914.

Present:—Justice Sir Asutosh Mookerjee, Kt., and Mr. Justice Chapman.

NOGENDRA MOHAN RAY AND ANOTHER—
PLAINTIFFS—APPELLANTS

versus

PYARI MOHAN SAHA AND OTHERS—
DEFENDANTS—RESPONDENTS.

Ejectment, suit for—Estates Partition Act (V of 1897 B. C.), s. 99, applicability of—Common tenancy—Private arrangement—Plaintiff not allowed to abandon his own case and adopt that of defendant.

To make section 99 of the Estates Partition Act applicable it is essential that the estate should be held in common tenancy and not in severalty in

pursuance of a private arrangement between the parties. [p. 422, col. 1.]

Hriday Nath v. Mohobutnessa Bibee, 20 C. 285, followed.

Where on a partition of the entire estate by the Collector under the Estates Partition Act the lands held by the defendants as a tenure under the co-sharers, to whose exclusive share they had been assigned by private partition, were allotted to the plaintiffs:

Held, that the plaintiffs took the disputed lands subject to the tenure of the defendants and were not entitled to eject them. [p. 422, col. 2.]

A plaintiff is not allowed to adopt the case of the defendant and claim relief on that footing by abandoning his own case. [p. 422, col. 2.]

Balmukund Kesurdas v. Bhagwandas Kesurdas, 19 Ind. Cas. 401; 15 Bom. L. R. 209, referred to.

Appeal against the decree of the Subordinate Judge of Dacca, dated the 31st August 1912, reversing that of the Munsif of Manikgunge, dated the 9th June 1911.

Mr. S. P. Sinha, Babus Dwarka Nath Chakrabarti and Debendra Nath Bagchi, for the Appellants.

Dr. Rash Behari Ghose and Babu Ramani Mohan Chatterjee, for the Respondents.

JUDGMENT.—This is an appeal by the plaintiffs in a suit for declaration of title to land and for ejectment of the defendants therefrom. The case for the plaintiffs is that the disputed lands were included in a revenue-paying estate owned by themselves and by their co-sharers and that the defendants held them as a tenure under the co-sharers, to whose exclusive share they had been assigned by private partition. Thereafter, on a partition of the entire estate by the Collector under the Estates Partition Act, these lands were allotted to the plaintiffs, but they were unable to obtain possession thereof, as the defendants set up their right to hold them as their tenure. The plaintiffs accordingly instituted this suit to establish their title and to eject the defendants on the ground that their tenure was operative, not upon the lands assigned to the plaintiffs, but upon those assigned to their grantors. The defendants denied the truth of the allegation of a prior private partition amongst the proprietors, and asserted that as their tenure was held under all the co-sharers, the plaintiffs were not competent to avoid it. On these pleadings, the issue was raised, whether there was a private settlement among the proprietors as regards the possession of the lands of the original estate as stated in the plaint. The trial Court found on the evidence that there was a private settlement among the co-sharers

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of the estate whereby each of them came to be in separate possession of distinct parcels of land. The Court also found that the tenure was held not under the entire body of co-sharers but under some of them only and that of the share owned by the plaintiffs, one twelfth had been derived from the grantor of the tenure. The Court thereupon held that the plaintiffs were entitled to eject the defendants from the remaining share of the lands. On appeal by the defendants, the Subordinate Judge affirmed the finding of the first Court that there was a private division of the lands to which all the joint proprietors had agreed and upon which they had all acted. In this view, the Subordinate Judge held that the partition by the Collector had not affected the tenure, as the defendants were not and could not be parties to the partition proceedings, and that the plaintiffs had taken the lands allotted to them subject to the tenure held by the defendants. The plaintiffs have appealed to this Court against the decree of dismissal made by the Subordinate Judge, and have contended that under section 99 of Act V of 1897 B. C., the lands in their hands are not subject to the tenure set up by the defendants. In support of this view, reliance has been placed upon the decision in *Joy Sankari Gupta v. Bharat Chandra Birdhan* (1).

Section 99 of the Estates Partition Act is in these terms: "If any proprietor of an estate held in common tenancy and brought under partition in accordance with this Act has given his share or a portion thereof in *putni* or other tenure or on lease or has created any other encumbrance thereon, such tenure, lease or encumbrance shall hold good as regards the lands finally allotted to the share of such proprietor and only as to such lands." It is hence essential, to make the section applicable, that the estate should be held in common tenancy. On behalf of the appellants, it has been contended that an estate must be deemed held in common tenancy so long as any incident thereof, for example, the liability to pay Government revenue, continues joint, although the lands may have been divided and are held in severalty. This contention is opposed to the decision in *Abdul Latif v. Amanaddi* (2); there it was held that the words "estate held

in common tenancy" are used in contradiction to an estate held in severalty among the proprietors themselves by private arrangement, as is clear from an examination of sections 5, 7, 63, 76 and 79 of the Estates Partition Act. This decision is in conformity with the earlier case of *Hridoy Nath v. Mohobutnessa Bibee* (3) which interpreted the corresponding section of an earlier Statute (section 128 of Act VIII of 1876, B. C.). An examination of the decision in *Hridoy Nath v. Mohobutnessa Bibee* (3), shows, again, that the view there taken was in accord with a long line of authorities decided under the corresponding provisions of Regulation XIX of 1814: *Ahmedullah v. Ashruff Hossein* (4); *Obhoy Churn v. Huri Nath Roy* (5); *Juggessur Doyal Singh v. Bissessur Pershad* (6). The position, therefore, is that under the Estates Partition Act, 1876, this Court, on an elaborate review of the previous state of law, came to the conclusion in *Hridoy Nath v. Mohobutnessa Bibee* (3) that the principle embodied in section 128 was applicable only where the lands of the estate were not held in severalty. The Legislature, in 1897, proceeded, presumably with full knowledge of the judicial interpretation of section 128, to reproduce its provision without any variation as section 99 of Act V of 1897. The inference seems irresistible that the judicial interpretation of section 128, to which we have referred, correctly represented the intention of the Legislature; for it is a well-settled principle of construction that the Legislature is presumed to know, not only the general principles of law, but the construction which the Courts have put upon particular Statutes. In the words of Lord Campbell, C. J., in *Mansell v. Reg.* (7) and James, L. J., in *Ex-parte Campbell, In re Cathcart* (8), "Where a section of an Act, which has received a judicial construction, is re enacted in the same words, such re-enactment must be treated as a legislative recognition of that construction." The inference is, therefore, perfectly legitimate that the Legislature has, in the new Act of 1897, adopted the settled

(3) 20 C. 285.

(4) 13 W. R. 447; 8 B. L. R. App. 73 note.

(5) 8 C. 72; 10 C. L. R. 81; 6 Ind. Jur. 246.

(6) 12 C. L. R. 281.

(7) (1857) 8 El. & Bl. 54 at p. 73; Dears & B. 375; 27 L. J. M. C. 4; 120 E. R. 20; 112 R. R. 468.

(8) (1870) 5 Ch. App. 703; 23 L. T. 289; 18 W. R. 1054.

(1) 26 C. 434; 3 C. W. N. 209.

(2) 9 Ind. Cas. 539; 15 C. W. N. 426.

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judicial construction, which is thereby sanctioned and intended to be continued in force: *Jogendra Chundra Roy v. Syam Das* (9). We hold accordingly, on the authority of the decision in *Hridoy Nath v. Mohobutnessa Bibee* (3) which has been accepted as good law applicable to Act V of 1897 in *Aimanaddi Patari v. Nabin Chandra Cope* (10) and *Abdul Latif v. Amanaddi* (2), that section 99 applies only where the lands are held jointly by the proprietors, and not in severalty in pursuance of a private arrangement between the parties. This view is not opposed to the decision in *Joy Sankari Gupta v. Bharat Chandra Birdhan* (1), where the lands were held not in severalty but in common tenancy. In these circumstances, it was ruled, on the authority of the decision of the Judicial Committee in *Byjnath Lall v. Ramooddeen Chowdhry* (11), that when on partition by the Collector, any land of an undivided joint estate, which had been encumbered by any co-sharer, was allotted to any other co-sharer, the latter took it free from the encumbrance so created. But we may observe that the decision in *Ahmedullah v. Ashruff Hossein* (4), which was followed in *Hridoy Nath v. Mohobutnessa Bibee* (3), is not, as is assumed in *Joy Sankari Gupta v. Bharat Chandra Birdhan* (1), inconsistent with, and has not consequently been overruled in effect by, the decision of the Judicial Committee in *Byjnath Lall v. Ramooddeen Chowdhry* (11). As explained in *Hridoy Nath v. Mohobutnessa Bibee* (3), which was not brought to the notice of the Court in *Joy Sankari Gupta v. Bharat Chandra Birdhan* (1), the lands in *Ahmedullah v. Ashruff Hossein* (4) were held in severalty; while the lands in *Byjnath Lall v. Ramooddeen Chowdhry* (11) were held in common tenancy. This distinction explains cases of *Venkatarama Iyer v. Esumsa Rowthen* (12), *Shaikh Nura v. Baikuntha Nath Ray* (13), *Brojonath Saha v. Dines Chandra Neogi* (14) and *Tarini Kanta v. Ishur Chandra* (15), where the decision in *Joy Sankari Gupta v. Bharat Chandra Birdhan* (1) was

followed. In the case before us, the Courts below have concurrently held that the lands were, under private arrangement, held in severalty and not in tenancy in common; consequently section 99 of Act V of 1897 has no application. The inference follows that the plaintiffs have taken the disputed lands subject to the tenure of the defendants and are not entitled to eject them.

It has finally been argued that the defendants should not be allowed to defeat the claim of the plaintiffs, when it has been found that their allegation is untrue on the facts. In our opinion there is no force in this contention. No doubt, as was laid down in the cases of *Shibkrishna v. Abdool Hakeem* (16), *Ramdoyal v. Junmenjoy* (17) and *Balmukund Kesurdas v. Bhagwandas Kesurdas* (18), a plaintiff cannot be allowed to abandon his own case, adopt that of the defendant and claim relief on that footing. Here, however, what has happened is that each party failed to realise the legal effect of the facts alleged by him; the parties went to trial on the substantial issue in the case, namely, whether or not there had been a private partition of the lands prior to the partition by the Revenue Authorities and whether the tenure of the defendants was created by the entire body of landlords or by some alone of the shareholders in respect of specific lands allotted to them. This question has been answered against the defendants and in favour of the plaintiffs but that does not prevent the defendants from contending that even on the facts found the claims for ejectment cannot be sustained.

The result is that the decree of the Subordinate Judge is affirmed and this appeal dismissed with costs.

Appeal dismissed.

(16) 5 C. 602; 5 C. L. R. 455.

(17) 14 C. 791 at p. 793.

(18) 19 Ind. Cas. 401; 15 Bom. L. R. 209.

(9) 1 Ind. Cas. 168; 36 C. 543 at p. 546; 9 C. L. J. 271.

(10) 5 Ind. Cas. 307; 11 C. L. J. 95.

(11) 1 I. A. 106; 21 W. R. 233.

(12) 5 Ind. Cas. 92; 7 M. L. T. 143; 33 M. 429; 20 M. L. J. 330.

(13) 30 Ind. Cas. 398; 21 C. L. J. 596.

(14) 30 Ind. Cas. 418; 21 C. L. J. 599.

(15) 18 Ind. Cas. 240; 21 C. L. J. 603.

ABDUL KHADIR v. AHAMMAD SHAIWA.

MADRAS HIGH COURT.

LETTERS PATENT APPEAL No. 120 OF 1911.

March 12, 1913.

Present:—Sir Charles Arnold White, Kt.,
Chief Justice, Mr. Justice Sankaran Nair and
Mr. Justice Tyabji.

P. ABDUL KHADIR—COUNTER-PETITIONER
No. 2—APPELLANT

versus

A. AHAMMAD SHAIWA RAVUTHAR
AND OTHERS—PETITIONERS AND

COUNTER-PETITIONERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 48—Decree-holder prevented from executing decrees by fraud or force of one judgment-debtor—Decree time-barred—Extension of time, if against all judgment-debtors—Construction of Statute.

Where a decree-holder is prevented from executing his decree by the fraud or force of one of several judgment-debtors within limitation, he can get an extension of the 12 years' period provided for execution of the decree by section 48 of the Civil Procedure Code, 1908, only as against that judgment-debtor but not as against other judgment-debtors who have not been guilty of fraud or force. [p. 424, col. 2.]

When there is on one side what is said to be the general policy of an Act and, on the other, the express words of a section dealing with a specific matter, the express words ought to prevail. [p. 424, col. 1.]

Appeal, under clause 15 of the Letters Patent, against the order of the Hon'ble Mr. Justice Phillips, reported in 12 Ind. Cas. 679, in Appeal against Appellate Order No. 45 of 1910, preferred against that of the Acting District Judge of North Malabar, in Appeal No. 449 of 1909, presented against that of the District Munsif of Cannanore, in Regular Execution Petition No. 705 of 1909.

Mr. J. L. Rosario, for the Appellants.

Mr. C. V. Ananthakrishna Aiyar, for the Respondents.

JUDGMENT.

WHITE, C. J.—The only statement of fact which is necessary for the purpose of dealing with the question of law as to the construction of section 48 of the Civil Procedure Code which has been raised in this appeal is, I think, this. A creditor has obtained a joint and several decree against two judgment-debtors, defendants Nos. 1 and 2. The first defendant has, by force or fraud, prevented the execution of the decree at some time within twelve years immediately before the date of the application to execute the decree. The second defendant has not. I think it is reasonably clear that, if we give to the words of sub-section 2 (a) in section 48

their natural meaning and construe the paragraph as meaning what it says, the construction adopted by Sundara Aiyar, J., is the right construction. The sub-section is as follows:—"Nothing in this section shall be deemed to preclude the Court from ordering the execution of a decree upon an application presented after the expiration of the said term of twelve years, where the judgment-debtor has, by fraud or force, prevented the execution of the decree at some time within twelve years immediately before the date of the application." Now the words are "the judgment-debtor." No doubt the expression "the judgment-debtor" in the singular includes the plural. But as it seems to me it includes the plural in this sense: "where the judgment-debtor has, or if there are two or more judgment-debtors the judgment-debtors have, by fraud or force, prevented the execution of the decree, etc." That construction of the section is in accordance with the literal meaning of the words and with the well-known principle of construction, which is now embodied in the Statute, that the singular includes the plural. I express no opinion as to whether, when there are two or more joint judgment-debtors, the judgment-creditor can only ask for the extension of the period of limitation when all the judgment-debtors have by force or fraud prevented the execution of the decree. That question was not argued. The contention, on the one hand, was that the judgment-creditor could only pray in aid the benefit of the enactment as against the judgment-debtor who had by force or fraud prevented the execution of the decree and on the other hand, that in a case where a joint judgment-debtor has by fraud or force prevented the execution of the decree, etc., the judgment-creditor is not only entitled to the benefit of the enactment as against that judgment-debtor but also as against any judgment-debtor who has not by fraud or force prevented the execution of the decree. It seems to me that the only way in which we could make it clear that the intention of the Legislature was as Mr. Anantakrishna Aiyar has contended, would be to add to the sub-section a definition clause to this effect, "for the purposes of this section judgment-debtor means the judgment-

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debtor who has by fraud or force prevented the execution of the decree or any joint judgment-debtor of that debtor." That would be reading into the section a great deal which is not there and, as it seems to me, would be doing violence to the express language of the section. The other construction, in my opinion, is in accordance with the natural meaning of the words used. Mr. Anantakrishna Aiyar has suggested that the policy of the Limitation Act is that where a decree is alive against one of several joint debtors, it is alive against all the joint debtors. I am not sure that I am prepared to accept that as a statement of the general policy of the Act; but even if it be so, when we have on the one side what is said to be the general policy of the Act and, on the other, the express words of a section dealing with a specific matter, I think that the express words ought to prevail.

Reliance has also been placed, in support of the contention against the view adopted by Sundara Aiyar, J., on Article 182 of the Limitation Act. Mr. Anantakrishna Aiyar has pointed out that under paragraph 5 the time was from the date of applying in accordance with law to the proper Court for execution, and that *Explanation I* says that where the decree or order has been passed jointly against more persons than one, the application, if made against any one or more of them, shall take effect against them all. That seems to me to be a very different matter from the matter which we are dealing with in this appeal. The principle, I take it, is that if the judgment-creditor does something which keeps alive a joint decree as against one of his joint judgment-debtors, the decree is to be regarded as alive as against all the joint judgment-debtors and if it is alive, it is, of course, capable of execution. That is a very different matter from the present case, which is not the case of a judgment-creditor having done something, but of the judgment-debtor having done something which, as regards him, no doubt entitled the judgment-creditor to say "my time has been extended." So far as I can see, there is no reason or principle why the judgment-creditor should be entitled to say that, as regards the men who had not prevented by fraud or force, etc., he should also have the benefit of the

enactment. I cannot see there is any equity which the judgment-creditor can set up in this case, although it may be that in the cases which are referred to in Article 182 of the Limitation Act there is an equity arising by the fact that he had done something for the purpose of realizing the fruits of his judgment. Here the creditor does nothing but relies upon something which one of his joint judgment-debtors has been doing. An argument was based on paragraph 2, in the third column of Article 182, a suit (*sic*) is kept alive by the fact that an appeal has been brought and it is reasonable enough that time should begin to run in favour of a party who does not appeal, not from the date of the decree of the Court of first instance, but from the date of the decree of the Appellate Court. It seems to me that there is not only no equity in favour of the judgment-creditor but that it would be inequitable that a judgment-debtor should be deprived of the benefit of the prescribed limitation by reason of acts done by his joint judgment-debtor, over whom he has presumably no control and for whose action he is not responsible. I may refer to the principle which is embodied in the Mercantile Law Amendment Act, and that is in accordance with the principle which I think is applicable here. Before the Mercantile Law Amendment Act of 1856, the English Law was that where one or more of several joint debtors were beyond the seas when the causes of action arose, the time did not begin to run either in favour of those abroad or those at home until the return of the former. Section 11 of the Mercantile Law Amendment Act provided that, where the cause of action lay against two or more joint debtors, the person who was entitled to the same should not be entitled to any time within which to commence and sue against any one or more of such joint debtors who shall not be beyond the seas at the time such cause of action or suit accrued, by reason only that some other one or more of such joint debtors was or were at the time such cause of action accrued beyond the seas.

In my opinion, Sundara Aiyar, J., was right and the plaintiff's application is barred as against the second defendant so far as the prayer for attachment of immoveables

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is concerned. The order will be modified accordingly. No order as to costs throughout.

SANKARAN NAIR, J.—I agree.

TYABJI, J.—I also agree.

Appeal rejected.

COURT OF THE BOARD OF REVENUE,
UNITED PROVINCES.

REVENUE PETITION No. 95 of 1913-14

OF FYZABAD DISTRICT.

November 13, 1914.

Present:—Mr. Tweedy, S. M., and
Mr. Holms, J. M.

LOTAN GOSHAIN—PLAINTIFF—APPELLANT
versus

THE AJODHYA ESTATE—DEFENDANT—
RESPONDENT.

Under-proprietary right, prima facie proof of—Naqsha tasfia lagan, entry in, weight of—Shankalapdar haq adna, heading of, name appearing under, effect of—Rent of under-proprietary holding, slight change in, effect of.

An entry in a *naqsha tasfia lagan* giving a person's name under the heading 'shankalapdar haq adna', is a sufficient *prima facie* proof of a *shankalap* under-proprietary right.

The mere fact that there has been a slight change in the rent of certain of the plots held by an under-proprietor, does not affect his under-proprietary rights.

Appeal from the decree of the Officiating Commissioner, Fyzabad, dated the 10th August 1914, upholding the order of the Assistant Collector, Fayzbad, dated the 1st June 1914.

FACTS.—The facts of the case were that the plaintiff contested the notice of ejectment issued against him by the defendant, on the ground that he was not a mere tenant but an under-proprietor of the plots entered in the notice; and the sole question for determination was whether he had established a *prima facie* claim to under-proprietary rights in respect of the plots in question.

Babus Sita Ram and Rudra Dat Singh, for the Appellant.

Babu Aditya Prasad, for the Respondent.

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JUDGMENT.—The Officiating Commissioner has made a mistake, I think, by not looking at the *naqsha tasfia lagan* himself. The words 'shankalapdar haq adna' are in the heading and not recorded after the name of Persan Goshain, the appellant's predecessor. The mere fact that there was a change in the rent of certain of the plots in 1279 *Fashi*, which was about the time of Settlement, is in no way against appellant's claim. He has held the plots included in the 33 *bighas* entered as *shankalap* in the *naqsha tasfia lagan* upto the present time without any material change in rent, though some 9 *bighas* seem to have been added to them. There is a previous judgment of Sir Duncan Baillie's on Petition No. 39 of 1908-9, dated the 8th March 1910, in which he considered that a similar entry in the *naqsha tasfia lagan* was sufficient *prima facie* proof of a *shankalap* under-proprietory right.

I would, therefore, admit the appeal as regards the plots in suit which are shown in the *naqsha tasfia lagan* as *shankalap* and modify the order of the lower Courts by cancelling the notice with regard to Nos. noted below* amounting to 28 *bighas* 4 *biswas* in area. As appellant has made an exaggerated claim he should bear his own costs throughout.

Appeal partly allowed.

* Omitted—Ed.

MADRAS HIGH COURT.

SECOND CIVIL APPEALS Nos. 536 TO 532
OF 1914.

May 2, 1913.

Present:—Mr. Justice Sundara Aiyar and
Mr. Justice Sadasiva Aiyar.

K. VENKATASUBBIAH AND OTHERS—
PLAINTIFFS AND DEFENDANTS NOS. 2 TO 18—
APPELLANTS
versus

THE SECRETARY OF STATE FOR INDIA
IN COUNCIL, REPRESENTED BY THE
COLLECTOR OF NELLORE—DEFENDANT
No. 1—RESPONDENT.

Grant—Water, free grant of, on any condition—
Presumption—Water-cess, if can be imposed—Madras
Water-cess Act (VII of 1865).

VENKATASUBBIAH v. SECRETARY OF STATE.

Where for some consideration or other or without consideration, a grant is made by the Government of a particular quantity of water or a certain definite fraction of the water of a tank to a person irrespective of the use he might make of it, the proper presumption is that it is a free grant without claim to any kind of payment for the water. [p. 427, col. 1.]

Second appeal against the decrees of the District Judge of Nellore, in Appeals Nos. 122, 128 and 136 of 1909, preferred against those of the District Munsif of Nellore, in Original Suits Nos. 1369 of 1908, No. 80 of 1909 and No. 435 of 1908.

Mr. P. Nagabhushanam, for the Appellants.

The Hon'ble Mr. L. A. Govindaraghava Aiyar (Acting Government Pleader), for the Crown.

JUDGMENT.—We observe that in the judgment of the District Munsif reference is made to the judgments in Original Suit No. 211 of 1894 and in the appeal therefrom as furnishing important evidence that the plaintiffs are entitled to a fourth of the water in the Anumakonda tank. In that suit the plaintiffs claimed certain reliefs on the basis of their right to a fourth of the water of the Anumakonda tank. The Secretary of State for India in Council was the first defendant in the suit. The reliefs were claimed against him and the second defendant therein. The Secretary of State for India in Council admitted that the plaintiffs and their co-sharers were entitled to the use of a fourth of the water flowing into the Brahmanakraka Anumakonda tank. He denied the right to the reliefs claimed in that suit, on the ground that the admitted right of the plaintiffs had not been infringed. The plaintiffs in the suit obtained a decree. The right to the use of the one-fourth of the water was the basis of the judgment in that case. If the effect of that judgment be that the plaintiffs were absolutely entitled to the use of a fourth of the water of the tank, irrespective of the use they made of it, it is possible that that judgment may make the question, raised in the present suit, of the plaintiffs' absolute right to one-fourth of the water *res judicata*. We do not wish to decide this matter now, as no issue was framed on the question apparently because the plaintiffs did not put forward that judgment as constituting the matter in dispute here *res judicata*. We think it desirable that an issue should be framed to

try the question. We accordingly frame the following issue:—"Is the question of the plaintiffs' absolute right to one-fourth of the water of the Anumakonda tank without liability to pay any water-cess *res judicata* in consequence of the judgment of the District Munsif's Court of Kavali in Original Suit No. 211 of 1894 and of the Subordinate Judge's Court of Nellore in Appeal No. 171 of 1896 (Exhibits C, Q and E)."

Both parties may adduce any evidence they may be advised to on this issue. The finding should be submitted within two months from the date of receipt of this order in the lower Court.

Seven days will be allowed for filing objections.

The second appeals coming on for final hearing after the return of the finding of the lower Court upon the issue referred by this Court for trial, the Court delivered the following

JUDGMENT.

SUNDARA AIYAR, J.—The District Judge has found that in Original Suit No. 211 of 1894 the plaintiffs' right to one-fourth of the water flowing through Yellareddi Kalva into the Anumakondapallem Tank was established; but he has held that the question of the plaintiffs' liability for the payment of the water-tax complained of in this suit is not barred as *res judicata*. He is, no doubt, right in saying that in Original Suit No. 211 of 1894 the liability of the plaintiffs to pay water-cess was not in question. But their exemption from liability must be held to follow from the right that was established in their favour in that suit. Their claim there was that they were absolutely entitled to a fourth of the water irrespective of the use that they made of it, and not merely to water necessary for irrigating any particular lands belonging to them. They complained of the opening of a vent which affected their right to a fourth of the water of the tank. The Government admitted their right to the use of one-fourth of the water. It was expressly found in that case that the right claimed by the plaintiffs was established, as the plaintiffs proved their immemorial enjoyment of a fourth of the water. A legal origin must be presumed for the exercise of the right claimed by the plaintiffs. The proper presumption is that there was

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some grant or contract entitling the plaintiffs to a fourth of the water. Mr. Govindaraghava Aiyar contends on behalf of the Government that, even if the plaintiffs' ownership to a fourth of the water be held to be proved, that circumstance would not be sufficient to entitle them to claim exemption from the payment of water-cess under Act VII of 1865 as amended. He argues that an engagement between the Government and the plaintiffs entitling them to the exemption must be proved. But if there was a contract or grant by virtue of which the plaintiffs became entitled to a fourth of the water, it would be unreasonable to suppose that the Government would still be entitled to levy a cess as remuneration for the water, the right to which had already become vested in the plaintiffs before the enactment of the Water-cess Act. The cess imposed under Act VII of 1865 was intended to compensate the Government for the use by holders of land of water belonging to it, or conserved by works constructed by it by empowering them to levy a remuneration from those using the water for irrigation; where such remuneration is otherwise paid by the landholder, that would be sufficient to establish an engagement of the kind referred to in the proviso to section 1 of the Act. Thus, where land in the possession of an owner is classified as wet and wet assessment is levied from him, it is taken that the wet assessment itself includes all payment due to Government for the use of the water required to irrigate the land, and this constitutes an engagement which would exempt the owner from the further payment of any cess under Act VII of 1865.

There can be no doubt that, when for some consideration or other, or it may be without consideration, grant is made by the Government of a particular quantity of water or a certain definite fraction of the water of a tank to a person, irrespective of the use he might make of it, the proper presumption is that it is a free grant without claim to any kind of payment for the water. This was the principle adopted in *Maria Susai Mulaliar v. Secretary of State for India in Council* (1). In *Secretary of State for India v. Swami Nautheswarar* (2), the learned Judges who decided the

(1) 14 M. L. J. 350.

(2) 6 Ind. Cas. 199; 34 M. 21; 7 M. L. T. 407; 20 M. L. J. 766; (1910) M. W. N. 495.

case held that a grant of water by Government must be taken to mean a grant without any claim for future payment for the water granted. Mr. Govindaraghava Aiyar urges that the actual decision in the last case is in his favour. But this argument cannot be accepted. There it was held that, when a portion of a *taruwa* belonging to a proprietor received water from a Government source, the mere fact that he was entitled to all the water that flowed to his portion of the *taruwa* after it reached it without obstruction by any one would not entitle him to exemption from the payment of cess for the water which was found to have been derived from a Government source. There was no grant of the water which flowed into his portion of the *taruwa*. His right was merely to the free flow of water to the *taruwa* without obstruction. It must, therefore, be held that the plaintiffs' right to a fourth of the water established in the previous litigation entitles the plaintiffs to exemption from payment of water-cess. The decree of the District Judge must be reversed and that of the District Munsif restored with costs here and in the lower Appellate Court. The Government will make the payment directed under this decree within four months from this date. Second Appeals Nos. 507 and 538 follow. The memoranda of objections are dismissed.

SADASIYA AIYAR, J.—From a perusal of the order of remand, I am of opinion that it was assumed on that occasion that, if the judgment in Original Suit No. 211 of 1894 decided that the plaintiffs were entitled absolutely to the use of a fourth of the water of the plaint tank of Anumakonda, it carried with it an exemption from liability to pay any water-cess to Government for the use of that water. The order contains the following sentences: "If the effect of that judgment" (*i.e.*, the judgment in Original Suit No. 211 of 1894) "be that the plaintiffs were absolutely entitled to the use of a fourth of the water of the tank, irrespective of the use they made of it, is possible that that judgment may make the question, raised in the present suit, of the plaintiff's absolute right to one-fourth of the water *res judicata*. We do not wish to decide this matter now, as no issue was framed on the question apparently because the plaintiffs

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did not put forward that judgment as constituting the matter in dispute here *res judicata*. We think it desirable that an issue should be framed to try the question. We accordingly frame the following issue :— 'Is the question of the plaintiff's *absolute right* to one-fourth of the water of the Anumakonda tank *without liability to pay any water-cess* *res judicata* in consequence of the judgment of the District Munsif's Court of Kavali in Original Suit No. 211 of 1894 and of the Subordinate Judge's Court of Nellore in Appeal Suit No. 171 of 1896 (Exhibits C, Q and E).'" I am, holding the above view as to what we intended in the order of remand, inclined to hold that Mr. Govindaraghava Aiyar is not entitled to argue that, even if the former judgment established the absolute right of the plaintiffs to the ownership of a fourth of the water, it did not also establish any right to exemption from liability to pay water-cess for that one-fourth of the water. Assuming, however, that he is entitled to argue that question, my mind is clear that the Government is not entitled to charge water-cess for the use of the water which does not belong to it. Mr. Govindaraghava Aiyar, however, with his usual subtlety of argument, contended that the decision in *Secretary of State for India v. Swami Nautheswarar* (2) and the words of section 1 of Act VII of 1865 gave the Government the right to charge water-cess even for the use of the water which belongs to the plaintiffs. I do not mean to deny that the Government by Act VII of 1865 in its amended form took the power to charge water-cess in some instances for water which, according to the ordinary principles of jurisprudence, might be held to belong to a landowner or *ryot*, provided it had belonged to the Government and it became the landowner's water only through a technical rule of law. When water of one land percolates or overflows into another land, the water so collected becomes (according to the technical rules of law) the property of the owner of the land into which it has so percolated or over which it has flowed. The Government thought that, when their water so percolated or overflowed, it was hard upon Government to lose the right to tax the use of such water, simply because they were unable owing to natural difficulties to retain their water or regulate the distribution of their water as

they wished. It was considered that, as the ownership in such water had passed to the *ryot* or landholder (into whose land the water had percolated) through no fault of Government, it was inequitable to deprive Government of the right to collect the cess for the use of such water by the lucky man into whose land it had gone. But to extend this extraordinary power of taxing another man's water to cases where the water admittedly belongs to the landowner, *not on account of its having been Government water which percolated or overflowed against the will of the Government into the land of the ryot*, but belongs to him absolutely by grant, or agreement or engagement (express or implied) is not only patently inequitable but, I think, is against the clear intention of the Legislature and of the Government; and I do not think that the words of the Act constrain us to hold that the Government is entitled to levy such an inequitable assessment.

As regards *Secretary of State for India v. Swami Nautheswarar* (2), I find after looking through the printed papers that in that case the water of the *taruvai* (swampish water spread) which was in question, was not intended for irrigation purposes at all. The sheet of water in that case was formed of drainage surplus waters and the right of fishery in that tank belonged in the proportion of three-fifths and two-fifths to the Government and the landholder respectively. In such a case, the water belonged to Government, as the whole of it first flowed over the three-fifths area belonging to the Government and only then passed on to the landholder's two-fifths area and even though a portion of the water afterwards so spread over the two-fifths of the area which belonged to the *inamdar* and would have become his property according to the ordinary principles of jurisprudence, the right of the Government to levy a cess for the use of that water which came upon the *inamdar's* land after passing through Government land was preserved or rather created by the Statute; and it was held that that right could not be taken away by the mere fact that Government water (consisting of extraordinary flood water flowing through a Government channel) had so afterwards come upon the land of the *inamdar* or landholder or become mixed up with the

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water that belonged to him. Without questioning the correctness of the decision in *Secretary of State for India v. Swami Nahteswarar* (2), I must say that I am not prepared to go one inch beyond the rule laid down in that case, as I am of opinion that it is impossible to give a wider right to Government on the most favourable construction which can be placed on the words of the Act in favour of the Government.

In the present case one-fourth of the water of the tank absolutely belongs to the landholder by reason of the finding in the former suit and such one-fourth share is not proved to have ever belonged to Government, and I, therefore, hold that water could not be taxed under the provisions of Act VII of 1865 unless it had belonged to Government and had ceased to belong to it owing to its having percolated or overflowed into the land of the landholder. In other words, the water must have been the water of the Government before it ceased to be such through the percolation or overflowing or through its discharge into the landholder's land or tank, etc. I, therefore, agree with the decree that is proposed to be passed by my learned brother.

Second Appeals Nos. 537 and 538 follow. The memoranda of objections are dismissed.

Appeals allowed.

PUNJAB CHIEF COURT.

CIVIL REVISION PETITION No. 1 of 1914.

June 22, 1915.

Present:—Mr. Justice Leslie-Jones.

SHER KHAN AND OTHERS—DEFENDANTS —
PETITIONERS

versus

GOKAL CHAND—PLAINTIFF—RESPONDENT.

Provincial Small Cause Courts Act (IX of 1887), s. 25—Revision—Limitation—Wrong decision—Limitation Act (IX of 1903), Sch. I, Art. 68—Punjab Loans Limitation Act (I of 1904).

The defendants executed an agreement in which they acknowledged the receipt of an advance to deliver certain goods within a fixed period and further agreed that on a breach of their contract they would pay damages to the plaintiff and return the amount paid in advance to the plaintiff. The plaintiff sued and it was pleaded that his suit was barred by limitation. The agreement contained a clause to the effect that if any delivery were made the fact

should be entered on the agreement itself or separate receipt be obtained. No such entry was made and no receipt was obtained and the evidence produced by the defendants as to delivery was found to be worthless. The Small Causes Court decreed the claim holding on the point of limitation that Article 68 of the Limitation Act read with Act I of 1904 applied.

Held, that the decision as to the question of limitation was wrong, but that as it appeared that substantial justice had been done by the decree of the Small Cause Court, there was no ground for interference. [p. 428, col. 2; p. 429, col. 1.]

Petition, under section 25 of Act IX of 1887, for revision of the decree of the Judge, Small Cause Court, Lahore, dated the 20th day of November 1913, decreeing the claim.

Mirza Asghar Beg, for the Petitioners.

Mr. Nand Lal, for the Respondent.

JUDGMENT.—On 17th March 1908, the defendants executed an agreement in which they acknowledged the receipt of an advance of Rs. 97 and agreed to deliver five maunds of rope to the plaintiff within 20 days at the rate of Rs. 20 per maund. They further agreed that on a breach of their contract they would pay damages at the rate of Rs. 3 per maund; that the plaintiff could recover the amount of his advance and damages from their persons and property, and also that they would be liable under Act XIII of 1859.

In July 1913 the plaintiff laid a complaint, which failed, under Act XIII of 1859. He then instituted the present suit on 4th October 1913 in the Small Cause Court for the recovery of Rs. 112 and has obtained a decree. The defendants have filed an application for revision. The Judge of the Small Cause Court held that the agreement was a bond subject to a condition and it was, therefore, within time under Article 68 of the Limitation Act read with Act I of 1904. There is, I think, no doubt that this decision was wrong. The agreement which was for the performance of a specified act and in the event of non-performance to pay a sum of money by way of damages, does not amount to a bond and does not come within the provisions of Article 68, cf. *Seth Eduljee Byramji v. Arjan Das* (1); *Gisborne & Co. v. Subal Bowri* (2).

Conceding, however, that there has been an erroneous decision on the point of limitation, it has been held in *Ghasita*

(1) 22 P. R. 1883.

(2) 8 C. 294 at p. 286; 10 C. L. R. 219.

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v. *Sultan* (3) that the Chief Court will not in the exercise of its discretionary powers of revision under section 25 of the Provincial Small Cause Courts Act interfere, where the judgment of the lower Court does substantial justice between the parties. In this case it appears to me that substantial justice has been done. The defence was that the rope had been delivered, but the agreement contains a clause to the effect that if any delivery were made the fact should be entered on the agreement itself or a separate receipt be obtained. No such entry was made and no receipt was obtained. The evidence produced by the defendants as to the delivery of the rope is clearly worthless. I accordingly reject the petition with costs.

Appeal rejected.

(3) 11 Ind. Cas. 445; 93 P. R. 1911; 228 P. L. R. 1911; 151 P. W. R. 1911.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL NO. 802 OF 1912.

September 26, 1913.

Present:—Mr. Justice Sadasiva Aiyar and
Mr. Justice Spencer.

K. J. V. V. VENKATAPATHI NAYANIVARU—PLAINTIFF—APPELLANT

versus

MAHOMED SAHIB AND OTHERS—

DEFENDANTS—RESPONDENTS.

Practice—Munsif having tried a suit in part made Sub-Judge—Successor, decree passed by, in that suit—Appeal to former Munsif—Decision, if valid—Principles—Appellate Court, power, of to set aside lower Court's judgment—Mere bias or prejudice of Judge, effect of—Remedy.

A Munsif was promoted as a Subordinate Judge and his successor finished the remaining portion of a trial begun by him and delivered judgment. An appeal preferred against the decision in that case came before the former Munsif who was Subordinate Judge. He heard the appeal without any objection on the part of the parties and decided the appeal:

Held, that the decision of the appeal was not invalid inasmuch as there was no statutory disqualification for a Judge to hear an appeal in a case in which he himself did not pass the order or decree appealed against though he might have partly tried the suit or proceeding in which the order or decree was afterwards passed by another Judge. [p. 431, col. 2.]

Where there is no Statutory or Common Law disqualification in the Judge of a Court an Appellate Court should not set aside the judgment of that Court on the mere ground that it might have been swayed by bias or prejudice. [p. 431, col. 2.]

Semble.—Mere bias or prejudice on the part of a Judge does not disqualify him in the absence of a statutory provision. [p. 431, col. 1.]

The appropriate course in such cases is for the party to apply to the proper superior Court to have the case transferred to another Court. [p. 431, col. 2.]

Second appeal against the decree of the Subordinate Judge of North Arcot, in Appeal No. 158 of 1911, preferred against that of the District Munsif of Vellore, in Original Suit No. 350 of 1909.

Mr. *Narayanamurthi*, for the Appellant.

Mr. *Muhammad Ibrahim Sahib*, for the Respondents.

JUDGMENT.—In this case the legal point we have to decide arises on the following facts. The District Munsif handed over charge to a successor without completing the trial of the suit, having been promoted as a Subordinate Judge. His successor finished the remaining portion of the trial, heard arguments and delivered judgment. Against the said decision there was an appeal and the former Munsif, who was promoted as Subordinate Judge, heard the appeal without any objection on the part of the appellant or respondent and decided the appeal confirming the judgment of his successor.

On second appeal the only ground which was seriously argued was that the Subordinate Judge was disqualified to hear and dispose of the appeal because he had, as Munsif, taken cognizance of the suit and had presided over its trial, though he had not heard the arguments or decided the case finally. Two other grounds Nos. 4 and 6 were feebly argued, but there is nothing in them as the slight mistake, probably a clerical mistake, as to the year of the alleged gift to the defendants is unimportant and no affidavit was filed in support of the sixth ground. We think that the legal contention is not valid. No case directly in point decided by any Indian High Court has been cited before us to support the appellant's contention. Section 17 of the Madras Civil Courts Act says: "No District Judge, Subordinate Judge, or District Munsif shall try any suit to or in which he is a party or personally in-

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terested, or shall adjudicate upon any proceeding connected with, or arising out of such suit.

"No District Judge or Subordinate Judge shall try any appeal *against a decree or order passed by himself in another capacity.*"

As regards the first sentence quoted above, even without this statutory provision a Judicial Officer is, under the Common Law, disqualified from trying a suit to or in which he is a party or personally interested. It is, however, not clear that under such general principles, the disqualification is absolute. The interest which disqualifies a Judge must be pecuniary interest or one which involves some individual right or privilege or it must be an interest arising out of the near relationship of the Judge to a party to the cause. It has been held in numerous cases in the American Courts that in the absence of a Statute positively prohibiting a Judge from exercising jurisdiction over a cause to try which he is disqualified not by having had a pecuniary interest or by having been a party to or Counsel in the suit, but on account of some other cause such as bias or prejudice or relationship to a party, or by having presided over a former trial in the same suit, the general rule is that his decision in such a suit is only voidable and not void. That the interest must be a direct pecuniary interest or interest as a real party to the suit or interest by near relationship to a substantial party to the suit, has been held in several cases. Simply because a legal question is involved in a suit which might affect the Judge's pecuniary interest in connection with some other matter, the Judge is not disqualified. If he was merely a nominal party to a suit it has been held in some American cases that he is not disqualified from trying that suit, though section 17 of the Civil Courts Act does not make any such distinction between the Judge being a nominal party or a really interested party. Mere bias or prejudice on the part of a Judge does not disqualify him in the absence of statutory provision. Even as regards relationship to a party to the cause a Judge was not under the common law disqualified by such relationship and it is only by Statute Law such a disqualification by reason of near

relationship could be imposed upon a Judge (see on this question of disqualification of Judges, *Cyclopædia of Law and Procedure*, Volume 23, pages 575 to 601).

We shall now consider the disqualification of a Judge to sit in an Appellate Court over his own decision. Under the Common Law, there is no disqualification imposed on a Judge to sit in his own Court in review of his own decision (it is so under the Statute Law also) or even to review it on appeal in the Appellate Court, if he becomes an Appellate Judge having appellate jurisdiction over the Tribunal in which he decided the cause as original Judge (see page 588 clause H, *Cyclopædia of Law and Procedure*). Section 17 of the Civil Courts Act, however, does introduce such a statutory disqualification as regards District and Subordinate Judges, but it is confined to the case where the appeal to be heard in the Appellate Court is *against the decree or order* passed by the District Judge or Subordinate Judge in another capacity. There is no such statutory disqualification where he has not himself passed the order or decree appealed against, though he might have partly tried the suit or proceeding in which the order or decree was afterwards passed by another Judge.

Where there is no Statutory or Common Law disqualification in the Judge of the Court below, an Appellate Court should not set aside the judgment of the lower Court on the mere ground that it might have been swayed by bias or prejudice. In other words, unless it is proved that circumstances existed which raised a reasonable presumption that the Judge of the lower Court was biassed, the Appellate Court should not interfere. Even in such a case unless objection was taken before the Judge of the lower Court itself at or during the trial of the cause to his hearing the suit or appeal (as the right to rely on the disqualification of a Judge by Common Law may be waived by consent in many cases), the Appellate Court should not interfere except in a strong or clear case of failure of justice in the lower Court through such bias or prejudice.

The appropriate course in such cases was for the party to have applied to the proper superior Court to have the case transferred

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to another Court. The unsuccessful litigant in the lower Court who took his chance should not be allowed to take the objection for the first time in appeal.

In Halsbury's Laws of England, Volume 19, at page 552, it is said:—"If, however, the fact that a Justice is interested in the subject-matter of a case is known to the parties, and objection to his acting is waived, the proceedings are not rendered void; and where the objection is thus waived at the hearing, it cannot afterwards be raised."

If this is so in the case of personal or pecuniary interest in the Judge, it must be much more so where the alleged disqualification is based merely on a probable bias in the Judge.

In the result the second appeal must be dismissed with costs.

Appeal dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 2109 OF 1912.

August 6, 1913.

Present:—Mr. Justice Ayling and Mr. Justice Sadasiva Aiyar.

GOVINDAN NAIR AND OTHERS—

DEFENDANTS—APPELLANTS

versus

CHERAL *alias* KRISHNA PANDUVAL AND

OTHERS—PLAINTIFF AND OTHERS—DEFENDANTS

—RESPONDENTS.

Interest Act (XXXII of 1839), s. 1—Debt certain—Debt expressed in measures of grain payable at specified time—Interest, if allowed.

A debt which is expressly expressed in measures of grain and payable at a specified time should be regarded as a debt certain within the meaning of section 1 of Act XXXII of 1839 although the commutation rate at the time of payment or suit may have to be determined.

Second appeal against the decree of the Subordinate Judge of South Malabar at Calicut, in Appeals Nos. 302 and 317 of 1911, preferred against that of the District Munsif of Manjeri, in Original Suit No. 584 of 1909.

Mr. C. V. Anantakrishna Aiyar, for the Appellants.

Mr. T. R. Ramachandra Aiyar, for the 1st Respondent.

JUDGMENT.—In our opinion, the Subordinate Judge's findings of fact as to the plaintiff's right to redeem cannot be said not to be based on evidence and must be accepted.

The appellants' Vakil argues, relying on *Narayan Ramchandra Bhatta v. Manager Nagappa* (1), that the award of interest on a debt payable in kind is not authorised by Act XXXII of 1839. With great respect to the opinion of the learned Judges who were parties to the decision above quoted, we are unable to agree with their view.

We fail to see why a debt which is specifically expressed in measures of grain and payable at a specified time should not be regarded as a debt certain (assuming the latter adjective in section 1 of the Act to qualify the word "debt" as well as "sum") merely because the commutation rate at the time of payment or suit may have to be subsequently determined. We do not find anything in the other case quoted by the appellants' Vakil, *Juggomohun Ghose v. Manickchund* (2) to conflict with this view. In our opinion the award of interest on the *porappad* in the present case was justified.

The rate of interest is, however, very high (20 per cent.) and it runs for a period of 40 years and more. Accepting the finding of the Subordinate Judge that this is the usual rate in Malabar, the Act authorises the award of interest at a rate "not exceeding the current rate" and we consider that, in the present case, the Court would have exercised its discretion wisely in reducing the rate to 6 per cent. The decree will be amended accordingly.

We see no reason why the interest awarded should not be set off against the sums due for *kanom* amount and improvements.

The appellants will pay half the respondent's costs in this Court. The time for redemption is extended to six months from this date.

The Subordinate Judge's decree with the modification above directed is confirmed.

Decree modified.

(1) 8 Ind. Cas. 411; 12 Bom. L. R. 831.

(2) 7 M. I. A. 263; 4 W. R. (P. C.) 8; 1 Sath. P. C. J. 257; 1 Sar. P. C. J. 681; 19 E. R. 308.

RAGHUBAR C. EMPEROR.

OUDH JUDICIAL COMMISSIONER'S
 COURT.

CRIMINAL REVISION No. 21 OF 1915.

March 10, 1915.

Present:—Mr. Kanhaiya Lal, A. J. C.

RAGHUBAR—ACCUSED—APPLICANT

versus

EMPEROR THROUGH Musammât KAILASA,

COMPLAINANT—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 488, 490—Maintenance—Jurisdiction of Civil and Criminal Courts—Illegitimate child—Decree of Civil Court on question of marital or filial relationship supersedes Magistrate's previous maintenance order—High Court, revisionary power of—Revision, power exercisable in.

A Magistrate's jurisdiction to settle maintenance under section 488, Criminal Procedure Code, is only auxiliary to that of the Civil Courts. [p. 433, col. 2.]

Therefore, a Civil Court decree declaring that A is not an illegitimate child of B supersedes a Magistrate's previous order for A's maintenance and the Magistrate is justified under section 490, Criminal Procedure Code, in refusing to enforce the Criminal Court order after the Civil Court decree is passed. And a High Court can set aside in revision the previous Criminal Court order in view of the subsequent Civil Court decree. [p. 434, col. 1.]

Ghana Kanta Mohanta v. Gerehli, 2 Ind. Cas. 550; 13 C. W. N. 150; 32 C. 479; *Deraje Malinga Naika v. Marati Kaveri*, 30 M. 400; 2 M. L. T. 344; 7 Cr. L. J. 233; *Nawab Zulfikar Khan v. Musammât Zainab Begam*, 3 Cr. L. J. 229; 9 O. C. 49; *Nur Muhammad v. Ayesha Bibi*, A. W. N. (1905) 54; 2 A. L. J. 160; 27 A. 483; 2 Cr. L. J. 104; *Balakidas, In re*, 23 B. 484; *Mahomed Abid Ali Kumar Kadar v. Ludden Sahiba*, 14 C. 276 and *Emperor v. Musammât Jodi*, 25 Ind. Cas. 846; 15 Cr. L. J. 646; 17 O. C. 260, referred to.

Application against the order of the Sessions Judge, Lucknow, dated the 2nd January 1915, upholding that of the Deputy Magistrate, Bara Banki, dated the 24th October 1914.

Babu Rajeshwari Prasad, for the Applicant.

Mr. E. Manuel, for the Complainant.

JUDGMENT.—In this case Musammât Kailasa obtained an order against the applicant, Raghubar, for the maintenance of an illegitimate child. The applicant subsequently filed a suit in the Civil Court for a declaration that he was not the father of the child, and obtained a decree which was confirmed by this Court on the 8th July 1914.* The present proceeding has arisen out of an application by Musammât Kailasa to enforce the original order for maintenancee dated the 11th May 1912. The Courts below held that the decree of the Civil Court did not

affect the order of the Magistrate or entitle Raghubar to demand that the Magistrate should refuse to enforce his previous order. Section 488, clause (5), and section 489 of the Code of Criminal Procedure provide for cases where subsequent events alter the situation of affairs, rendering a revocation or modification of the original order necessary. Section 490 empowers a Magistrate to consider any objections that may be raised to the enforcement of an order and declares that no such order shall be enforced unless the Magistrate is satisfied as to the identity of the parties and the non-payment of the allowance due. The grounds on which an enforcement might be refused are not therein stated, and the question is whether the cessation of the conjugal relationship by reason of a subsequent divorce or the decision of a competent Court on the question of marital or filial relationship in question can justify a refusal. The jurisdiction conferred on a Magistrate to settle the maintenance is, as pointed out in *Ghana Kanta Mohanta v. Gerehli* (1) and *Deraje Malinga Naika v. Marati Kaveri* (2), only auxiliary to that possessed by the Civil Courts, and a Magistrate ought to take the judgment of a competent Civil Court into consideration, if it settles the question of relationship and finally places the matter out of the pale of discussion. In *Nawab Zulfikar Khan v. Musammât Zainab Begam* (3), Chamier, A. J. C., in dealing with a case in which a party against whom an order for maintenance was passed under section 488 of the Code of Criminal Procedure obtained a decree from the Civil Court that the person who had obtained the order was not his wife, observed: "Courts exercising jurisdiction under section 488 of the Code of Criminal Procedure must often decide questions of marriage, divorce, paternity and so forth, but their decisions are not binding upon the parties in other litigation in Civil Courts; they are merely incidental to the main object of the proceedings, namely, the grant or refusal of an order for maintenance. On the other hand if a competent Civil Court

*The case is reported in 26 Ind. Cas. 526; 17 O. C. 331; 1 O. L. J. 175.—*Ed.*

(1) 2 Ind. Cas. 550; 32 C. 479; 13 C. W. N. 150.

(2) 30 M. 400; 2 M. L. T. 344; 7 Cr. L. 235.

(3) 9 O. C. 49; 3 Cr. L. J. 229.

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has decided that *A* is not and never has been the wife of *B*, then a Magistrate cannot in proceedings under section 488 hold that *A* is the wife of *B* and order *B* to maintain her. If the principle on which the High Courts have acted in holding that in proceedings under section 490, Magistrates must attend to a divorce effected after the order for maintenance; is correct, as I think it is, it seems to follow that Magistrates must in such proceedings attend to a decree such as was obtained by Zulfiqar Khan in the present case." Scott, J. C., concurred in that view. In *Nur Muhammad v. Ayesha Bibi* (4) and *Bulakidas In re* (5), a decree of a Civil Court was held to supersede any previous order of a Magistrate for maintenance, and in *Mahomed Abid Ali Kumar Kadar v. Ludden Sahiba* (6) and *Emperor v. Musar-mat Jadi* (7) a subsequent divorce of his wife by the husband was held to produce a similar effect. Section 490 replaced the word "shall" used in the corresponding section of Act X of 1882 by the word "may", and the object of the Legislature in making the above alteration obviously was to enable the Magistrate to consider any reasons that may be urged against the enforcement of the order than those for which separate provision is made by section 488, clause (5), and section 489 of the Code. It is open, moreover, to this Court to set aside in revision the order for maintenance passed on the 11th May 1912 in view of the decree of the Civil Court above referred to.

The application is, therefore, allowed and the order fixing maintenance above referred to will be treated as discharged.

Application accepted.

(4) 27 A. 483; A. W. N. (1905) 54; 2 A. L. J. 160; 2 Cr. L. J. 104.

(5) 23 B. 484.

(6) 14 C. 276.

(7) 25 Ind. Cas. 846; 15 Cr. L. J. 646; 17 O. C. 260.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 353 OF 1915.

CASE REFERRED No. 37 OF 1915.

July 30, 1915.

*Present:—*Mr. Justice Seshagiri Aiyar.

In re RAMASAMY GOUNDEN—

ACCUSED.

Penal Code (Act XLV of 1860), s. 228—Interruption to Court, what acts constitute—Mere noise, if sufficient—Actions, when to be taken.

An audible remark by a person is not intentionally offering interruption to the Court so as to constitute an offence under section 228 of the Penal Code.

Action should be taken by Court under section 228 of the Penal Code only in exceptional cases as the Court in such cases is both a prosecutor and a Judge.

Case referred for the orders of the High Court, under section 438 of the Criminal Procedure Code, by the District Magistrate of Coimbatore, in his letter, dated the 7th June 1915, (Criminal Revision Case No. 17 of 1915).

Mr. P. R. Grant, for the Government.

ORDER.—I am wholly unable to understand how on the facts stated by the Magistrate any offence was committed under section 228, Indian Penal Code. The Magistrate says that the proceedings in his Court were interrupted by the audible remark made by the accused. That is not enough to convict the accused. The Court has to be satisfied that the accused intentionally offered interruption to the Court. There are no materials on which a Magistrate could have come to the conclusion that the accused intended to insult him, or to interrupt his proceedings. Courts who take action under section 228 ought not to give room for the belief that they are unduly sensitive about their dignity. In cases coming under the section, the Court is both prosecutor and Judge; and it is, therefore, necessary to see that the powers are used only in exceptional cases. This is not the first instance in which the Magistrate took action under this section. Constant proceedings of this character will have a tendency to interfere with the proper administration of justice, as they would put the parties in fear of a possible summary punishment for acts which may be innocently committed. I set aside the conviction and direct the fine to be refunded.

Conviction set aside.

In re MUTHURAKKA THEVAN.

MADRAS HIGH COURT.
CRIMINAL REVISION CASE No. 330 OF 1915.
CASE REFERRED No. 30 OF 1915.
July 27, 1915.

Present:—Mr. Justice Spencer.

In re MUTHURAKKA THEVAN AND

OTHERS—ACCUSED.

Penal Code (Act XLV of 1860), ss. 75, 392—Conviction under sections 75, 392, whether for distinct offences—Separate sentences for each offence, if legal—Criminal Procedure Code (Act V of 1898), ss. 35, 106, applicability of.

A person convicted under sections 392 and 75 of the Penal Code is not convicted of distinct offences within the meaning of section 35 of the Code of Criminal Procedure.

Section 106 of the Code of Criminal Procedure applies only when a person is convicted of an offence involving a breach of the peace.

Case referred for the orders of the High Court, under section 438 of the Criminal Procedure Code, by the District Magistrate of Tinnevely, in his letter, dated the 20th May 1915, R. O. C. No. 597, Magisterial.

ORDER.—The Joint Magistrate, Sermadevi, sentenced the third accused to 18 months' rigorous imprisonment for the offence of robbery (section 392, Indian Penal Code) and to six months' additional rigorous imprisonment under section 75 as he was an old offender. This was not a legal sentence. A person convicted under sections 392 and 75 of the Penal Code is not convicted of distinct offences within the meaning of section 35 of the Code of Criminal Procedure.

The two sentences passed by the Magistrate are hereby quashed, and in lieu of them, I direct that the third accused be rigorously imprisoned for a period of two years on a single sentence under section 392 and 75, Indian Penal Code.

The Magistrate further directed all the three accused to execute a bond to keep the peace for two years and on their failing to find security he referred the matter under section 123 (2) of the Code of Criminal Procedure for the orders of the Sessions Court.

The provisions of section 106, Code of Criminal Procedure, are not applicable to the circumstances of this case, as they related to cases in which persons are accused and convicted of offences involving a breach of the peace. As it appears from the District Magistrate's report that the Sessions Judge has passed no orders upon

In re KRUSHNO KARIKO.

the reference and as the reference was not legally made, the order requiring the accused to give security is hereby set aside.

Order set aside; Sentence modified.

MADRAS HIGH COURT.
CRIMINAL APPEAL No. 235 OF 1914
REFERRED TRIAL No. 20 OF 1914,
July 27, 1914.

Present:—Mr. Justice Ayling and
Mr. Justice Tyabji.

In re KRUSHNO KARIKO—PRISONER.

Penal Code (Act XLV of 1860), ss. 299, 300—Charge of murder—Provocation—Insufficient—Reduction of sentence—Statement of accused pleading guilty, value of.

A provocation though insufficient to bring a charge of murder within the exception to section 300 may yet be sufficient for the reduction of the sentence.

A statement of an accused pleading guilty if probable and consistent should be given weight to and acted on in preference to the prosecution evidence.

Trial referred by the Court of the Additional Agency Sessions Judge, Ganjam, for confirmation of the sentence of death upon the said prisoner in Case No. 4 of the Calendar for 1914.

JUDGMENT.—Appellant pleaded guilty to the charge of murder in the Sessions Court; and we cannot accept his story put forward for the first time in his appeal petition to the effect that death was caused accidentally. The offence undoubtedly amounts to murder.

The only question is that of sentence. The Additional Agency Sessions Judge has not discussed it or given any reasons, but has imposed a sentence of death. Appellant undoubtedly suffered some provocation before the offence and it has to be considered whether this provocation, though insufficient to come under exception to section 300, Indian Penal Code, would justify the remission of the death sentence.

The prosecution evidence, as recorded by the Committing Magistrate, affords such an altogether inadequate motive for the crime, that we cannot believe it represents all that took place. Accused's version as contained in Exhibit A is much more probable, and seems to have been given to the Inspector at an early stage of the inquiry. In our opinion it probably represents the real sequence of events: and if this be so, we do not think

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the case is one which, looking to the primitive nature of the parties, calls for a death sentence.

We confirm the conviction, but reduce the sentence to transportation for life.

Conviction affirmed; Sentence reduced.

PUNJAB CHIEF COURT.

CRIMINAL APPEAL No. 757 OF 1913.

May 18, 1914.

Present:—Mr. Justice Shah Din and
Mr. Justice Scott-Smith.

GHANWARA *alias* GAUHAR—CONVICT—
APPELLANT

versus

EMPEROR—PROSECUTOR—RESPONDENT.

Confession, retracted—Identification of dead body on articles of clothing—Criminal Procedure Code (Act V of 1898), s. 288—Transfer of statements, value of.

A confession made by an accused before the Committing Magistrate, which he retracts both before and after commitment, is of no value as a piece of evidence against him. [p. 437, col. 1.]

A conviction cannot be based upon statements of witnesses transferred to the record of the Sessions Court under section 288, Criminal Procedure Code, 1898, when they came forward after the accused confessed and gave only circumstantial evidence insufficient to connect the accused with the commission of the crime. [p. 437, col. 2.]

It is not safe to rely upon the articles of clothing when the body itself is not identifiable on account of being in an advanced stage of decomposition. [p. 437, col. 2.]

Appeal from the order of the Sessions Judge, Multan Division, dated the 25th August 1913, convicting the appellant.

Mr. Ganpat Rai, for the Appellant.

Mr. C. Bevan Felman, for the Respondent.

JUDGMENT.—The appellant, Gauhar or Ghanwara, an Awan of Mauza Thalli, Tahsil Lodhran, has been convicted by the Sessions Judge, Multan, of having murdered his wife, Musammât Karim Khatun, sometime in the month of May 1913, and has been sentenced to transportation for life.

There are no eye-witnesses of the alleged murder; and the conviction of the appellant is based upon his confession before the Committing Magistrate on the 28th June and upon circumstantial evidence. On the 2nd June 1913 one Chimna (P. W. No. 13) saw the body of a woman tied up in a cloth floating down the Rajapur Minor, and he reported the matter to the *lambardar* of Mauza Thatta

close by. The *chaukidar* of the village went and made a report at Thana Lodhran; and the Sub-Inspector Mohan Singh (P. W. No. 15) went to the spot and had the body taken out of the canal. On the corpse were found four articles of clothing viz., *ghagra*, *chunni*, *cholar* and *bhochan* (Exhibits P1 to P4). The dead body was sent to the Civil Surgeon for *post mortem* examination: the examination was held on the 4th June, but owing to decomposition being far advanced it was impossible to discover the cause of death. The flesh from the face having been eaten away the body was not in an identifiable condition.

The Police sent intimation to neighbouring villages of the discovery of the dead body from the canal, but for some time no clue to the identity of the deceased was discovered. On the 21st June, Nur Muhammad, *lambadar* of Mouza Thalli, (P. W. No. 7) went to Thana Karor in company with Musammât Siani (P. W. No. 2), Ghazi (P. W. No. 6) and the appellant, Gauhar, and there reported that Musammât Karim Khatun, wife of Gauhar, had been missing for some time, and that Gauhar on being questioned about her disappearance could not give a satisfactory explanation. Musammât Siani, mother of Musammât Karim Khatun and mother-in-law of Gauhar, appellant, had her suspicions aroused against the appellant, and it was she who had reported the matter to Nur Muhammad, *lambardar*, who in his turn had taken Musammât Siani and appellant and his maternal uncle, Ghazi, to Thana Karor. The Sub-Inspector of Thana Karor sent for the clothes that had been found on the corpse (Exhibits P1 to P4) from Thana Lodhran. These were shown to Musammât Siani, and she is said to have identified them as those of her daughter, Musammât Karim Khatun.

The Police investigation was completed on the 27th June, and the case was *challaned* on the same date. On the 28th the Committing Magistrate, Sardar Arjan Das, took down the evidence of two witnesses for the prosecution, Musammât Siani and Nur Muhammad, *lambardar*; and thereafter he recorded the statement of the appellant. In answer to the Magistrate's question, "Did you kill the

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deceased?" the appellant made a detailed statement in the course of which he said that he had strangled his wife as she was bad character and thereafter he had thrown the dead body into the Sardarwali canal. After the appellant's statement had been taken down the Magistrate proceeded to record the evidence of *Musammât Walayat*, maternal grandmother of appellant, *Musammât Jannat*, aunt of appellant and, *Ghazi*, uncle of appellant; and the case was then adjourned to the 16th July for the examination of other witnesses. After two further adjournments the case was heard on the 4th and 5th August by Diwan Kanhya Lal, who had meanwhile succeeded Sardar Arjan Das, and on his examining the appellant on the said dates the appellant retracted his confession of 28th June and stated that he had made that confession in consequence of pressure from the Police. In the Court of Session the appellant adhered to his statements of the 4th and 5th August and denied all knowledge of how his wife was killed, if she was killed at all.

As some stress has been laid by the Government Advocate on the confession of the appellant before the Committing Magistrate on the 28th June, we may say at once that we attach no importance whatever to that confession. In our judgment in *Firoze v. Emperor* (1) decided to-day, we have already considered the question whether a confession made by an accused person to a Committing Magistrate under circumstances similar to those of the present case can have any value as a piece of evidence against him. For reasons given in that judgment, we hold that the appellant's confession, dated the 28th June, is even of less value than the confession of the accused in the case cited; and we must accordingly leave this confession out of consideration.

As regards the circumstantial evidence against the appellant reliance has been placed on the statements of *Musammât Walayat* (P. W. No. 4), *Musammât Jannat* (P. W. No. 5) and *Ghazi* (P. W. No. 6), as showing that on the last day that *Musammât Karim Khatun* had dis-

appeared the appellant had come and taken her away from their well, where she was picking berries in the company of *Musammât Walayat* and *Musammât Jannat*; and that five days after that the appellant had returned to the village and said that he had left his wife at her mother's house. The statements of these witnesses which are relied upon by the prosecution were made in the Committing Magistrate's Court after the appellant had made his confession on the 33rd June; but they were all retracted in the Sessions Court; and the Sessions Judge has transferred the previous statements of the three witnesses concerned to his own record under section 288, Criminal Procedure Code. In view of the circumstances connected with the proceedings in the Committing Magistrate's Court, we must hold that the statements in question are of no evidential value at all; and it follows that the so-called circumstantial evidence relied upon by the prosecution must be rejected.

The Assessors were unanimously of opinion that it was not proved that the dead body found in the canal was that of *Musammât Karim Khatun*; and considering that the corpse was not in a recognizable condition and that the alleged identification of it was based simply upon the identification of the four articles of clothing (Exhibits P1 to P4), we are disposed to agree with the Assessors that the identity of the dead body with *Musammât Karim Khatun* has not been satisfactorily proved. But assuming that the body was that of *Musammât Karim Khatun*, we agree with the Assessors that it has not been proved by reliable evidence that the appellant had murdered the woman.

We accordingly accept this appeal and setting aside the appellant's conviction and sentence we acquit him.

Appeal accepted.

(1) Criminal Appeal No. 284 of 1914.

In re SENGODA GOUNDAN.

In re A. SHAKOOR SAIT.

MADRAS HIGH COURT.

CRIMINAL APPEAL No. 223 OF 1915.

July 22, 1915.

Present:—Mr. Justice Ayling and

Mr. Justice Tyabji.

In re SENGODA GOUNDAN AND OTHERS—

PRISONERS—APPELLANTS.

Penal Code (Act XLV of 1860), ss. 299, 302, 304, 395, 396—*Mere stuffing of cloth into mouth of deceased to silence him, if murder.*

Where an accused merely stuffed a cloth into the deceased's mouth in order to silence him and not with any idea of killing him, the offence is not murder but one punishable under section 304, Indian Penal Code.

Appeal against the order of the Court of Session of the Trichinopoly Division, in Case No. 12 of the Calendar for 1915.

Mr. P. R. Grant, for the Government.

JUDGMENT.—We see no reason to doubt the substantial truth of the prosecution story as to the dacoity, the manner in which deceased Karuppa Goundan met his death, or the complicity of appellants.

We do not, however, think that the act of the accused Nos. 1 and 2 amounts to murder. It seems clear that they stuffed a cloth into deceased's mouth in order to silence him, not with any idea of killing him, and the most that can be said is that they must be presumed to have known that they were likely in so doing to cause his death: (*Vide* last clause of section 299, Indian Penal Code). We alter the sections under which appellants have been convicted from sections 302 and 396, Indian Penal Code, to sections 304 and 395, Indian Penal Code. We reduce the sentences on accused Nos. 1 and 2 to seven years' rigorous imprisonment and confirm the sentences on the other appellants.

Conviction altered; Sentence reduced.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 275 OF 1915.

CASE REFERRED No. 21 OF 1915.

July 29, 1915

Present:—Mr. Justice Sadasiva Aiyar.

In re A. SHAKOOR SAIT—

ACCUSED.

Criminal Procedure Code (Act V of 1898), s. 110—*Security for good behaviour, period for—Security for good behaviour for two years, if legal—Magistrate, duty of.*

Security for good behaviour can, at the longest, be demanded for only one year except in very bad cases. Security for two years cannot be demanded, even if the accused is guilty of different offences in different places. [p. 439, col. 1.]

In such cases, a Magistrate should direct detention in prison, and not commit the accused to prison until the orders of the High Court are obtained. [p. 439, col. 1.]

Case referred for the orders of the High Court, under section 123, clause (2), of the Criminal Procedure Code, by the Acting Chief Presidency Magistrate, Egmore, Madras, in his letter, dated the 28th April 1915, (Reference on Calendar Case No. 7746 of 1915.)

FACTS.—Case referred by the Chief Presidency Magistrate. One Shakur Sait of Bangalore had been bound over in Rs. 500 with two sureties for good behaviour for two years, in default to suffer two years' rigorous imprisonment. The accused was unable to furnish the security required, and the sentence came up to the High Court for confirmation. It transpired in the course of the inquiry that the accused had been carrying on a series of frauds connected with the sale of electric rings, alleging that he was the agent of a Bombay firm under the name of Modi and Co., obtained advances from various persons, and then either failed to despatch any electric ring or despatched a smaller number than he had received money for. In one case he received Rs. 60 from a Vakild of the Cochin Chief Court representing that he was related to the Hon'ble Khan Bahadur Haji Ismail Sait, and subsequently he sent to the Vakild a V. P. parcel for Rs. 447, requesting him to take delivery of it, but not to open it until he arrived. The Vakild suspected something wrong and placed the matter in the hands of the Criminal Investigation Department, when the various other frauds came to light. It was also in evidence that the electric rings were utterly useless.

The Crown Prosecutor, for the Government,

In re KOTAIGADU.

ORDER.—I think that the accused need not have been asked to give security for more than one year, which is contemplated by the Legislature as the longest limit to be adopted except in very bad cases.

I, therefore, reduce such period to one year and the period to be mentioned in the consequent order of imprisonment on default to one year.

The error of the Magistrate in committing the accused to prison pending this Court's orders instead of directing his detention in prison is noted. The period for which the accused has already been in prison will be treated as having been spent in prison, though the order of committal passed just now.

Sentence reduced.

MADRAS HIGH COURT.

CRIMINAL APPEALS NOS. 292 AND 306 OF 1915.

July 26, 1915.

Present:—Mr. Justice Ayling and

Mr. Justice Tyabji.

In re KOTAIGADU AND OTHERS—PRISONERS

—APPELLANTS.

Penal Code (Act XLV of 1860), ss. 71, 326, 397—Conviction for dacoity—Conviction also for grievous hurt, if legal—Criminal Procedure Code (Act V of 1898), s. 288—Sessions trial—Statement before Committing Magistrate, when admissible in Sessions trial—Charge to Jury—Misdirection.

In a conviction for the offence of dacoity the grievous hurt should not be made the subject of a separate charge and a separate punishment should not be inflicted for it as provided in section 71 clause (2) of the Penal Code. [p. 439, col. 2.]

Under section 288 of the Code of Criminal Procedure, the statement of a witness before the Committing Magistrate will be evidence at the Sessions trial only when that witness was "produced and examined," that is examined as a witness and not if he is only cross-examined or tendered for cross-examination. [p. 440, col. 1.]

Subba v. Queen-Empress, 9 M. 83; 2 Weir 356, distinguished.

Where in a charge to the Jury it was stated that the knife with which the injury was inflicted was found in the accused's father's house without a further direction that it was not found in the house in which the accused was living and where it was also stated that the knife was covered with mammalian blood without stating at the same time whether it was human or not:

Held, that these were clear misdirections and that the verdict of the Jury based on a charge containing such misdirections was illegal and could not be sustained. [p. 440, col. 2.]

Appeals against the orders of the Court of Session of the North Arcot Division, in Case No. 15 of the Calendar for 1915.

Messrs. *N. Chandrasekhara Aiyar* and *K. R. Subramania Sastri*, for the Prisoners.

Mr. P. R. Grant, for the Government.

JUDGMENT.—The appellants have been convicted of offences under sections 326 and 397, Indian Penal Code. They are said to have waylaid a Revenue Inspector, Prosecution Witness No. 1, and to have wounded and robbed him of his property, causing injuries amounting to grievous hurt. The main offence is, of course, under section 397, Indian Penal Code.

The grievous hurt which constitutes the offence under section 326, is an integral part of the offence under section 397, Indian Penal Code, and need not have been made the subject of a separate charge. The first clause of section 71, Indian Penal Code, precludes the imposition of separate sentences for the two offences and if we were able to uphold the conviction, we should have to consider what reduction should be made in the joint sentences which the Sessions Judge has imposed for the two offences.

We are, however, unable to uphold the conviction. On the one hand, the procedure of the learned Sessions Judge is illegal as regards the evidence of an important witness (Prosecution Witness No. 11) and on the other, his direction to the Jury appears to us to be materially defective and calculated to prejudice the defence.

Prosecution Witness No. 11 is or should be a very important witness. He was a peon in attendance on the Revenue Inspector at the time of the alleged offence, and was himself beaten and driven away. Before the committing Magistrate he gave a deposition supporting the Revenue Inspector as to the commission of the offences but expressing inability to identify his assailants. In the Sessions Court he was simply tendered for cross-examination while at the same time his deposition in the Magistrate's Court was put in and marked as Exhibit J. Admittedly the only section which could be cited to cover, this procedure is section 288 Criminal Procedure Code, and this is inapplicable for the simple reason that the witness was not "produced and examined" as required therein. The same point has been ex.

In re VICTOR D. SOUZA.

haustively dealt with by a Bench of this Court in *Subba v. Queen-Empress* (1) Kernan, Officiating Chief Justice, says: "The provision is *not* that the evidence before the Magistrate may be put in as the evidence of the witness if he is tendered for cross-examination, but it is that such evidence before the Magistrate may be treated as evidence in the case, if the witness is *examined*; that is, examined as a witness, not if he is cross-examined or tendered for cross-examination." The course adopted by the Sessions Judge in that case was taken at the instance of the defence: but the learned Chief Justice proceeds to say that had it not been so (and it is not the case here) he would have felt it his duty, apparently on this ground alone, to set aside the conviction.

In our opinion the Sessions Judge should have caused Prosecution Witness No. 11 to be examined before him under section 286, Criminal Procedure Code; and his admission of Exhibit J was illegal.

As regards the charge to the Jury, we think the learned Sessions Judge has erred in his presentation of the evidence regarding the discovery of the "knife stick", on which he lays stress as corroboration of prosecution 1st witness' evidence (*vide* paragraph 7 of the charge). The Judge says, "you have the second fact that the weapon which, Syfuddin (Prosecution Witness No. 1) says, was used to cause the injuries on his head, was found in the house of the 1st accused's father." The house in which the article was found was not that of the 1st accused but of his father. The 1st accused says he lives, not there, but in the house of his mother-in-law and has adduced some evidence to prove this. If this be so, no inference adverse to the 1st accused can be drawn from the discovery, at any rate, none worthy of consideration. The Sessions Judge has made no reference to this: nor has he directed the attention of the Jury to the common nature of the article or to the extreme difficulty, not to say impossibility, of Prosecution Witness No. 1 being able to identify the weapon used. On the other hand, he has commented on the fact that the weapon was stained with mammalian (not necessarily human) blood; and has instructed

the Jury that it was the duty of the defence to explain how mammalian blood came there. In view of the circumstances alluded to above, we certainly do not think that the defence was under any obligation to adduce evidence on the point: and we think that the Sessions Judge's presentment of this portion of the evidence can hardly have failed to prejudice the appellants.

In contrast to the stress laid on the circumstances, the Sessions Judge has not referred to the failure of the prosecution to trace the dagger (the principal weapon employed) and the property named in Exhibit II; and has not properly left it to the Jury to draw what inference they would from the failure of the prosecution to examine a number of witnesses originally named in the charge-sheet (*vide* paragraph 12 of his charge).

We must set aside the convictions and sentences and direct the re-trial of the appellants. The re-trial will take place before the Sessions Judge of Chingleput.

Conviction and sentence set aside.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 217 OF 1915.

CRIMINAL REVISION PETITION No. 174
OF 1915.

July 30, 1915.

Present:—Mr. Justice Ayling and
Mr. Justice Tyabji.

In re VICTOR D. SOUZA—PETITIONER.

Criminal Procedure Code (Act V of 1898), ss. 454 (2), 534—Omission to ask accused if he is an European British subject—Revision.

An omission to ask an accused whether he is an European British subject, is merely an irregularity and is not a sufficient ground for interference in revision. [p. 444, col. 1.]

Petition, under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Sessions Court of Madura, in Criminal Appeal No. 3 of 1915, preferred against that of the Court of the Sub-Divisional first Class Magistrate of Madura Division, in Calendar Case No. 90 of 1914.

The Hon'ble Mr. T. Richmond, for the Petitioner.

(1) 9 M. 83; 2 Weir 356.

ABDUL GANI v. EMPEROR.

ORDER.—The marriage between P. W. No. 2 is sufficiently proved, and is not in dispute. The facts found do not amount in law to connivance. It is argued that accused should have been asked if he were an European British subject under section 454 (2), Criminal Procedure Code, but having regard to section 537, Criminal Procedure Code, this, even if correct, is not a sufficient ground for interference.

No other point is argued.

The petition is dismissed.

Petition dismissed.

CALCUTTA HIGH COURT.

CRIMINAL REVISION PETITION No. 1751
OF 1914.

January 26, 1915.

Present:—Mr. Justice Fletcher and
Mr. Justice Beachcroft.

In the matter of ABDUL GANI—ACCUSED—
PETITIONER

versus

EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), ss. 467, 471—Forged document produced before Registrar for registration, effect of—Document, subsequently found to be forged by Court—Criminal Procedure Code (Act V of 1898), s. 195—Sanction to prosecute.

The accused presented before the Registrar a certain document for registration, the execution of which was denied by the complainant but the Registrar directed it to be registered. Thereafter as the result of a civil suit instituted by the complainant, the document was found by the Court to be a forged one. A complaint was then presented before the Sub-Divisional Officer under sections 467, 471, Indian Penal Code, and process was issued under section 467, Indian Penal Code:

Held, that the Magistrate could proceed under section 471, Indian Penal Code, without obtaining the sanction of the Civil Court, but that so far as the proceedings founded on the offence under section 467, Indian Penal Code, were concerned he could not proceed without the previous sanction of the Civil Court. [p. 441, col. 2; p. 442, col. 1.]

Teni Shah v. Bolahi Shah, 5 Ind. Cas 879; 14 C. W. N. 479; 11 Cr. L. J. 280, referred to.

Sanction of the Civil Court is not necessary in the case of an offence that was committed by a prior use of the forged document outside the Court. [p. 442, col. 1.]

Noor Mahomed Cassum v. Kaikhosru Maneckjee, 4 Bom. L. R. 268, approved and followed.

Babus Hemendra Kumar Das, for the Petitioner.

Mr. Orr, Deputy Legal Remembrancer, Bengal, for the Crown.

JUDGMENT.—This is a Rule calling upon the District Magistrate to show cause why the proceedings should not be quashed on the ground that there was no such sanction as was requisite under section 195, clause (c), of the Code of Criminal Procedure. The accused presented before the Registrar a certain document for registration. The complainant denied the execution of the document, but the Registrar directed it to be registered. Thereupon a civil suit was instituted by the complainant before the Munsif to have it declared that the document was a forgery and the Munsif declared it to be a forgery. A complaint was then presented before the learned Sub-Divisional Officer under sections, amongst others, 467, 471, Indian Penal Code, and the Magistrate issued process under section 467, Indian Penal Code. The present petitioner, that is the accused, thereupon applied for and obtained the present Rule. The point that has been argued in this case is solely as to whether sanction is required for prosecution on a charge under section 467, Indian Penal Code. The point, so far as we are concerned, is covered by the decision of this Court in the case of *Teni Shah v. Bolahi Shah* (1). It is not necessary for us to state whether we concur in that decision or not because, in our view, the Magistrate could and can proceed under section 471, Indian Penal Code, without obtaining the sanction of the Munsif. The punishment that the Court can inflict for an offence under section 471, Indian Penal Code, if it is proved, is the same as that under section 467, Indian Penal Code. It has been decided by the High Court at Bombay in the case of *Noor Mahomed Cassum v. Kaikhosru Maneckjee* (2) that where an offence punishable under section 471, Indian Penal Code, is made out in a complaint, the use complained of being prior in date to the use of the document in question in evidence in a Civil Court, the sanction of such Court is not necessary under section 195 (1) (c), Code of the Criminal Procedure, before a Criminal Court can take cognizance of such offence. The decision seems to us to be correct and founded on good sense, namely, that sanction of

(1) 5 Ind. Cas. 879; 14 C. W. N. 479; 11 Cr. L. J. 280.

(2) 4 Bom. L. R. 268.

In re CHINNU.

the Civil Court is not necessary in the case of an offence that was committed by a prior use of the forged document outside the Court. If the story as told by the complainant in the present case be true, namely, that the forged document was used before the Registrar, then in the case of a prosecution for that offence, namely, for the use before the Registrar sanction of the Munsif would not be necessary. But so far as the proceedings founded on the offence under section 467, Indian Penal Code, are concerned, having regard to the decision of *Teni Shah v. Bolahi Shah* (1), referred to above, they cannot proceed without the previous sanction of the Munsif. The present Rule must, therefore, be made absolute to the extent we have mentioned.

Rule made absolute.

EMPEROR v. DURGA HALWAI.

"The law is that when a person is found in possession of stolen property very soon after the theft, he may be presumed to be the thief *if there is no evidence to the contrary.*" Of course, this should be "unless he can account for his possession" and if the Judge meant (or the Jury were likely to understand him to mean) that they were to pay no attention to any explanation which accused might put forward in the absence of evidence to support it, then we should have to interfere. But a perusal of other passages in the charge convinces us that this was not his meaning, and that the Jury could not have so understood. The Judge reminded them that accused had claimed the property as his own, and then, after mentioning the absence of defence evidence, went on to discuss the probability of the story.

We do not think the passage referred to, though somewhat carelessly worded, could have misled the Jury: and we see no reason to interfere. The sentence is not excessive.

The conviction and sentence are confirmed, and the appeal dismissed.

Appeal dismissed.

MADRAS HIGH COURT.

CRIMINAL APPEAL No. 296 OF 1915.

July 29, 1915.

Present:—Mr. Justice Ayling and
Mr. Justice Tyabji.

In re CHINNU—PRISONER—APPELLANT.

Charge to Jury—Misdirection—Jury not misled.

In a case of theft the Judge in his charge to the Jury said "the accused may be presumed to be the thief *if there is no evidence to the contrary*" instead of the words "*unless he can account for his possession*". But there were passages in the charge which showed that the Judge did not mean and the Jury did not understand him to mean that they should pay no attention to any explanation which the accused might put forward in the absence of evidence to support it:

Held, that the passage in question did not amount to a misdirection.

Appeal against the order of the Court of Session of the South Canara Division, in Case No. 8 of the Calendar for 1915.

The *Public Prosecutor*, for the Government.

JUDGMENT.—The conviction in this case is by a Jury, and the only question is whether the accused has been prejudiced by any misdirection in the charge to the Jury.

Some portions of the latter have not been very happily worded: in particular the passage in which the learned Sessions Judge says:

CALCUTTA HIGH COURT.

CRIMINAL REFERENCE No. 1 OF 1915.

May 31, 1915.

Present:—Mr. Justice Chitty and
Mr. Justice Chapman.

EMPEROR—COMPLAINANT

versus

DURGA HALWAI AND OTHERS—ACCUSED.

Criminal Procedure Code (Act V of 1898), ss. 107-110—Good behaviour, security for—'Residing' importation of the term—S. 110, application of—Findings—Fit case.

In none of the sections 107 to 110, Criminal Procedure Code, does the word "residing" occur, and to read it into those sections would involve a complete alteration of their scope and effect. [p. 443, col. 2.]

Ketaboi v. Queen-Empress, 27 C. 993; 5 C. W. N. 29, distinguished.

Where there is evidence of no less than 14 burglaries in respect of which suspicion has fallen upon the accused and their reputation as thieves is firmly established by the evidence of a number of witnesses including those called for the defence:

Held, that it would be difficult to imagine a case in which the application of section 110 is more necessary or proper. [p. 443, col. 2.]

EMPEROR *v.* DURGA HALWAI.

Reference made by the Presidency Magistrate, Calcutta.

Babus *Monmotho Nath Mukherjee* and *Pro-bodh Chandra Chatterjee*, for the Accused.

Mr. *S. R. Das*, Counsel, and Babus *Manindra Nath Benerjee* and *Tarak Nath Sadhu*, for the Crown.

JUDGMENT.—This is a reference under section 123, Criminal Procedure Code, in the matter of six persons, Durga Halwai, Mohendra Karmakar, Jai Gopal Das, Ganga Bissen, Dwarka Sukul and Sham Lal, who have been ordered to furnish security for good behaviour, the first four for three years, and the last two for two years, respectively, under section 110, Criminal Procedure Code, and who have all failed to furnish such security. The case made against them is that they are all by habit house-breakers and thieves, and form part of a gang who have been operating in Calcutta during the past three years or thereabouts. On behalf of Mohendra Karmakar and Jai Gopal Das it was argued that the Presidency Magistrate had no jurisdiction to take proceedings against them under section 110, because they were not within the local limits of his jurisdiction. There appears to be no force in this contention. Mohendra Karmakar may be a native of Midnapur, but it is proved that he was residing in Calcutta down to Agrahan last. He attempted (but without success) to show that he was carrying on a shop for the manufacture and sale of iron chests in a remote village in the Midnapur District. About December 1914 he disappeared. He was arrested in January in the Midnapur District in connection with a burglary committed at Serampore in December 1914. He was brought under arrest from Serampore to be placed before the Magistrate in this case. Jai Gopal was arrested in Calcutta at the shop of Kedar Bania. For him it was said that he lived at Sinthi near Dum Dum. It appears that he used to go there to the house of his mother-in-law and that he used a bicycle to come and go. It was argued that "within the local limits of his jurisdiction" must be read as "residing within the local limits etc.," and the case of *Ketaboi v. Queen-Empress* (1) was cited. The remarks in that judgment must be read in connection with the particular facts of

(1) 27 C. 993; 5 C. W. N. 29.

that case, which were entirely different from those before us. In none of the sections 107 to 110 does the word "residing" occur, and to read it into those sections would involve a complete alteration of their scope and effect.

It was undoubtedly within the local limits of the Presidency Magistrate's jurisdiction that the habits of all these six persons, which are now complained of, were practised, and their evil reputation, if any, acquired. Of the merits of the case very little need be said. There is abundant and cogent evidence that all these six persons are habitual house-breakers and thieves. They have all been in jail, some of them once and once again, for similar offences. They all last emerged from jail at various dates from October 1911 to July 1912. Since then they have been associating in Calcutta with Parmessari and Sitanath, other offenders of the same class, and have formed a regular gang for the commission of house-breaking and theft. There is evidence of no less than 14 burglaries from 1912 down to 1914 in respect of which suspicion has fallen upon them. Their reputation as thieves is firmly established by the evidence of a number of witnesses including those called for the defence. It would be difficult to imagine a case in which the application of section 110 was more necessary or proper. We accordingly confirm the order of the Presidency Magistrate and direct that Durga Halwai, Mohendra Karmakar, Jai Gopal Das and Ganga Bissen be detained in prison for three years each, and Dwarka Sukul and Sham Lal for two years each, or until within such periods they respectively give the security to the Magistrate as ordered by him. The imprisonment will in each case be rigorous.

Order confirmed.

In re MR. HAWKINS.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 356 OF 1915.

CASE REFERRED No. 39 OF 1915.

July 30, 1915.

Present:—Mr. Justice Ayling and

Mr. Justice Tyabji.

In re MR. HAWKINS, GENERAL
MANAGER, INDIAN ALUMINIUM
COMPANY, LTD.—ACCUSED.

Electricity Act (IX of 1910), s. 33—"Every person"
meaning of—Application of section.

In section 33 of the Electricity Act the term "every person" is not confined to persons who are licensed under parts II and III of the Act, nor is the section confined to cases in which the accident actually results in personal injury or death.

Case referred for the orders of the High Court, under section 432 of the Criminal Procedure Code, by the fourth Presidency Magistrate, Madras, in his letter, dated the 11th June 1915, Reference No. 12453 of 1915.

FACTS.—The Electrical Engineer, Madras, prosecuted Mr. Hawkins, the Manager of the Indian Aluminium Factory, Triplicane, for failure to report an accident under section 33 of the Electricity Act. The shafts of one of the engines attached to the factory broke at a time when all the men were at the work. This accident was not reported. The fourth Presidency Magistrate before whom the complaint was made inquired into the case, and it was contended that the section applied only to persons who are license-holders under the Act, and that the only person to whom the accident should have been reported was the person appointed under the Factories Act. The Presidency Magistrate felt some doubt about the applicability of the Act to persons like the accused who are not licensees, and made, therefore, the present reference to the High Court.

The *Crown Prosecutor*, for the Government.

Messrs. *King and Partridge*, for the Accused.

ORDER.—In making the reference the Presidency Magistrate should have distinctly formulated the questions of law which he referred for our opinion.

So far as we can deduce them from his letter of reference, they are two in number.

(1) Whether the term 'every person' in section 33 of Act IX of 1910 is confined

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to persons licensed under Parts II and III of the Act?

(2) Whether section 33 is confined to cases in which the accident actually results in personal injury or death?

Our answer to both questions is "No." As regards the second we may add that the wording of the section is perfectly clear and specifies cases likely to have resulted in loss of life or personal injury as well as those which actually so resulted. Whether such a result was likely in any case in which it did not actually ensue is a question of fact to be determined with reference to the surrounding circumstances.

Reference answered in the negative.

CALCUTTA HIGH COURT.

CRIMINAL REVISION PETITION No. 1989
OF 1914.

February 2, 1915.

Present:—Mr. Justice Fletcher and

Mr. Justice Beachcroft.

BARODA KANTA SARKAR AND OTHERS
—PETITIONERS

versus

EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), ss. 192, 193—False evidence, fabrication of—Document, admissibility of—Intention and not admissibility creates criminal offence.

Under section 192 of the Indian Penal Code it is the intention that creates the criminal offence and not the fact as to whether, under the terms of the law, the document is admissible in evidence. [p. 445, col. 2.]

Correctness of the reported decisions showing that section 192 is limited to such cases as those in which the fabricated evidence is, in fact, admissible under the terms of the law of evidence, is doubtful and the view expressed in such reported decisions might raise considerable difficulty in cases where the Judge has improperly admitted in evidence a document not admissible under the terms of the law. [p. 445, col. 2.]

Babu *Manmatha Nath Mukherjee*, for the Petitioner.

Babus *Atulya Charan Bose* and *Asita Ranjan Ghose*, for the Opposite Party.

JUDGMENT.

FLETCHER, J.—This is a Rule calling on the District Magistrate to show cause why the criminal proceedings instituted against the

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petitioners should not be quashed on the ground that the facts alleged do not constitute an offence under section 193, Indian Penal Code. The learned District Magistrate has forwarded a very long explanation from the Sub-Divisional Magistrate, which I do not think we need go into. The facts relating to the present case are as follows; at any rate, these are the allegations, because nothing stated in this judgment must be deemed to be facts proved against the accused, but they are facts which will be assumed for the purposes of the present Rule. There are 12 accused in the present case who are all related to one another. The first three accused are the petitioners before us. As long ago as the year 1900, there was a civil suit instituted by the accused or some of them against one Purna Chandra Som, who is the father of the present complainant. That suit was compromised on the 18th February 1902 and by the terms of the compromise, which was signed by, amongst others, the three petitioners, it was declared that a certain piece of land was the property of Purna Chandra Som. The three petitioners on the 25th August 1914 instituted criminal proceedings against Lolit Mohan Som, *i.e.*, the present complainant, charging him with mischief under section 426, Indian Penal Code, and, during those proceedings, the complainant and his father discovered, so the allegation is, that a *kobala*, dated the 12th February 1914, and two *pattas* had been executed. They obtained certified copies of those documents and thereupon the present petitioners abandoned the prosecution of Lolit Mohan Som under section 426. The petitioners stated that they would bring a civil suit. That was on the 12th September 1914. On the 21st September 1914, Lolit applied for summons against all the accused for having committed an offence under section 193 of the Indian Penal Code. Apparently, five prosecutions were instituted on the ground that the documents had been presented for registration on five different dates. The only question we have got to consider in this case is whether any case has been disclosed upon the complaint which would bring the case within the meaning of section 192 of the Indian Penal Code. The *kobala*, which is one of the documents on

which the present prosecution is founded, must be taken in the present case to have included, in the description of the land conveyed, a portion of the property which was given to the complainant's father by the compromise of the 18th February 1902. If that be so, it seems to me that the document will fall within the definition of 'fabrication of false evidence' as given in section 192. The decisions of the High Courts in India, at any rate some of them, would seem to show that section 192 is limited to such cases as those in which the fabricated evidence is, in fact, admissible under the terms of the law of evidence. Speaking for myself, I have gravest doubt whether those decisions are correct. I think the words of the section will show that it is the intention that creates the criminal offence and not the fact as to whether, under the terms of the law, the document is admissible in evidence. The view expressed in the cases mentioned might raise a considerable difficulty in cases where the Judge has improperly admitted in evidence a document not admissible under the terms of the law. However, we have not got to consider that in this case, because the *kobala* in this case seems to me to be clearly admissible under section 13 of the Evidence Act. If it is admissible under section 13, then the accused who are the petitioners before us asserted a right to convey the property which, we must take for the present purpose, includes a portion of the property of the complainant's father. If they did that with criminal intent, it seems to me that that would be a fabrication of false evidence, within the meaning of section 192 of the Indian Penal Code, and if the facts are proved, the accused—the petitioners before us—could be convicted of an offence under section 193, Indian Penal Code. I do not wish to express any opinion one way or the other as to whether this document does, in fact, do so. That is a matter to be argued at the trial. This is a document in Bengali, which language I do not know. I have had only extracts read to me by one of the learned gentlemen who appear to show cause, from which I cannot say at the present moment that the statements asserted in this *kobala* would not, if a criminal intent is proved, render the petitioners before us liable to conviction

In re PICHARI ANTHU.

under section 193. I think, therefore, that the present Rule ought to be discharged.

BEACHOROFF, J.—I agree. I think the document would be admissible in evidence. But, in my view, the question of admissibility is not all important, the real question is the intention of the accused.

Rule discharged.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 318 OF 1915.

CASE REFERRED No. 29 OF 1915.

August 12, 1915.

Present:—Mr. Justice Spencer.

In re PICHARI ANTHU AND ANOTHER—
ACCUSED.

Criminal Procedure Code (Act V of 1898), s. 35—Sentence for offence, directed to take effect after expiry of sentence for default to find security for good behaviour, legality of.

A Magistrate acts illegally if he directs that a sentence of imprisonment for an offence should take effect after the expiry of the sentence which the accused may be undergoing for default to find security for good behaviour.

Joghi Kannigan v. Emperor, 31 M. 515; 4 M. L. T. 223; 8 Cr. L. J. 402, followed.

Case referred for the orders of the High Court, under section 438 of the Criminal Procedure Code, by the District Magistrate of Bellary, in his letter, Judicial No. 6566 of 1915, dated the 5th May 1915.

Mr. M. H. Hakim, for the Acting Public Prosecutor, for the Government.

ORDER.—The Sub-Magistrate's direction that the sentence of two months' imprisonment for the offence under section 225B of the Indian Penal Code should take effect after the expiry of the sentence which the accused Nos. 3 and 4 were undergoing for default to find security for good behaviour, was illegal. See *Joghi Kannigan v. Emperor* (1). I direct that it be reckoned to commence from the date of the Magistrate's order, viz., 9th April 1915.

Order modified.

(1) 31 M. 515; 4 M. L. T. 223; 8 Cr. L. J. 402.

ZERI KHAN v. EMPEROR.

LOWER BURMA CHIEF COURT.

CRIMINAL REVISION PETITION No. 115B

OF 1915.

July 30, 1915.

Present:—Sir Charles Fox, Kt., Chief Judge.

ZERI KHAN—APPELLANT

versus

EMPEROR—OPPOSITE PARTY.

Explosive Substances Act (VI of 1908), s. 8—Accidental explosion—Injury to property—Obligation to give notice to Police—"Occupier," meaning of—Penal Code (Act XLV of 1860), s. 176—Omission to give notice—Intention.

The primary requisite for the obligation to give notice to the Police under section 8 of the Explosive Substances Act is not "serious injury to property" but an accidental explosion. If the explosion was designed, the obligation to give notice does not arise even if the explosion may have been attended with "serious injury to property". [p. 447, col. 1.]

The word "occupier" in section 8 of the Act refers to some one on the spot at the time of the explosion who must necessarily have become aware of the explosion. [p. 447, col. 1.]

Unless the omission to give notice is intentional, section 176, Indian Penal Code, does not apply. [p. 447, col. 2.]

Review of the order of the second Class Township Magistrate of Zilin, dated the 14th of November 1914, passed in Criminal Trial No. 77 of 1914.

JUDGMENT.—The accused in the case was the manager of a quarry in which dynamite was used for blasting. The quarry is in the Kyaikto Sub-Division of the Thaton District. On a day on which he was in Rangoon a large piece of stone crashed through the roof of a villager's house, which is on the other side of a public road a short distance from the quarry, and did considerable damage to the house. The stone was thrown out of the quarry by the force of an explosion of dynamite. No report of what had happened was made to the Police by any of those concerned in the quarrying. When the accused returned to the quarry the authorities had the matter already under investigation. He made no report of it in consequence, he says, of the Police already knowing about it. He was prosecuted for an offence punishable under section 176 of the Indian Penal Code, in that being legally bound to give notice to a public servant he intentionally omitted to give the notice.

Section 8 of the Explosives Act contains the provision, which, it is said, bound the accused to give notice to the officer in charge

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of the nearest Police station. Eliminating what is not applicable to the accused's case, the section says that whenever there occurs in or about or in connection with any place in which an explosive is used any accident by explosion attended with serious injury to property, the occupier of the place shall forthwith give notice thereof to the officer in charge of the nearest Police station.

The first question that arises in the case is whether there was "any accident by explosion." There is no evidence that dynamite exploded accidentally for all that appears, a charge of dynamite inserted into rock may have been exploded designedly at the time it was designed to explode. This explosion may have been attended with serious injury to property; but serious injury to property is not the preliminary requisite for the obligation to give notice. The primary requisite is an accidental explosion. The records sent up with the case go to show that the occurrence and injury to the complainant's house were due to rash use of dynamite for blasting rock in the near vicinity of houses and a public road rather than to any accidental explosion. If they were not due to the latter the obligation imposed by section 8 of the Explosives Act did not apply.

The next question is whether the accused was the occupier of the place at the time any accidental explosion occurred. The section imposes on the occupier the duty of forthwith giving notice of the accidental explosion. This necessarily means that the occupier must be some one on the spot at the time, who must necessarily have become aware of the explosion.

The whole object of the section is to ensure that the Police shall be at once informed of an accidental explosion attended with serious consequences. In case of such an explosion when explosives are being carried in a vessel or in any sort of carriage it is not the owner of the vessel or carriage who is made liable to give notice, but the master of the vessel or person in charge of the carriage. In the cases of such persons the provision of the section requires no impossibility: they can and must forthwith give notice. The word 'forthwith' cannot be read in their case as meaning "as soon as they hear of the accident" nor, in my opinion, can it be so read in the case of an "occupier". When

using this last word the Legislature must be taken to refer to an occupier in whose power it is to comply with the obligation of forthwith giving notice after the accidental explosion, and no one but an actual occupant of the place at the time of the explosion could comply with such obligation. The accused in this case, having been away from the place when the so-called accident occurred, was not liable to be convicted for not having given notice of it. Even if he were the question would remain whether he intentionally omitted to give notice. It shall have been obvious that he did not do so, and that he was not liable to punishment under section 176 of the Penal Code. The peculiar reasoning by which the Township Court and the District Magistrate avoided dealing directly with the necessary question of whether the accused had intentionally omitted to give notice is not creditable to either of them, and displays an undue inclination to apply the Penal Law in a manner in which it was not applicable.

The prosecution appears to me to have been entirely misconceived. If a punishable offence was committed by any one it was of an entirely different nature, which the records sent with the case show, that the District Magistrate was aware of.

The conviction and sentence are set aside. The accused is acquitted. The fine paid will be refunded.

Conviction and sentence set aside.

MADRAS HIGH COURT.

CRIMINAL APPEAL NO. 90 OF 1915.

April 29, 1915.

Present:—Sir John Wallis, Kt., Chief Justice, and Mr. Justice Coutts-Trotter.

In re ABIBULLA ROWTHAN *alias* KABIL ROWTHAN AND OTHERS—ACCUSED—

APPELLANTS.

Criminal Procedure Code (Act V of 1898), s. 342—Accused, no evidence given against—Magistrate, right of, to question accused—Statement made by accused under circumstances, whether admissible in subsequent trial.

Section 342 of the Code of Criminal Procedure gives the Magistrate only the right to question the accused for the purpose of enabling him to explain any circumstance appearing in evidence against him.

PATAN DIN V. BHAGWAN DIN.

Where no evidence has been given implicating the accused, the Magistrate has no right under the Statute to put questions to him or invite him to make a statement. A statement, therefore, made by the accused under these circumstances is not admissible evidence against him on his subsequent trial.

Mohideen Abdul Kadir v. Emperor, 27 M. 238; 2 Weir 408; 1 Cr. L. J. 566; *Reg. v. Berriman*, 6 Cox, C. C. 388, followed.

Appeal against an order of the Court of Session of the Trichinopoly Division, in Case No. 7 of the Calendar for 1915.

Dr. *Swaminadhan*, for the Appellants.

Mr. *C. Sydney Smith*, for the Government.

JUDGMENT.—There was no evidence before the Sessions Court against accused Nos. 2, 6 and 7 other than their own admissions in the Court below and the Sessions Court itself. The admissions in the Court below were made in answer to an invitation from the Committing Magistrate to say what they had to say. At the time when these statements were made in the Court of the Committing Magistrate the prosecution had given no evidence at all involving any one of these accused, as appears from an examination of the record of the evidence given in that Court. Section 342 of the Code of Criminal Procedure only gives the Magistrate the right to question the accused for the purpose of enabling him to explain any circumstance appearing in the evidence against him. We think that where no evidence has been given implicating the accused, the Magistrate has no right under the Statute to put questions to the accused or invite him to make a statement. We further think that if a statement is made by the accused in such circumstances, it is not admissible evidence against the accused on his subsequent trial. This is in agreement with the decision of White, C. J., in *Mohideen Abdul Kadir v. Emperor* (1) and the same principle was applied by Erle, J., in *Reg. v. Berriman* (2) to a statement elicited from a prisoner improperly questioned by an examining Magistrate in England. The same objection applies to the answers elicited from the accused by the learned Judge at the trial; and we feel constrained to say that the learned Judge subjected the accused to a cross-examination which far outstripped anything enjoined or permitted by section 342 of the Code. We set aside the convictions of accused Nos. 2, 6 and 7.

(1) 27 M. 238; 2 Weir 408; 1 Cr. L. J. 566.

(2) 6 Cox. C. C. 388.

With regard to the 4th accused, there is some evidence against him, but it is practically the word of Prosecution Witnesses Nos. 1 and 2 against that of the 4th accused. The surrounding circumstances throw no light on the probabilities of the matter and we do not think it would be safe to convict on the evidence of two interested persons. We set aside this conviction and sentence also.

Appeal allowed.

UDH JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION PETITION NO. 5 OF 1915.

February 9, 1915.

Present:—Mr. Stuart, A. J. C.

PATAN DIN—APPLICANT

versus

BHAGWAN DIN AND ANOTHER—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 195—*Sanction to prosecute—Private grudge.*

A person cannot obtain sanction to prosecute in pursuance of a private grudge.

Application against the order of the District Magistrate, Fyzabad, dated the 10th October 1914, reversing that of the Magistrate, third Class, Fyzabad, dated the 14th August 1914.

Mr. *Rudra Dat Sinha*, for the Applicant.

Mr. *Fakhar-ud-din Hasan*, for the Opposite Party.

ORDER.—In this case the learned District Magistrate considered that the applicant was endeavouring to obtain sanction to prosecute in pursuance of private grudge. I see no reason to differ from this conclusion, and its acceptance necessarily involves a refusal of sanction to prosecute. I, therefore, do not interfere with the revocation of the sanction.

Sanction revoked.

AJUDHI v. EMPEROR.

ODDH JUDICIAL COMMISSIONER'S
COURT.

CRIMINAL APPEAL No. 155 OF 1915.

June 11, 1915.

Present:—Mr. Kanhaiya Lal, A. J. C.

AJUDHI—ACCUSED—APPELLANT

versus

EMPEROR—PROSECUTOR—RESPONDENT.

*Penal Code (Act XLV of 1860), ss. 303, 304—
Culpable homicide not amounting to murder—Pro-
vocation, grave and sudden—Wife found lying with
stranger, murder of.*

Where an accused, finding his wife inside his house lying on a cot with a man with whom she had previously had an intrigue, murdered the wife:

Held, that the provocation caused by the wife and the man being found lying together on the cot in view of the previous intrigue was sufficiently grave and sudden to disturb the equanimity of the accused, so that the case fell within the exception contained in section 300, Indian Penal Code, and that the accused should accordingly be convicted under section 304, Indian Penal Code. [p. 450, col. 1.]

Appeal against the order of the Sessions Judge, Hardoi, dated the 4th May 1915.

Mr. St. George Jackson, for the Appellant.

The Government Pleader, for the Crown.

JUDGMENT.—The appellant, Ajudhi, has been convicted on a charge of murdering his wife by the learned Sessions Judge of Hardoi and sentenced to transportation for life.

It appears from the evidence of Rajjab, the *chaukidar* of the village, that the deceased was living with the accused from six or seven years, and that for 12 or 18 months, preceding the murder, the accused had been complaining to him of an intrigue between his wife and a man named Raghunath and had asked him to remonstrate with Raghunath in the matter. Raghunath states that about a year and a half ago he had an intrigue with the wife of the accused, and had a serious quarrel with him about it, of which a report was made by him to the Police. On the morning of the 29th March 1915 the accused went as usual to his fields to work, and on returning at about 4 *gharis* after dawn with a bundle of grass, found Raghunath, it is stated, outside his house. The house of Raghunath is close to the house of the accused, there being only a passage or small piece of open ground between the two.

The story for the prosecution is that the accused got angry at finding Raghunath

opposite his door and bringing a *lathi* from inside his house, abused him and struck him twice on his legs with his *lathi*. Raghunath warded off the blows with his stick, which broke in consequence, and fled and entered the house of some other person to save himself. The wife of the accused, who is said to have been pounding barley at the time, shut herself up meanwhile in a room, the doors of which she closed from inside. The accused battered at the doors with a hatchet, and on his wife coming out and trying to escape he seized her and killed her. The fact of the killing is admitted by the accused. His version is that he killed her because he saw her on a cot with Raghunath inside the house, committing adultery.

The evidence adduced to support the story of the prosecution consists of Raghunath, Ram Lal and Ibrahim Beg. Raghunath is naturally interested in minimising any part he might have taken in the affair which led to the murder. Ram Lal is a neighbour and professes to have seen Raghunath outside the house of the accused when he was attacked, and to have witnessed the murder from the roof of his house. But, as stated by the learned Sessions Judge, Ram Lal has had a considerable motive for hostility towards the accused in connection with the property of one of his relations, which the accused had seized. There was also a quarrel and a fight between the accused and Ram Lal in connection with it. The learned Sessions Judge considered that Ram Lal had lied in his endeavour to conceal that hostility and in that state of circumstances it is difficult to place any reliance on his statement. Ibrahim Beg states that on hearing the alarm he went to the house of the accused and found it chained from inside, that he went to the house of Ram Lal, and finding no access to the roof there came back to the door of the accused and found its chain undone, and that when he entered, the murder was being committed. He does not, however, profess to have seen Ram Lal on his roof, and if as stated by Chajju Singh and Ibrahim Beg there is no access or stairway leading to the roof of Ram Lal, the statement of Ram Lal that he was present at the time

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when Raghunath was attacked and saw the murder from his roof, becomes open to question. The prosecution evidence cannot be trusted.

If Raghunath was seen merely standing outside the house of the accused, which is close to his own door, there was little reason for the accused to have taken exception at his presence, and still less reason for him to have attacked his wife or for the wife to have shut herself up in one of the rooms of her house.

The story told by the accused, namely that Raghunath was found with his wife inside his house on a cot, is, therefore, more probable, and whether they were committing adultery at the time or not, the provocation caused by their being found lying together on a cot in view of the previous intrigue, was sufficiently grave and sudden to disturb the equanimity of the accused. The case is, therefore, one falling within the exception contained in section 300 of the Indian Penal Code.

I alter the conviction accordingly into one under section 304 of the Indian Penal Code and considering the circumstances, sentence the accused to rigorous imprisonment for two years.

Appeal partly allowed.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 363 OF 1915.

CASE REFERRED No. 41 OF 1915.

August 3, 1915.

Present:—Mr. Justice Ayling and

Mr. Justice Tyabji.

N. R. VENKATACHALAM CHETTI—

ACCUSED

versus

THE CHAIRMAN, MUNICIPAL COUNCIL,

ERODE—COMPLAINANT.

Criminal Procedure Code (Act V of 1898), s. 528—Transfer of criminal case—Reasons to be recorded.

An order of transfer of a criminal case, even for the ends of justice, must be for recorded reasons.

Case referred for the orders of the High Court, under section 438 of the Code of Criminal Procedure, by the District Magistrate of Coimbatore, in his letter, dated the

27th June 1915, R. O. C. No. 500 (a) Miscellaneous Petition of 1915.

The *Acting Public Prosecutor*, for the Government.

ORDER.—The Sub-Divisional Magistrate says he ordered the transfer “for the ends of justice” but he has recorded no reasons, and as the District Magistrate has made this reference, we presume we are right in inferring that he does not agree with the Sub-Divisional Magistrate as to the expediency of the order. It would have been better if he had expressed his opinion clearly on this point.

As, however, the Sub-Divisional Magistrate’s order of transfer is, on the face of it, in conflict with section 528 (3) of the Criminal Procedure Code, we hereby set it aside.

Order set aside.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 348 OF 1904.

August 23, 1904.

Present:—Mr. Justice Davies and Mr. Justice Sankaran Nair.

Re KOSA KUMARAN—ACCUSED.

Criminal Procedure Code (Act V of 1898), ss. 109, 110—Security for good behaviour under both sections, if legal.

A person cannot be bound over to be of good behaviour under both the sections 109 and 110 of the Criminal Procedure Code.

ORDER.—We think that no person should be bound over to be of good behaviour under both sections 109 and 110 of the Code of Criminal Procedure. The sections contemplate different classes of cases and if a man is amenable under section 109 he can hardly be amenable under section 110, and *vice versa*. In this case evidence shows the prisoner was properly bound over under section 110, and we see no evidence to justify his being bound over under section 109. We, therefore, cancel the order binding him over under that section and leave the order to stand as one made under section 110.

Order accordingly.

In re MANDRU GADABA.

MADRAS HIGH COURT.

CRIMINAL APPEAL No. 286 OF 1914.

CRIMINAL REVISION CASE No. 369 OF 1914.

August 17, 1914.

Present:—Mr. Justice Ayling and

Mr. Justice Tyabji.

In re MANDRU GADABA—PRISONER—

APPELLANT.

Penal Code (Act XLV of 1860), s. 86, construction of—Intoxicated person—Knowledge—Intent.

Per Ayling, J.—Under section 86 of the Penal Code ordinary drunkenness makes no difference to the knowledge with which a man is credited and if an accused knew what the natural consequences of his act were, he must be presumed to have intended to cause them. [p. 451, cols. 1 & 2.]

Per Tyabji, J.—Section 86 of the Penal Code does not lay down that an intoxicated person shall be dealt with as if he had the same intent as he would have had if he had not been intoxicated. [p. 452, col. 1.]

Appeal against an order of the Agent to the Governor, Agency Division, Vizagapatam District, in Calendar Case No. 12 of 1914.

Mr. K. Govinda Marar, for the prisoner.

Mr. Nugent Grant, for the Public Prosecutor, for the Crown.

JUDGMENT.

AYLING, J.—It is clearly proved that the accused in this case backed deceased Dinni to death with a *tangi*. The lower Court convicted him of culpable homicide not amounting to murder. Against this conviction he appeals, and at the same time the case has been taken up by this Court in revision and the accused has been called on to show cause why the conviction should not be altered to one under section 302 of the Indian Penal Code and the sentence enhanced.

I have no hesitation whatever in rejecting the appeal, as the evidence leaves no doubt that the deceased was killed by the accused and by no one else.

As regards the nature of the offence it seems to me that it certainly amounts to murder. The nature of the wounds and of the weapon used are such that a sober man would undoubtedly be presumed to know that the wounds were likely to prove fatal. Section 86 of the Indian Penal Code makes it clear that ordinary drunkenness (appellant is said to have been drunk) makes no difference to the knowledge with which a man is credited. If the accused

knew what the natural consequences of his act were, he must be presumed to have intended to cause them. The offence, therefore, comes within the substantive portion of section 300 of the Indian Penal Code. It is pleaded on behalf of the accused that it also comes within exception 4 to the same section. This is for him to show. It may be conceded that the offence was committed "without premeditation in a sudden fight in the heat of passion upon a sudden quarrel," but the accused has also to show that he took no undue advantage and did not act in a cruel or unusual manner. The evidence makes it perfectly clear that the deceased had only a small stick like a cane, while the accused fell upon him with a *tangi*, a sort of battle-axe ordinarily carried by these hill-men. To my mind it is clear that in so doing the accused did take an undue advantage and acted in a cruel and unusual manner, and that he is precluded from availing himself of this exception. My learned brother, however, takes a different view: and while I myself with great deference think that the accused should have been charged with and convicted of murder, I am not sure that the case is one in which the interests of justice imperatively require the interference of this Court in revision.

I would, therefore, simply confirm the conviction and the sentence passed by the lower Court and dismiss the appeal.

TYABJI, J.—The accused was charged under section 304 of the Indian Penal Code of having committed culpable homicide not amounting to murder, and sentenced to ten years' rigorous imprisonment.

The facts proved, at the trial, were that the accused and the deceased were drunk, and quarrelled. Then the accused struck the deceased 11 times with his *tangi* which severed the arteries, and caused the death of the deceased. The Sessions Judge found the accused guilty, and sentenced him to ten years' rigorous imprisonment.

I agree with my learned brother that the appeal should be dismissed for the reasons mentioned by him.

With reference to the revisional proceedings, the question is whether the accused was guilty not only of culpable homicide

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but of murder, and whether we ought to convict him under section 302 instead of section 304 of the Indian Penal Code, enhancing the sentence.

It is true that section 86 of the Indian Penal Code lays down that in certain cases an intoxicated person shall be liable to be dealt with "as if he had the same knowledge as he would have had if he had not been intoxicated." But it does not provide that the intoxicated person shall be dealt with as if he had the same *intent*. It seems to me that the word "intent" was advisedly omitted, as "knowledge" and "intent" are both referred to in the earlier portion of the section. On the other hand, it must be noted that section 86 expressly deals with "cases where an act [is] done with a particular knowledge or intent." It may, therefore, be (as was contended by the Public Prosecutor) that section 86 implies that intent should be inferred from knowledge, though knowledge alone is expressly imputed to the intoxicated person. The section should, in my opinion, be construed strictly. But it is unnecessary to express any final opinion on this aspect of the case and on the effect of the necessary inferences to be drawn from the knowledge which section 86 imputes to an accused person. For even taking the restricted interpretation of section 86 that is contended for as being the correct one on behalf of the accused, he comes within the "fourthly" mentioned case in section 300.

The question then is whether the facts entitle the accused to the benefit of the fourth exception to section 300. It is clear on the facts, as they appear from the evidence, that the case does come within the exception unless it is shown that the offender took undue advantage or acted in a cruel or unusual manner. It is in this connection that the Public Prosecutor has not satisfied my doubts. The accused was not put to his trial under this section. He would, therefore, not be concerned with proving that which would make exception 4 to section 300 available to him. The question, therefore, of the onus of proof as laid down in section 105 of the Indian Evidence Act cannot in fairness be pressed against the accused. Apart from it, I am not satisfied on the facts, as they now appear

on the evidence, that the accused took any undue advantage, or acted in a cruel or unusual manner. For in this connection, I do not think that section 86 requires us to disregard the fact that accused was intoxicated; section 86 is a section which creates an artificial rule for the effect of evidence and the significance of facts. The section must be read as it is. It does not provide that in all criminal matters, and for deciding all questions under the Indian Penal Code "a person who is intoxicated shall be dealt with in the same way as if he had not been intoxicated, unless the thing which intoxicated him was administered to him without his knowledge or against his will." I, therefore, think that it is very doubtful, even if the charge had been under section 302, and the case had to be decided on the materials before us, whether the accused should not be considered to have come under exception 4 to section 300. But remembering that the trial was under section 304 and not under section 302, I feel no doubt in giving expression to the opinion that the conviction ought not now to be altered to one under section 302 and that the sentence ought not to be enhanced.

My learned brother's view is different from mine on the question involved in the revision case; and I need hardly say that I cannot feel entire confidence in the correctness of my opinion on learning of his views. But whether my views are right or wrong I feel no doubt as to them. I am clearly of opinion that we should not interfere in revision and that the sentence should be confirmed.

Appeal dismissed.

PUNJAB CHIEF COURT.
CRIMINAL REVISION PETITION No. 347 OF 1915.
May 14, 1915.

Present:—Mr. Justice Shah Din.
Musammāt BUDHAN—ACCUSED—
PETITIONER
versus

RAM RAKHA MAL—COMPLAINANT—
RESPONDENT.
Criminal Procedure Code (Act V of 1898), ss. 145

Re ROSARIO QUADROS.

GOVINDA CHETTI *v.* PERUMAL CHETTI.

439—*Revision—Criminal cases—Failure to observe prescribed procedure, effect of.*

Where before passing an order under section 145 of the Criminal Procedure Code the Magistrate failed to observe the procedure prescribed by law, *viz.*, no preliminary order in writing was made by the Magistrate, nor was a copy of such order served upon the parties, or published in the manner laid down in the section:

Held, that the order was *ultra vires*.

Petition for revision, under section 439 of the Criminal Procedure Code, of the order of the Magistrate, first Class, Gurdaspur, dated the 27th October 1914, directing the petitioner not to disturb the possession of respondent and seek her remedy in the Civil Court.

Mr. Nand Lal, for the Petitioner.

Lala Amar Nath Chopra, for the Respondent.

JUDGMENT.—The order passed by the Magistrate against the petitioner under section 145 of the Criminal Procedure Code is *ultra vires* and bad in law, inasmuch as he has not strictly complied with the procedure laid down in the said section. No preliminary order in writing, as is contemplated by sub-section (1) of section 145, was made by the Magistrate, nor was a copy of such order served upon the petitioner or published in the manner prescribed by sub-section (3). I accept this revision and set aside the order of the Magistrate, dated the 27th October 1914, as one made without jurisdiction.

Appeal accepted.

MADRAS HIGH COURT.

REFERRED CASE NO. 77 OF 1913.

CRIMINAL REVISION CASE NO. 530 OF 1913.

November 20, 1913.

Present:—Mr. Justice Miller.

Re ROSARIO QUADROS—

ACCUSED.

Workman's Breach of Contract Act (XIII of 1859)—Bandsman, if workman.

A musician in a band is not an artificer or labourer and is, therefore, not a workman within the meaning of Act XIII of 1859.

Case referred for the orders of the High Court under section 438, Criminal Procedure Code, by the District Magistrate of

South Canara, in his Reference of 2nd August 1912.

The *Public Prosecutor*, for the Crown.

ORDER.—A musician in a band is clearly not an artificer or labourer, and is not, I think, a workman within the meaning of the Act (Act XIII of 1859). I agree with the District Magistrate and set aside the order of the Magistrate.

Order set aside.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE NO. 458 OF 1913.

CRIMINAL REVISION PETITION NO. 369 OF 1913.

September 1, 1913.

Present:—Mr. Justice Miller and

Mr. Justice Sadasiva Aiyar.

GOVINDA CHETTI AND OTHERS—
PETITIONERS

versus

PERUMAL CHETTI AND ANOTHER—

COUNTER-PETITIONERS—RESPONDENTS.

Criminal Procedure Code (Act V of 1898), s. 144, second order under—Magistrate, jurisdiction of—Sub-Magistrate, powers of—High Court, power of, to interfere—Charter Act (24 & 25 Vict. c. 104), s. 15.

A Sub-Magistrate while he ought to give due and very great respect to the advice of his District Magistrate, ought to use his own judicial mind and come to his own conclusion whether a temporary and emergent order under section 144, Criminal Procedure Code, ought to be passed. The general "instructions" of a District Magistrate are not legally binding on the Sub-Magistrate in particular cases. [p. 454, col. 1.]

Where a second order under section 144, Criminal Procedure Code, did not state that there was again a temporary emergency and a continuing or existing insufficiency of the Police force to protect the petitioners in the exercise of their right:

Held, that the presumption was very strong that the order was passed merely in order to evade the provisions of section 144 of the Criminal Procedure Code and that the Magistracy were attempting to give themselves a much more extended jurisdiction than covered by section 144 of the Code and that the High Court had jurisdiction under section 15 of the Charter Act to interfere with such an order. [p. 454, col. 2.]

Petition under sections 435 and 439 of the Code of Criminal Procedure, praying the High Court to revise the order of the District Magistrate of Salem, in Criminal Miscellaneous Petition No. 8 of 1913, presented against the proceedings, dated the 27th June 1913, on the file of the Sub-Magistrate of Salem.

GOVINDA CHETTI V. PERUMAL CHETTI.

Mr. L. A. Govindaraghava Aiyar, for the Petitioners.

The Public Prosecutor, for the Government.

Messrs. R. Sadagopachariar and C. Rajagopalachariar, for the second Respondent.

JUDGMENT.

SADASIYA AIYAR, J.—In the absence of the Police Sub-Inspector's report of the 22nd June 1913, on the basis of which the Salem Town Sub-Magistrate passed his order of the 27th June 1913, I cannot see my way to hold that the said order passed under section 144 of the Criminal Procedure Code was an order passed without jurisdiction. The said report of the Sub-Inspector of Police is not part of the record sent to us and before we could send for it, the two months during which the order is to remain in force would expire and there would be no use in revising the order after it is spent. I would, therefore, dismiss this petition, but I do not think it inappropriate to make some observations with reference to the proceedings of the lower Courts.

The Sub-Magistrate's proceedings of the 15th July 1913 lend some justification to the argument addressed to us by the petitioners' learned Vakil that the Sub-Magistrate considered himself legally bound by the "District Magistrate's order which prohibits the procession," evidently in perpetuity. The Sub-Magistrate, while he ought to give due and very great respect to the advice of the District Magistrate, ought to have used his own judicial mind on the Sub-Inspector's report and have come to his own conclusion whether a temporary and emergent order under section 144 ought to have been passed. The general "instructions" of the District Magistrate are not legally binding on the Sub-Magistrate in particular cases. Again there is some force in the petitioners' learned Vakil's contention that the Magistracy at Salem are, under the shelter of section 144 of the Criminal Procedure Code (which relates to the passing of provisional orders to tide over temporary emergencies and in cases where "immediate prevention or speedy remedy is desirable"), the Magistracy are under the shelter of that sec-

tion trying to clutch at a much more extensive jurisdiction, namely, a jurisdiction to prohibit the petitioners by a permanent injunction from taking processions throughout an indefinite future period along the streets of Salem. I have no doubt that under section 15 of the Charter Act, we are entitled to prevent such indirect evasion by the Magistracy of the law as laid down in section 144 [see *Remjit Singh v. Luchman Prasad* (1), *Satish Chandra Roy v. Emperor* (2), *Gopi Mohun Mullick v. Taramoni Ohowdhrami* (3) and *Queen-Empress v. Pratap Chunder Ghose* (4), (the observations in which cases indicate that the arm of the law is long enough to prevent such evasion of the Code by arbitrary and successive renewals of orders passed under section 144 and that the powers given to the High Court under clause 15 of the Charter Act are sufficient to prevent such evasion)].

The District Magistrate's order of the 23rd July 1913, refusing to set aside the Sub-Magistrate's order of the 22nd June 1913, does not state that there was again a temporary emergency and a continuing or existing insufficiency of the Police force to protect the petitioners in exercise of their rights. Unless such a ground is expressly mentioned and is *prima facie* established in any future order passed in connection with this question, the presumption would, in my opinion, be very strong that the order was passed merely in order to evade the provisions of section 144 and that the Magistracy are attempting to give themselves a much more extended jurisdiction than is covered by section 144 of the Criminal Procedure Code.

With these observations I would dismiss this revision petition.

MILLER, J.—I agree in the order proposed, and entirely concur in my learned colleague's observations as to the attempt which, there seems reason to fear, the District Magistrate of Salem is making, to obtain a jurisdiction wider than that given him by section 144 of the Code of Criminal Procedure.

Petition dismissed.

(1) 7 C. W. N. 140.

(2) 11 C. W. N. 79 at p. 80; 4 Cr. L. J. 433.

(3) 5 C. 7 at p. 19; 4 C. L. R. 309.

(4) 25 C. 552; 2 C. W. N. 593.

WIR SINGH v. EMPEROR.

PUNJAB CHIEF COURT.
CRIMINAL REVISION PETITION No. 38 of 1915.
May 21, 1915.

Present:—Mr. Justice Le-Rossignol.
WIR SINGH AND OTHERS—CONVICTS—
PETITIONERS

versus

EMPEROR—PROSECUTOR—RESPONDENT.

Penal Code (Act XLV of 1860), s. 447—Punjab Land Revenue Act (XVII of 1887), ss. 101A, 101B—Land transferred from one district to another—Failure to pass order of suspension at the time of transfer.

The petitioners were convicted of an offence under section 147, Indian Penal Code. They were in possession of certain land formerly included in the Gujrat District but transferred under the operation of section 101A of the Punjab Land Revenue Act to Gujranwala District. The land was fit for cultivation and it appeared that the Collector apparently at the time of transferring the area failed to pass an order of suspension under section 101B of the Act, though such an order appeared to have been passed at a much later date:

Held, that the petitioners were entitled to be acquitted, for the transfer did not affect their proprietary rights and the transfer would not have justified their ejection otherwise than in the manner prescribed by law.

Petition, under section 439 of the Criminal Procedure Code, for revision of the order of the District Magistrate, Gujranwala, dated the 13th August 1914, affirming that of the Magistrate, second Class, Hafizabad, dated the 20th June 1914, convicting the petitioners.

Mr. Nand Lal, for the Petitioners.

JUDGMENT.—The petitioners appear to have been unfairly dealt with. They were in possession of an area, formerly included in the Gujrat District but transferred under the operation of section 101A, Land Revenue Act, to Gujranwala District.

The land appears to be fit for cultivation but the Collector apparently, at the time of transferring the area, failed to pass an order of suspension, under section 101B, though such an order appears to have been passed at a much later date.

Consequently the transfer of this land to Gujranwala did not affect the proprietary rights of the petitioners, and they were entitled to retain possession even after the transfer.

Further, even if the transfer had caused a forfeiture of their proprietary rights it would not have justified their ejection otherwise than in the manner prescribed by

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law. Such a course is not shown to have been followed.

For these reasons the petition is accepted, the petitioners are acquitted and the fines shall be refunded.

Petition accepted.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 604 of 1913.
December 4, 1913.

Present:—Mr. Justice Sankaran Nair and
Mr. Justice Ayling.

In re RANGASAMI PILLAI—

ACCUSED.

Criminal Procedure Code (Act V of 1898), ss. 109, 110—Security for good behaviour under both sections, if legal.

A person cannot be bound over to be of good behaviour under both the sections 109 and 110 of the Criminal Procedure Code.

Case referred for the orders of the High Court, under section 438 of the Criminal Procedure Code (Act V of 1898), by the District Magistrate of Coimbatore, in his letter, dated the 1st September 1913, R. O. C. No. 1467-M.

Mr. C. F. Napier, Public Prosecutor, for the Crown.

ORDER.—We do not think that a person should be bound over under both the sections 109 and 110 of the Criminal Procedure Code. See *Kosa Kumaran, In re* (1). We accordingly set aside the order binding him under section 109. The evidence fully supports the order so far as section 110 is concerned. We leave the order, therefore, to stand as one made under section 110.

Order accordingly.

(1) 30 Ind. Cas. 450; 38 M. 556 note.

HARUMAL PARMANAND v. EMPEROR.

SIND JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPEAL No. 137 OF 1914.

February 22, 1915.

Present:—Mr. Pratt, J. C., and

Mr. Fawcett, A. J. C.

HARUMAL PARMANAND—APPELLANT

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1893), ss. 337, 338—Pardon—Penal statutes, interpretation of.

All that sections 337 and 338, Criminal Procedure Code, require is that there should be an offence that is triable exclusively by the Court of Session under inquiry or trial. The fact that there may be other offences alleged or charged which are not so triable will not invalidate the grant of any pardon. [p. 457, col. 1.]

The paramount object, in construing penal as well as other Statute, is to ascertain the Legislative intent, and the strict rule of construction is not violated by permitting the words to have their full meaning, or the more extensive of two meanings, when best effectuating the intention. [p. 457, col. 2.]

Appeal against the judgment of the Sessions Judge, Larkana.

Mr. Lalchand Hassomal, for the Appellant.

Mr. E. Raymond (Public Prosecutor for Sind), for the Crown.

JUDGMENT.

FAWCETT, A. J. C.—The appellant, Harumal, was Post Master in charge of a branch post office at Naundero, a village about 10 miles from Larkana. On or about the 17th or 18th April 1913 he received a money order which had been sent from Sukkur for payment of Rs. 15-1-0 to one Keshavdas Utamchand, a resident of Sukkur. The money order had been addressed to Naundero owing to a mistake. The prosecution case is that the appellant on the 19th April 1913 induced one Bindumal to forge Keshavadas' signature as payee and another person, by name Ramchand, to sign the money order as a witness of the payment after which he misappropriated the amount of the order, which he returned as having been duly paid. He has been convicted by the Sessions Court of abetment of forgery under sections 467 and 114, Indian Penal Code, and of criminal breach of trust as a public servant under section 409, Indian Penal Code.

The main evidence against him consists of the depositions of Bindumal and Ramchand. The latter two were originally 'challaned' by the Police as co-accused, but the enquiring

Magistrate at the request of the prosecution tendered a pardon to Ramchand under section 337, Criminal Procedure Code, and he was examined as a witness both in the Magistrate's Court and the Sessions Court. Bindumal was committed for trial with the appellant, Harumal, on charges under sections 467 and 409/114, Indian Penal Code, but on the second day of the trial in the Sessions Court he was tendered and accepted a pardon under section 338, Criminal Procedure Code. He was then ordered to be examined as a witness for the prosecution, which was done.

Mr. Lalchand, for appellant, contends that both these pardons were illegally granted, and that the evidence of these two witnesses must, therefore, be excluded from consideration as inadmissible. His contention is that a strict interpretation must be put on sections 337 and 338, which only authorise the tender of a pardon "in the case of any offence triable exclusively by the Court of Session or High Court," and that as the offence under section 409, Indian Penal Code, was not so exclusively triable, the condition precedent to the grant of pardon under those sections was not fulfilled.

In the present case the alleged offence under section 467, Indian Penal Code, was triable exclusively by the Sessions Court, and the question is whether the fact that there was an additional offence charged against the accused, which was not so triable, prevents the application of the provisions of sections 337 and 338. I think the Legislature clearly shows that this is not intended. In the first place, the grant of a pardon under those sections extends not only to the particular offence in respect of which the pardon was tendered to the approver, but also as indicated by section 339, sub-section (1), to "any other offence of which he appears to have been guilty in connection with the same matter." This is clearly shown to be so by Straight, J., in *Queen-Empress v. Ganga Charan* (1). If a pardon is intended to be restricted to cases where no other offence was charged, but one exclusively triable by the Sessions Court, then the Legislature would scarcely have inserted in section 339 (1) the words "or for any other offence of which he appears to have been guilty in connection with the same matter." This supposition is strengthened (1) 11 A. 79 at pp. 87, 89; A. W. N. (1888) 280; 13 Ind. Jur. 193.

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thened by the condition on which the Legislature authorises the tender of a pardon, namely, that the approver shall make "a full and true disclosure of the whole of the circumstances within his knowledge relative to such offence." If those circumstances afford ground for the joinder of a charge of an offence not exclusively triable by the Sessions Court, then it can scarcely be supposed that the Legislature would intend that this should be prohibited in the case in which a pardon is tendered under section 337 or section 338, in spite of the general provisions of sections 233 and 235, Criminal Procedure Code, to the contrary. If there had been any such intention, an exception to section 335 would presumably have been made accordingly. Sub-section (4) of section 337 also clearly implies that there may be an offence triable by a Magistrate in addition to the offence in respect of which the pardon is tendered. Nor can it reasonably be supposed that the Legislature intended that a Court should be precluded in such cases from exercising the general powers, conferred upon it by section 227, of adding a charge at any time before judgment is pronounced, etc. And if a Court may subsequently add a charge of an offence not triable exclusively by a Sessions Court, why should the fact of there being such an additional charge framed already prevent the tender of a pardon in cases where there is an offence exclusively triable by a Sessions Court actually under inquiry or trial? In my opinion all that sections 337 and 338 require is that there should be an offence that is triable exclusively by the Sessions Court under inquiry or trial; and the fact that there may be other offences alleged or charged, which are not so triable, is immaterial. In such cases the offence triable exclusively by the Sessions Court is obviously the main offence charged, being generally punishable with heavier punishment and treated by the Legislature as more serious than others not so triable; and the condition that a pardon should be tendered only when there is such an offence under inquiry or trial is clearly due to a desire to limit the power of pardon to cases where the seriousness of the main crime alleged may justify such an exercise of the prerogative of the Crown, which is delegated to the Courts under these sections. This view

is strengthened by the history of section 337. In the corresponding section 209 of the Code of 1861 [cited in *Reg. v. Remedios* (2)], as also in section 347 of the Code of 1872, the Magistrate mentioned therein was authorised "to tender a pardon to any one or more of the persons supposed to have been directly or indirectly concerned in or privy to any offence... triable (exclusively) by the Court of Session," and the present sub-section (1) of section 337 (which reproduces similar provisions in the Code of 1882) contains nothing to justify the view that any alteration of the law was intended. Similarly the fact that Mr. Lalchand admits he cannot adduce any authority in support of his proposition goes against his contention. Thus, as the Public Prosecutor points out, in the case of *Queen-Empress v. Mulua* (3) a pardon was tendered to a person charged under section 392, Indian Penal Code, an offence not exclusively triable by a Sessions Court, as well as under section 302, Indian Penal Code, yet no objection to the validity of the pardon was taken on that ground. It is clear that the Courts have not construed sections 337 and 338 in the narrow manner Mr. Lalchand would have us do, and in my opinion there is no good ground for any such narrow construction. As pointed out in Maxwell's "Interpretation of Statutes," 3rd Edition, pages 385, 398*: "The paramount object, in construing penal as well as other Statutes, is to ascertain the Legislative intent; and the rule of strict construction is not violated by permitting the words to have their full meaning, or the more extensive of two meanings, when best effectuating the intention."

For similar reasons I think it is clear that when an accused person is tendered and accepts a pardon under section 337 or section 338, he ceases to be an accused person to whom the provisions of section 342 are applicable. This is clear from the provisions of sub-sections (2) and (3) of section 337. It is quite unnecessary in such a case for the prosecution to be withdrawn against him under section 494, Criminal Procedure Code, and if the remarks in *Banu Singh v. Emperor* (4) are intended to lay down the contrary,

(2) 3 B. H. C. R. 59 Cr.

(3) 14 A. 502; A. W. N. (1892) 95.

(4) 10 C. W. N. 962; 4 Cr. L. J. 145; 33 C. 1353 pp. 1357, 1358.

See also *Edwards*, pages 445. —Ed.

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I respectfully dissent from them. There is also no good ground for the suggestion that the words "any person" in section 338 do not cover an accused person before the Sessions Judge. Section 343 shows the contrary and it is difficult to see any other case to which the section would apply. In my opinion, therefore, the evidence of Bindumal and Ramchand is admissible against the appellant.

On the merits, I can see no good ground for differing from the conclusions of the learned Sessions Judge. It is most improbable that Keshavdas would deny the signature purporting to be his on the money order, if he had really signed it, and the surrounding circumstances are entirely against any probability of his going to Naundero and receiving payment there on the 19th April. The theory that his denial is a false one made at the instigation of the Police Inspector or Postal Inspector, who enquired into the case, has nothing substantial to support it.

The two approvers have, no doubt, made previous contradictory statements, but, as the Sessions Judge points out, this is natural having regard to the fact that they were then in the position of accused persons. No doubt Ramchand's first confessional statement of 12th August 1913 was probably made under hope of pardon, but this is immaterial, as he was subsequently pardoned when Ramchand was subsequently examined by the Police Inspector on October 28th and resiled from the former statement, he, no doubt, did so because he thought that the Police inquiry would result in proceedings against him. Also it is not natural that in his first confessional statement he should merely say that the amount of Rs. 15-1 was paid to Bindumal and not given the further details as to his getting re-payment of a loan of Rs. 10 out of this amount, which appear in the subsequent statements to the Magistrates and the Sessions Court. I can see no reason to disbelieve Ramchand's deposition because of his previous statements. As regards Bindumal he appears to have merely denied his guilt, as was natural, until he was examined after accepting his conditional pardon.

The evidence against the appellant of these two approvers is corroborated by the fact of the money not being paid to the right payee Keshavdas and the circumstances under

which the money order reached the accused, and gave him, more than any one else, an opportunity to commit a fraud of the kind alleged. It is further corroborated by the accused's own statements, which are inconsistent on the point whether Keshavdas was really paid or some one unknown to the accused who represented himself as Keshavdas and as the Sessions Judge shows the denial in his second statement that he knew Bindumal before, is clearly an afterthought and false. The circumstances, in which Bindumal's name was first elicited, also point to the truth of his participation in the affair. And it is almost impossible that he or Ramchand could have taken part in the forgery without the appellant's connivance. The evidence of Ramchand as to the loan of Rs. 10 supplies a good reason for his being taken into the conspiracy; and, no doubt, the appellant thought that, as there might be enquiries regarding the payment, it was desirable to have a second person who could support the payment.

The evidence of the two approvers is consistent and to my mind bears the stamp of truth. It is also, I think, sufficiently corroborated to justify its being used as the basis of appellant's conviction. In my opinion there is no reasonable doubt as to his guilt; and I would confirm the convictions and sentences and dismiss the appeal.

PRATT, J. C.—I concur.

BY THE COURT.—The appellant, who is on bail, must be taken into custody and re-committed to jail to serve the remainder of this imprisonment.

Appeal dismissed.

PUNJAB CHIEF COURT.

CRIMINAL APPEAL No. 101 OF 1915.

June 7, 1915.

Present:—Mr. Justice Leslie-Jones.

UDA AND OTHERS—CONVICTS—APPELLANT
versus

EMPEROR—PROSECUTOR—RESPONDENTS.

Penal Code (Act XLV of 1860), ss. 392, 395—When robbery is dacoity—Approver's testimony—First report, name of culprit not mentioned in, effect of—Value of evidence of identification and production of stolen property.

An offence of robbery cannot be converted into an offence of dacoity where there is a simple allegation but not adequate proof on behalf of the prosecution that five or more persons have taken part in committing or attempting to commit the crime. [p. 460, col. 2.]

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An approver's testimony is not sufficiently corroborated so as to base a conviction thereon by

(a) the accused's producing stolen property from a place not in his possession as such an evidence can be easily fabricated; [p. 460, col. 2.]

(b) the evidence of the witnesses alleging to have recognized the culprit at the time of committing the crime where his name does not find a place in the first report to the Police made by a person who had ample time before doing so to discuss the matter with them (witnesses.) [p. 460, col. 1.]

Appeal from the order of the Sub-Divisional Magistrate, with section 30 powers, Kaithal, District Karnal, dated the 23rd December 1914, convicting the appellants.

Mr. Morrison, for the Appellants.

Mr. Herbert, Assistant Legal Remembrancer, for the Respondent.

JUDGMENT.—On the 24th November 1914 Parbu, a money-lender of the village of Hibana in the Karnal District, had gone to the village of Kasan in order to settle his accounts with Surta, son of Mughla, who owed him a large amount of money. For this purpose he had brought with him his account books, which contained the records of his debts of Uda and Nanak also. He had had conversation with Surta, son of Mughla, during the day and his story is, that after he had gone to bed in the shop of his friend, Mathra Das, at some time before midnight, Surta, son of Mughla, together with Uda and Bhola came to the shop, and knocking him up asked him for some water. Having lit a lamp he opened the door and let them come in. As soon as the door was opened, Surta, son of Mughla, seized him while Bhola and Uda broke open the chest belonging to Mathra Das in which Parbu was keeping his account books. This chest contained also a number of ornaments and other articles which were the property of Mathra Das.

Having emptied the box the thieves made off with the account books and other property, but the story is that in addition to these three there were two others, namely, Surta, son of Bhola, and Nanak, who were waiting in the lane outside, having come there with the object of assisting in the robbery.

All five persons are said to have been identified not only by Parbu, but also by Mathra Das and four other witnesses for the prosecution.

Surta, son of Mughla, was granted a pardon by the District Magistrate, not so much

because it was thought that no conviction could be obtained without his assistance, but in order that the stolen property might be recovered. In addition to his statement there is also further evidence that part of the stolen property was produced not only by the approver himself, who produced the bulk of it, but also by Surta, son of Bhola, Bhola and Nanak Uda produced nothing.

This is the story which has been believed by the Sub-Divisional Magistrate, exercising powers under section 30, Criminal Procedure Code, who sentenced Uda, Bhola, Surta son of Bhola, and Nanak to transportation for seven years each.

All the convicts have now preferred appeal to this Court.

The fact of the robbery cannot be denied.

There appears to be no doubt that Bhola and Uda participated in it. Both were mentioned along with the approver in the first report made by Parbu and it is obvious that he could easily have indentified them. There is no doubt that there was genuine recovery of the stolen ornaments and clothes from Bhola's house and though nothing was recovered from Uda, there does not appear to be any reason why he should have been falsely accused. The fact that he had none of the stolen property in his possession is explained by the approver by saying that he ran away early. This statement is borne out by what is to be found in the Police diary, and I think it is true.

The case of the other appellants, however, stands on a different footing. The Magistrate has stated in his judgment that in his first report Parbu specifically incriminated all five thieves. This statement is incorrect.

The first report which was made at the *thana* the next day at midday mentions the presence of no one beyond Surta, son of Mughla, Uda and Bhola. The next day, *i. e.*, the 26th of November, when the Police investigation had begun in the village of Kasan, Parbu stated that there had been several people standing outside the shop but still gave no names, and Mathra Das when examined mentioned four but not five thieves and included Nanak but not Surta, son of Bhola.

Seeing that the *thana* is only nine *kos* distance from *Mauza Kasan* and it took at least 12 hours to make the first report, it is

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obvious that Parbu cannot have set off in any great hurry and before he started, he had ample time to discuss the matter with those persons who now appear as prosecution witnesses and state that they saw all five thieves on the occasion of the robbery.

If, then, Nanak and Surta, son of Bhola, had really been identified at the time, their names would naturally have found a place in the first report.

As regards the possibility of their identification, the Magistrate remarks that the night was not dark and there was moon shining. The time of the robbery is now put at about 10-30 P. M. All that was stated in the first report was that it occurred before midnight, but even if 10-30 P. M. is correct, it seems more than doubtful whether the thieves could have been identified by the light of the moon which had not yet reached its first quarter.

There are, moreover, strong indications in the diaries that Nanak and Surta, son of Bhola were ultimately accused not because they had been actually seen, but for the reason that they had made themselves prominent in an earlier visit to the shop of Mathra Das during the day time. Nanak accused was in debt to Parbu and Surta and Bhola to Mathra Das and Parbu. They appear to have understood perfectly well that there were plenty of people who would be very glad if the books of the latter were made away with. The story of the prosecution witnesses that these accused took an active part in preventing them from coming to the assistance of Parbu is a later invention and although it is quite possible that in addition to the three men who entered the shop, there may have been others standing in the lane, I am very far from being satisfied that anyone else was then identified.

As regards these two appellants, the only remaining corroboration of the statement of the approver is their alleged production of certain ornaments. Surta is supposed to have produced a few ornaments from a pile of dung cakes inside the fenced enclosure belonging to one Sewa Ram. Nanak is supposed to have produced other ornaments from the same place. There is also a story that as the result of a statement by Nanak a stolen ring was recovered from his brother. The alleged discovery of

this ring is later than the Police diaries which make no mention of it.

I am afraid I do not trust any of this evidence. It is of a kind which it is extremely easy to fabricate and it is not even adequate proof of the possession of the appellants. Keeping in view, therefore, the fact that these two appellants were not named until a comparatively late stage in the case, whereas if the prosecution story were true they would have been named immediately, I am not disposed to regard this alleged production as sufficient corroboration of the story told by the approver, and I hold that it is not adequately shown that there were more than three persons engaged in the robbery. This being so, I am unable to maintain the conviction of Bhola and Uda of dacoity and I convict them instead under section 392, Indian Penal Code.

There can, of course, be no doubt that the main offender in this case was Surta, son of Mughla, who has received a free pardon. Bhola was not interested, at least in the theft of Parbu's books. Uda was so interested, but to a much less extent than Surta, son of Mughla, and concerning him the evidence of the approver is that he joined reluctantly in the robbery and bolted before the proceeds were carried off. There can be no doubt that Parbu was put in fear of instant hurt but no actual injury was caused to him; and having regard to all the circumstances I think that the punishment awarded is unnecessarily severe. I sentence Bhola to five and Uda to three years' rigorous imprisonment. The order relating to them under section 545, Criminal Procedure Code, will hold good. Nanak and Surta, son of Bhola, are acquitted, their convictions and sentences being set aside.

Appeal partly accepted.

MAHOMAD IBRAHIM v. KATTAYAN.

MADRAS HIGH COURT.

CRIMINAL MISCELLANEOUS PETITION No. 49
OF 1915.

April 15, 1915.

Present:—Mr. Justice Kumaraswami Sastri.

MAHOMAD IBRAHIM RAVUTHAR

AND OTHERS —ACCUSED NOS. 1 TO 5—

PETITIONERS

*versus*KATTAYAN *alias* AROKIA UDAYAN —

COMPLAINANT—RESPONDENT.

Criminal proceedings, stay of, pending disposal of civil proceedings.

Where a document presented for registration was impugned as a forgery, and on the refusal of the Registration Officer to register it, one party appealed to the District Registrar and filed a suit to compel registration, while the other party rushed into a Criminal Court with a charge of forgery against the attesting witnesses and the obligee:

Held, that this was a fit case in which criminal proceedings ought to be stayed until the disposal of the civil suit.]

In all such cases, the test is whether the accused would be prejudiced if the criminal proceedings are not stayed until the disposal of the civil suit, and in this respect there is no distinction between proceedings instituted in pursuance of sanction granted by a Court and those instituted by a party himself where no such sanction is necessary.

Anna Ayyar v. Emperor, 30 M. 226; 6 Cr. L. J. 131, followed.

Petition praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to issue an order directing stay of further proceedings in Preliminary Register Case No. 11 of 1914, on the file of the Town second Class Magistrate of Trichinopoly, pending disposal of Original Suit No. 34 of 1915 on the file of the Court of the District Munsif of Trichinopoly.

Messrs. *G. Venkataramiah* and *K. S. Ganesa Aiyer*, for the Petitioners.

Mr. R. N. Aiyangar, for the Respondents.

Mr. P. R. Grant, for the Government.

ORDER.—The Sub-Registrar refused registration and criminal proceedings were at once instituted by the present counter-petitioner. The 1st petitioner has filed a suit under the provisions of the Registration Act. I am of opinion that this is a case where criminal proceedings should be stayed pending the disposal of civil proceedings. There will be no hardship to the counter-petitioner, while on the other hand the petitioners will be seriously hampered if criminal proceedings in which the 1st petitioner and

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the attesting witnesses are accused are not stayed. I do not think it makes any difference in principle whether the criminal proceedings have been instituted in pursuance of sanction given by a Court, or in the exercise of the right given to a party to institute proceedings when no sanction is necessary. In either case the test is, whether the party is likely to be prejudiced by criminal proceedings going on when a civil suit is pending in which the genuineness of the document is in issue. In the present case the law gives the 1st petitioner the right of appeal to the District Registrar and the right of a suit to direct registration. I can see no grounds for holding that when a party anticipating an appeal to the Registrar and a civil suit rushes into a Criminal Court, the Court should not stay proceedings pending the civil suit, especially when all the attesting witnesses are co-accused.

It is argued that the discretion of the 2nd Class Magistrate should not be disturbed. I am unable to find any intelligible ground on which the Sub-Magistrate refused to stay proceedings. The power of the High Court to stay proceedings is clear [*Anna Ayyar v. Emperor* (1)].

I direct that the criminal proceedings be stayed pending the disposal of Original Suit No. 34 of 1914. The District Munsif will see that the suit is disposed of as early as possible.

*Petition granted;
Criminal proceedings stayed*

(1) 30 M. 226; 6 Cr. L. J. 131.

PUNJAB CHIEF COURT.

CRIMINAL REVISION PETITION No. 280 of 1915.

May 31, 1915.

Present:—Mr. Justice Leslie-Jones.UDHAM SINGH AND ANOTHER—CONVICTS—
APPELLANTS*versus*

EMPEROR—PROSECUTOR—RESPONDENT.

Arms Act (XI of 1878), ss. 19 (f), 20—Person carrying revolver in pocket without license, offence committed by—Revolver found in pocket of one of two men sitting together—Both persons, whether guilty.

A person carrying a revolver in his pocket without a license to keep arms is guilty only under Section

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19 (f) of Act XI of 1878 and not under section 20 of the Act for concealing the arm. [p. 463, col. 2.]

Khem Singh v. Emperor, 28 Ind. Cas. 796; 8 P. R. 1915 Cr.; 60 P. W. R. 1914 Cr.; 76 P. L. R. 1915; 16 Cr. L. J. 412, distinguished.

Where an arm was found in possession of one of two men sitting together and it was proved that at one time the revolver was possessed by the other too, both are guilty of possessing the arm without a license. [p. 463, col. 1.]

Appeal from the order of the Magistrate, first Class, Amritsar, exercising enhanced powers under section 30 of the Criminal Procedure Code, dated the 6th March 1915, convicting the appellant.

Mr. *Roshan Lal*, for the Appellants.

Mr. *Herbert* (Assistant Legal Remembrancer), for the Respondent.

JUDGMENT.—Udham Singh, a *Jat* aged 27 years of the village of Burj Rai in the Amritsar District, has been convicted by a Magistrate exercising powers under section 30, Criminal Procedure Code, of an offence under section 20 of the Indian Arms Act, 1878, and has been sentenced to five years' rigorous imprisonment. Pal Singh, his elder brother, has received a like sentence for abetting the same offence. From these convictions and sentences they have now appealed to this Court.

The facts of the case are briefly as follows. At about 7.45 p. m. on the evening of the 13th February last the two appellants were sitting under a palm tree just outside the Station Club grounds in the Ram Bagh at Amritsar. When asked by the two constables what they were doing, replied that they wanted to know where Mr. King, the Deputy Commissioner, and Mr. Broadway, the Superintendent of Police, were to be found. This aroused the suspicion of the constables, who called Mr. Perrott, the Assistant Superintendent of Police, from the Club. The appellants were then searched and a revolver with six cartridges were found in an outside pocket of Udham Singh's coat. In another of his pockets was a bottle half full of liquor. Udham Singh was sober, but Pal Singh was worse for the liquor. The original theory was that the appellants were waiting outside the Club with the object of making an attempt on the lives of Mr. King and Mr. Broadway, but it has been dismissed by the learned Magistrate, who has given excellent reasons for his finding which I need not repeat. The fact is that

Pal Singh, who took his discharge from the 23rd Cavalry six years ago, is an inveterate visitor of European officers, as is evidenced by the statements of officers belonging to his late regiment and others. He had visited Major Howes of the 23rd Cavalry the previous day, and Lieutenant Colonel [Sherar on the 7th February. He had visited Mr. Broadway himself in December last. On that occasion also he was under the influence of liquor.

It has been fully established from tickets found on the person of Udham Singh that the original intention of the appellants who had left Lahore the same day was to proceed to Patti Station, which is close to their village.

For the reasons why they broke their journey at Amritsar, we have only the statement of Pal Singh from which it would appear that they left the station in order to drink at leisure. Then they wandered to the Ram Bagh, the probability being that Pal Singh had in his head the hasty idea of making a *salam* to European officers, whom he had previously met. It may be mentioned that he states that he previously had an interview with Mr. King who was then pleased to see him. However this may be, there is plenty of evidence that Pal Singh is a well disposed person, and, as the Magistrate has found, there is much to indicate that they did not visit the Ram Bagh with any sinister motive.

Their story was that the revolver belonged to their uncle, Sardar Chaugat Singh, a *Risaldar* in the 23rd Cavalry, who stated that he had lent it to them, as they were carrying money, in order to protect themselves in their journey from Patti Station to their home. The Magistrate has disbelieved this story, thinking that it was unlikely that they required such protection and remarking also that this origin of the revolver had not been disclosed to the Police. That is a mistake, as the Police diary shows that Udham Singh stated that it was obtained from their uncle. The story of *Risaldar* Chaugat Singh (who was called as a witness for the prosecution) as to how he himself obtained possession of the said revolver is hardly credible but this is another matter, and that it was from him that his nephews got the

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revolver, I can see no reason to disbelieve. His story that he gave it to them for self-protection is not necessarily untrue. At all events, I can discover no other reason that is more probable, and in the absence of any other statement I am prepared to accept this one.

What the Magistrate says is that it is not unlikely that Pal Singh purchased the revolver, which is of American manufacture, from some returned emigrant, and he goes on to remark that, however that may be, there can be no doubt that it was Pal Singh who instigated his brother to keep the revolver and "by its delivery enable Udham Singh to commit an offence under section 20 of the Arms Act." All this is pure surmise, and the fact is that unless the story of Sardar Chaugat Singh is believed to the extent above indicated, there is no positive evidence on which Pal Singh can be convicted at all. *Risaldar* Chaugat Singh says distinctly that (although the revolver was intended for the protection of both his nephews) it was to Pal Singh that he gave it. Pal Singh, therefore, must have made it over later to Udham Singh. If so, both of them were in possession of it during different periods of the day, but unless the *Risaldar* is believed on this point, there is no evidence on which Pal Singh can be convicted of any offence.

That Pal Singh, however, first had possession of the revolver, I see no reason to doubt, but even so there is nothing to show that while it was in his possession it was concealed in any way, though the probability is, of course, that he carried it in his pocket, that being the natural thing to do.

In the case of Udham Singh we know as a certainty that he was carrying the revolver in the outer pocket of his coat, but the question still remains whether this was being done "in such a manner as to indicate an intention that such act may not be known to any public servant."

The learned Assistant Legal Remembrancer who appeared for the Crown, (I may remark has not disputed the findings of the Magistrate in so far as they are favourable to the appellants) relies on the

ruling published as *Khem Singh v. Emperor* (1). The facts of that case were not parallel, and the Hon'ble Judges who decided it were careful to remark that they did not think it necessary to lay down any general rule as to what cases fall under section 20; and what cases under section 19 of the Act, and that each case must be decided on its own facts.

In the present case we have but the bare fact that Udham Singh was carrying the revolver in his pocket. There is no evidence to show, whether in day, light it could have been seen through the material of the coat or not, but doubtless it was in any case concealed to a greater or less extent by the facts of its being placed in a pocket at all. No man, however, who carries a revolver, would put it anywhere else than in a pocket. For the sake of convenience he would not think of carrying it in his hand, and unless he wished to advertise its possession to the whole world, he would not carry it exposed to view as in a belt. In fact Udham Singh was doing just what any rational man entitled to carry a revolver would do, and if he can be convicted under section 20, it must be not so much because he carried the revolver in his pocket, but because not being entitled to carry a revolver, he must, having placed in his pocket, be presumed for that reason to have desired to conceal its possession from public servants.

To that length I am not prepared to go.

If a man is in reality trying to conceal a revolver in such a manner as to bring him within the purview of section 20 of the Act, there will probably be some other evidence, such as conduct for instance, to justify his conviction. But in this particular case, not only is there no such evidence, but the facts point rather to disregard of consequences, than any thing in the shape of active concealment.

Udham Singh was carrying the revolver as openly as it was possible to carry it with any regard to his own convenience, and he and his brother went out of their way to bring themselves into contact with

(1) 28 Ind. Cas. 796; 8 P. R. 1915 Cr.; 60 P. W. R. 1914 Cr.; 76 P. L. R. 1915; 16 Cr. L. J. 412.

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public servants. As already stated, I consider that the Magistrate has quite rightly found that there was no sinister motive; and my belief is that Udham Singh and his brother had practically forgotten the existence of the revolver.

In my opinion, therefore, the facts do not justify conviction under section 20. I set those convictions and sentences aside and instead convict the prisoners under section 19 (f) and having regard to the whole circumstances of the case, I sentence each of them to one year's rigorous imprisonment.

Appeal partly accepted.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 836 OF 1914.
CRIMINAL REVISION PETITION No. 689
OF 1914.

April 20, 1915.

Present:—Mr. Justice Oldfield and
Mr. Justice Seshagiri Aiyar.

In re DORASAMI AIYAR—ACCUSED —
PETITIONER.

Penal Code (Act XLV of 1860), s. 381—Evidence Act (I of 1872), ss. 11, 32—Ownership of alleged stolen property—Witness stating what a deceased person had said to him—Admissibility of such statement.

A witness's statement as to what a deceased person had said to him regarding the ownership of the property alleged to be stolen is not admissible in evidence either under section 11 or under section 32 of the Evidence Act.

Bela Rani v. Mahabir Singh, 14 Ind. Cas. 116; 9 A. L. J. 351; 34 A. 341, followed.

In the absence of evidence as to the ownership of stolen property, a conviction under section 381, Penal Code, cannot stand.

Petition, under sections 435 and 439 of the Code of Criminal Procedure, praying the High Court to revise the judgment of the Court of the Deputy First Class Magistrate of Saidapet Division, in Criminal Appeal No. 26 of 1914, preferred against that of the Court of the second Class Magistrate of Saidapet Taluq, in Calendar Case No. 138 of 1914.

Mr. K. Narasimha Aiyar, for the Appellant.

The Acting Public Prosecutor, for the Government.

MOFIZUDDIN AHMED v. BASANTA KUMAR GHOSH.

ORDER.—The only evidence as to the ownership of the property alleged to have been stolen is the 1st prosecution witness's statement as to what Ranganatha Tawkar, now deceased, said to him regarding it. We cannot bring this statement within the terms of section 32, Indian Evidence Act; and following *Bela Rani v. Mahabir Singh* (1), we do not think it is admissible under section 11. In the absence of evidence as to the ownership of the property, the conviction of an offence punishable under section 381, Indian Penal Code, cannot stand. It is set aside and the accused must be released, if in custody.

*Conviction set aside;
Accused set at liberty.*

(1) 14 Ind. Cas. 116; 34 A. 341; 9 A. L. J. 351.

CALCUTTA HIGH COURT.

CRIMINAL REVISION PETITION No. 1335
OF 1914.

September 18, 1914.

Present:—Sir Lawrence Jenkins, Kt.,
Chief Justice, and Mr. Justice Teunon.
MOFIZUDDIN AHMED—PETITIONER

versus

BASANTA KUMAR GHOSH—OPPOSITE
PARTY.

Criminal Procedure Code (Act V of 1898), s. 195, sub-s. (1), cl. (b)—Subordinate Magistrate transferred after disposing of a case and acquitting accused—Application for sanction to prosecute complainant—Sanction given by District Magistrate—Legality of sanction—Subordinate Magistrate, whether subordinate to District Magistrate.

After the accused in a case had been acquitted and the first Class Deputy Magistrate, who had disposed of the case, transferred from the District, one of the acquitted persons applied for sanction to prosecute the complainant under section 211, Indian Penal Code. The application was made to and granted by the District Magistrate:

Held, that although the cases pending in the Court of the transferred Deputy Magistrate on the date of his transfer were placed before the District Magistrate, either for disposal by himself or for re-distribution among his subordinate Magistrates, he never became the presiding Judge in the Deputy Magistrate's Court and, therefore, was not competent to grant sanction as he did [p. 465, col. 1.]

Held, further, that for the purposes of section 195 of the Code of Criminal Procedure, the Court of the Subordinate Magistrate was not subordinate to the District Magistrate but to the Sessions Judge. [p. 465, cols. 1 & 2.]

RAM SUBHAG SINGH v. EMPEROR.

Babu Bimala Charan Deb and Amal Kumar Roy Chowdhury, for the Petitioner.

Babu Srish Chandra Chowdhury, for the Crown.

JUDGMENT.—In this case it appears that five persons were placed on their trial on a charge under section 143 and were acquitted. The trial took place in the Court of Babu Makhan Lal Chatterjee, a Magistrate exercising first Class powers. The present petitioner was the complainant in the case to which we have referred and after the disposal of that case and the transfer to another District of the Deputy Magistrate, an application was made by one of the accused persons for sanction under section 195 of the Criminal Procedure Code to the prosecution of the petitioner on a charge under section 211 of the Indian Penal Code. That application was made to and was granted by the District Magistrate.

It is conceded that for the purposes of section 195 of the Code the Court of the Deputy Magistrate was subordinate, not to the District Magistrate, but to the Sessions Judge and the question we have to consider then is, whether in view of the provisions of section 195, sub-section (1), clause (b), the District Magistrate represents the Court in which the alleged offence punishable under section 211, Indian Penal Code, was committed.

In showing cause against the Rule it has been suggested by the learned Pleader who has appeared on behalf of the Crown that inasmuch as on the departure of the Deputy Magistrate, all cases then pending in his Court were placed before the District Magistrate we should hold that for the time being the District Magistrate became the presiding Judge in the Deputy Magistrate's Court.

Now it may well be that in so far as he proceeded to dispose of such part-heard cases the District Magistrate, within the meaning of section 350 of the Code succeeded to and exercised the jurisdiction which the Deputy Magistrate had ceased to exercise.

But neither the case under section 143 nor the application for sanction were among the cases so left part-heard, and when the District Magistrate placed on his own file all such cases it would seem that he did so

not in order to the exercise of the Deputy Magistrate's functions, but in order to the exercise of his own higher functions and the re-distribution of the pending business among his subordinate Magistrates.

For these reasons we hold that the District Magistrate was not competent to make the order now in question. We accordingly make this Rule absolute and set aside the sanction complained of.

Rule made absolute.

CALCUTTA HIGH COURT.

CRIMINAL REVISION PETITION No. 1925 OF 1914.

May 19, 1915.

Present:—Mr. Justice Fletcher, Mr. Justice Sharfuddin and Mr. Justice Beachcroft.

RAM SUBHAG SINGH—

ACCUSED—PETITIONER

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 233, 537—Object of s. 233—'Distinct offences', meaning of—Hurt caused to two persons—Separate charges—Illegality—'Irregularity,' meaning of—Subramania Iyer's case, what decided—Words "subject to the provisions herein before contained" in s. 537, whether refer to the entire preceding Code—English decisions, force of—Privy Council judgment—General observations, force of—Pleader's consent—Trial.

Per Sharfuddin and Beachcroft, JJ.—The joinder in one charge of two distinct offences of causing hurt to two distinct individuals is not an illegality which vitiates the trial but is an irregularity which is cured by section 537, Criminal Procedure Code. [p. 471, col. 1; p. 479, col. 1.]

The qualifying words "subject to the provisions, hereinbefore contained" in section 537, Criminal Procedure Code, do not refer to the entire Code that precedes that section but only to sections 529 to 536 of Chapter XLV where the section occurs. [p. 473, col. 2; p. 479, col. 2.]

Per Sharfuddin, J.—The first portion of section 233, Criminal Procedure Code, is not so imperative as to render a trial null and void if the direction enjoined therein is disobeyed. In other words, a disobedience of the first portion of section 233 is not an illegality which vitiates a trial but is a mere irregularity curable by section 537 of the Code. [p. 475, col. 2.]

Section 233 of the Code contains the general law and the reason of it is that the mind of the Court might not be prejudiced against the prisoner, if he were tried in one trial upon different charges resting upon different evidence. [p. 478, col. 1.]

A charge is a first notice, to the prisoner, of the matter whereof he is accused, and it must convey to him with sufficient clearness and certainty that which the prosecution intended to prove against him and of which he will have to clear himself. [p. 478, col. 1.]

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What their Lordships of the Privy Council have decided in the case of *Subramania Iyer*, 25 M. 61, is that if law expressly provides a particular mode of trial, a disobedience of that law vitiates the whole trial. It is doubtful if the framing of charges is a mode of trial but joint trial of charges as to distinct offences would be a mode of trial. [p. 478, col. 2.]

When two offences have been committed and either of them has no connection with the other they are distinct offences. [p. 478, col. 2.]

Although illustrations have no force of law they go a great way to explain the intention of the Legislature. [p. 478, col. 2.]

Per *Beachcroft, J.*—In the case of *Subramania Iyer*, 25 M. 61, the Privy Council did not decide that a defect under section 233, Criminal Procedure Code, was fatal to the trial. They in effect decided that a disregard of the second part of the section, by joining charges beyond the limits specified in section 234, vitiated the trial. The general observation "their Lordships are unable to regard the disobedience to an express provision as to a mode of trial as a mere irregularity" must be read with the sentence immediately following it which limits its application to the case where charges are tried together which the law expressly says shall not be tried in the same trial. The words "mode of trial" in the general observation cannot have reference to the formal defect of drawing up one charge instead of two. The drawing up of the charge is part of the trial, but the words "mode of trial" have reference to the constitution of the trial. [p. 468, col. 2; p. 469, cols. 1 & 2.]

The object of section 233 is two-fold: in the first place, to give an accused person notice of the charges which he has to meet, in the second, to see that he is not embarrassed by having to meet charges in no way connected with one another. Where the offences form part of the same transaction the law allows them to be tried together; in such a case the accused is not likely to be embarrassed or the Court confused. The first part of the section is designed to give the accused notice of the charges against him. The object is that he shall not be convicted of an offence of which he has not been charged. This object is not frustrated, and the accused is not prejudiced if the accusations against him are written in one sentence or on one sheet of paper, instead of in two sentences or on two sheets of paper. [p. 469, col. 2.]

It is open to question whether consent of Pleaders can validate a trial which is illegally constituted. [p. 470, col. 1.]

Where a thing is directed to be done and that thing is in effect done, but in the wrong way, the error amounts only to an irregularity and not an illegality. [p. 471, col. 1.]

Though a decision even of the Privy Council is an authority only for what it decides, the general remarks of their Lordships are ordinarily considered to have binding force in this country. [p. 469, col. 1.]

Reliance on cases decided under the Criminal Law of England is liable to mislead though such cases may sometimes be useful as illustrating principles. [p. 472, col. 1.]

Per *Fletcher, J.*, (dissenting).—The causing of hurt to two different persons are two distinct offences for each of which there ought to be a separate charge. A failure to frame two separate charges is not a curable irregularity but an illegality which vitiates

the trial. [p. 467, col. 1.]

The whole of the section 537, Criminal Procedure Code, is governed by the words "subject to the provisions, hereinbefore contained." Therefore a neglect of the provisions of section 233, Criminal Procedure Code, is not cured by that section and renders the trial illegal. [p. 467, col. 1.]

This Rule first came up for hearing before Fletcher and Beachcroft, JJ., who differed in their opinions, and delivered the following judgments on the 23rd February 1915.

Dr. Dwarka Nath Mitter, *Babus Baikunta Nath Mitter* and *Manindra Nath Banerji*, for the Petitioner.

Mr. Sultan Ahmad, Deputy Legal Remembrancer, for the Crown.

JUDGMENT.

FLETCHER, J.—This is a Rule calling upon the District Magistrate to show cause why the conviction and sentence passed upon the petitioner should not be set aside.

The petitioner was charged along with others of having committed an offence punishable under section 147 of the Indian Penal Code. He was also charged with having caused hurt to two persons, Khalifa Ahir and Rambilas Lal, and thereby having committed an offence under section 323 of the Indian Penal Code. Only one charge was framed against the petitioner in respect of the hurt caused to these two persons. The petitioner having been convicted and sentenced on the charges framed against him applied for and obtained the present Rule.

The only question for our decision is, whether the charges of committing hurt against two persons having been charged in one charge renders the trial illegal.

Section 233 of the Code of Criminal Procedure provides that for every distinct offence of which any person is accused there shall be a separate charge. The causing of hurt to two different persons are obviously two distinct offences and there ought to have been in the present case two separate charges framed against the petitioner of the offences charged under section 323 of the Indian Penal Code.

The question we have to decide is, whether the failure to frame two separate charges vitiated the trial or whether it was merely an irregularity which is cured by other sections in the Code.

It has been held in a series of cases in this Court that the neglect to observe the

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provisions of section 233 of the Code renders the trial illegal.

I need not set out all the cases laying down this proposition. It will be sufficient to state that they commence with the case of *Gul Mahomed v. Cheharu Mandal* (1) and end with the case of *Asgar Ali v. Emperor* (2). Those cases which are binding on us clearly cover the question which we have to decide.

Unless we come to the conclusion that the matter ought to be referred to a Full Bench, our decision must be in accordance with those authorities.

There is, however, a later decision of this Court, *Musai Singh v. Emperor* (3), in which a contrary view was taken. With all due respect to the learned Judges who decided that case, it was not open to them to ignore the previous decisions of the Court and to decide that case without reference to them. The case of *Musai Singh v. Emperor* (3) does not appear to me on consideration to have been well decided. The learned Judges observe that in the case before them "the defect is one of 'duplicity' not of misjoinder."

In England, however, an indictment is said to be 'double' when an accused has been charged with having committed two or more offences in one count of the indictment. This I should have thought was a misjoinder. Further, the learned Judges in quoting the law in India from the Code of Criminal Procedure make, what is to my mind, a most important omission. In quoting from section 537, which is the only section (if any) that can remedy a defect such as we are at present considering, the learned Judges fail to observe that the whole of the section is governed by the words "subject to the provisions hereinbefore contained." This includes amongst other provisions the provisions contained in section 233 and a neglect of the provisions contained in that section is not, I think, cured by section 537.

Not only do I, therefore, consider that we are bound by the decisions of this Court earlier than the decision in the case of

Musai Singh v. Emperor (3) but I approve and follow such decisions. In my opinion the case of *Musai Singh v. Emperor* (3) was wrongly decided and as it is contrary to the series of the earlier decisions of the Court we are not bound by and ought not to follow it.

The present Rule ought, therefore, I think, to be made absolute and the petitioner should be re-tried according to law.

BEACROFT, J.—The charges against the petitioner were of rioting and causing hurt. The latter charge, which has formed the subject of discussion in this case runs as follows:—"that you on or about the 5th day of July 1914 at Megitala voluntarily caused hurt to Khalifa Ahir and Ram Bilas Lal and thereby committed an offence punishable under section 323 of the Indian Penal Code." This charge and the charge of rioting are drawn up on a form with the heading "charges with two heads."

The only ground urged by the petitioner's Vakil is that the charge above quoted is defective and, therefore, on the authority of the case of *Subramania Aiyar v. Emperor* (4) the whole trial was bad. The learned Vakil also cited five cases decided by this Court and one by the Allahabad High Court to support his contention. It is unfortunate that the Crown has not been represented to argue the case before us, yet in spite of that fact I feel no doubt whatever that the Rule ought to be discharged.

The five cases of this Court quoted by Dr. Dwarka Nath Mitter were the following in order of time, (1) *Gul Mahomed v. Cheharu Mandal* (1). The accused was convicted on one charge of extorting a *machilika* and Rs. 25 apparently on different dates. The learned Judges held that the fact of there being only one charge was fatal to the trial, on the authority of *Subramania Aiyar's* case (4). (2) *Johan Subarna v. Emperor* (5). One charge was framed in respect of two attempts to cheat on different dates. The learned Judges said "there should have been two charges. Under the ruling of the Privy Council in *Subramania Aiyar's* case (4) this would seem to be an illegality which vitiates the trial and cannot be cured by section 537." Then referring to a case cited by the Deputy Legal

(1) 10 C. W. N. 53; 3 Cr. L. J. 141.

(2) 20 Ind. Cas. 609; 17 C. W. N. 827; 14 Cr. L. J. 449; 40 C. 846.

(3) 22 Ind. Cas. 1908; 15 Cr. L. J. 224; 41 C. 66; 18 C. W. N. 183.

(4) 25 M. 61; 28 I. A. 257; 11 M. L. J. 233; 3 Bom. L. R. 450; 5 C. W. N. 866; 2 Weir 271.

(5) 10 C. W. N. 520; 2 C. L. J. 618; 3 Cr. L. J. 111

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Remembrancer, "this does not relate to a defect under section 233, Criminal Procedure Code, which according to the ruling of the Privy Council above referred to vitiates the trial." (3) *Tilakdhari Das v. Emperor* (6). In this case two persons were charged in one charge for misappropriation of three sums of money, collected in accordance with their duty from three persons. Apparently it was suggested that the money had never come into the possession of one of these two persons. It was argued that there was both misjoinder of persons on the authority of *Budhai Sheikh v. Tarap Sheikh* (7) and of offences on the authority of *Johan Subarna v. Emperor* (5) and *Gul Mahomed v. Cheharu Mandal* (1). The learned Judges remarked that the cases cited carried the rule in *Subrahmanya Aiyar's* case (4) to an extreme length, but they were not prepared, as the case had not been fully argued, to dissent from the cases cited. They then remarked that the irregularity in procedure—it is not clear whether they referred to misjoinder of persons, or offences or both—had in fact caused a failure of justice and ordered a re-trial of the accused separately, which suggests that they considered the joinder of persons to be irregular. This case is certainly not an authority in favour of the petitioner. It is to be noticed that the learned Judges did not refer to section 222, Criminal Procedure Code, which might have been an answer to the argument of misjoinder of charges, the charge being of one offence of misappropriation only, though three sums were separately specified. (4) *Srish Chandra Mukerjee v. Emperor* (8). The accused was charged with cheating and an allegation of delivery of property on three different dates was made in one charge. Two cases only, those of *Johan Subarna v. Emperor* (5) and *Gul Mahomed v. Cheharu Mandal* (1), were cited, and the learned disposed of the case on the authority of those cases, without expressing any opinion on the correctness of the view propounded. (5) *Asqar Ali v. Emperor* (2). The accused was charged with misappropriating between the 29th May and 4th December 1911

a sum of money made up of two sums collected between those dates. Harington, J., said the charge was bad in view of section 233. Coxe, J., said that as the charge framed was illegal, the conviction could not stand in view of *Subrahmanya Aiyar's* case (4). The authority of this case is considerably weakened as the learned Judges do not seem to have referred to section 222 of the Code of Criminal Procedure and their decision is directly contrary to the decisions in *Samiruddin Sarkar v. Nibaran Chandra Ghose* (9) and *Sat Narain Tewari v. Emperor* (10). In all three cases there was a charge of misappropriation of a lump sum and it is immaterial whether that sum is made up of several smaller sums or not.

In only one of these five cases, the second, was the Crown represented.

The case in the Allahabad High Court is that of *Emperor v. Fattu* (11). The accused were charged with committing dacoity and it was alleged that they looted the houses of three, if not four, persons on one night. Stanley, C. J., remarked: "Their Lordships of the Privy Council have held in the recent case of *Subrahmanya Aiyar v. Emperor* (4) that the disregard of the express provisions of sections 233 and 234 of the Code of Criminal Procedure was not a mere irregularity, such as could be remedied by section 537, but was altogether illegal."

It will be noticed that in two of the above six cases the Privy Council is represented as having decided that a defect under section 233, Criminal Procedure Code, is fatal to the trial. In my opinion that is too broad a generalization of what their Lordships said. They in effect decided that a disregard of the second part of section 233, by joining charges beyond the limits specified in section 234, vitiated the trial. A reference to the judgment itself will show that their Lordships made no mention of section 233, Criminal Procedure Code. The head-note of the report does, it is true, say that one of the counts of the indictment contravened the provisions of sections 233 and 234, but the judgment itself from beginning to end deals with section 234 and with that section alone.

(6) 6 C. L. J. 757; 6 Cr. L. J. 442.

(7) 33 C. 292; 10 C. W. N. 32; 3 Cr. L. J. 126.

(8) 4 Ind. Cas. 16; 10 Cr. L. J. 469; 13 C. W. N. 1067.

(9) 8 C. W. N. 807; 31 C. 928; 1 Cr. L. J. 791.

(10) 10 C. W. N. 51; 32 C. 1085; 3 Cr. L. J. 138.

(11) 26 A. 195; A. W. N. (1903) 231; 1 Cr. L. J. 364.

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The criticisms, in the last paragraph of the judgment, of the decision of this Court in *In the matter of Abdur Rahman* (12) have reference to section 234 only, as in that case there was a joinder of offences not committed within the space of 12 months.

In a passage that is frequently quoted, Lord Halsbury, L. C., who also delivered the judgment in *Subramania Aiyar's* case (4), says in *Quinn v. Leatham* (13): "Every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be explications of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. A case is only an authority for what it actually decides. I entirely deny that it can be quoted for a proposition that may seem to follow logically from it."

Now in those cases in this Court in which the learned Judges have expressed the opinion that a defect under section 233 vitiates the trial, they have considered themselves bound by *Subramania Aiyar's* case (4). With the greatest respect for the learned Judges who took part in those decisions I venture to say that the decision of the Privy Council is not an authority for the proposition stated.

Though a decision even of the Privy Council is an authority only for what it decides, the general remarks of their Lordships are ordinarily considered to have binding force in this country. But not only is the decision in *Subramania Aiyar's* case (4) not an authority on the result of a disregard of the first part of section 233, Criminal Procedure Code, but the "generality of the expressions" used in the judgment does not even bear on the question. Dr. Dwarka Nath Mitter relies especially on the sentence—"Their Lordships are unable to regard the disobedience to an express provision as to a mode of trial as a mere irregularity." But this sentence must be read with the one immediately following it which limits its application to the case where charges are tried together which the law expressly says shall not be tried in the same trial. Nor can

the words "mode of trial" in that sentence have reference to the formal defect of drawing up one charge instead of two. The drawing up of the charge is, of course, part of the trial, but the words "mode of trial" have reference to the constitution of the trial, and when their Lordships speak of "disobedience to an express provision as to a mode of trial", they do not refer to a formal defect in the proceedings in a trial which is properly constituted. That the present accused could be tried at one trial for the offence of rioting and two offences of causing hurt is not and cannot be disputed.

If then *Subramania Aiyar's* case (4) is not to be regarded as an authority for the proposition advanced for the petitioner, is the defect in the charge curable? For an answer to this question the cases cited do not help us, as the learned Judges did not consider the question apart from the case of *Subramania Aiyar v. Emperor* () .

The object of section 233 is two-fold: in the first place, to give an accused person notice of the charges which he has to meet, in the second, to see that he is not embarrassed by having to meet charges in no way connected with one another. Where the offences form part of the same transaction the law allows them to be tried together; in such a case the accused is not likely to be embarrassed or the Court confused. The first part of the section is designed to give the accused notice of the charges against him. The object is that he shall not be convicted of an offence of which he has not been charged. This object is not frustrated, and the accused is not prejudiced, if the accusations against him are written in one sentence or on one sheet of paper instead of in two sentences or on two sheets of paper.

This was in effect the view taken in the case of *Moharuddi Malita v. Jadu Nath Mandul* (14) in which three charges of theft were included in one formal charge, the persons from whose fields the thefts had been committed being differentiated by the letters (a), (b) and (c). The accused were convicted and separately sentenced for three offences of theft. Even though they were charged with having committed "an offence", they

(12) 27 C. 839; 4 C. W. N. 656.

(13) (1901) A. C. 495; 70 L. J. P. C. 76; 85 L. T. 289; 50 W. R. 139; 65 J. P. 708; 17 T. L. R. 749.

(14) 11 C. W. N. 54; 4 Cr. L. J. 415.

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were convicted of three offences. The learned Judges held that this was an error of form and not of substance, an irregularity and not an illegality. That the Pleaders consented to the joint trial of three persons does not affect the case. It does not touch the present question which is as to the misjoinder of charges and not as to the misjoinder of persons, and in any case it is open to question whether consent of Pleaders could validate a trial which was illegally constituted.

The learned Judges also distinguished the case from that of *Gul Mahomed v. Cheharu Mandal* (1), on the ground that in that case the two offences were distinct and committed at different times. Whether or not this distinction be a sound one, it will also apply to the 2nd and 4th cases which I have referred to above. If the distinction was good in *Moharuddi Malita v. Jadu Nath Mandul* (14) it is good in the present case.

The mere fact that the letters (a), (b) and (c) were used in *Moharuddi Malita v. Jadu Nath Mandul* (14) does not really distinguish that case from this: here both persons assaulted are named; the irregularity in that case was really greater than the irregularity in this, for in that case charged with one offence, though there were in fact three offences, they were convicted of three; in the present case, charged with one offence, though there were in fact two, the petitioner had been convicted only of one offence though the facts found amount to two.

The result of this review is that of the five cases of this Court cited for the petitioner, three have been distinguished in another case on grounds applicable to this and the authority of the other two, as I have already pointed out, is considerably weakened by other considerations.

In the case of *Musai Singh v. Emperor* (3) an accused was charged with having cheated three different persons and caused them to deliver to him three sums of money, three distinct offences of cheating, but there was only one charge under section 420, Indian Penal Code, covering the three different acts. It was held that the charge was defective for duplicity and not misjoinder and the case of *Subramania Aiyar v. Emperor* (4) now quoted against such a charge was referred to by the learned Judges as not affecting such a case. The case of *Sriish Chandra Mukerjee v.*

Emperor (8) was relied on in support of the Rule in that case, but the Rule was discharged, the defect being treated merely as an irregularity. The learned Judges relied on sections 535 and 537, Criminal Procedure Code. It may be interesting to note that the learned Vakil who now appears for the petitioner appeared in that case to support the exactly opposite contention. He has not attempted to distinguish that case from this.

If the view be correct that no departure from the strict letter of the law can be treated as a mere irregularity, but is an illegality, it is difficult to see what kind of case is provided for by the phrase "irregularity in the charge" in section 537, for unless there has been a departure of some kind from the strict letter of the law, it is clear that there has been no irregularity. Dr. Dwarka Nath Mitter suggested two instances of what would be merely an irregularity (1) where the name of the accused or of the person against whom the offence was committed is omitted from or wrongly given in the charge, (2) where the common object is not specified in a charge of rioting.

Obviously the first is not an instance of irregularity, it is either an omission or an error, both of which are also provided for by section 537. The second is also an omission, and if the common object is one of the particulars required by section 222 to be given in the charge, then section 225 would cure the defect and recourse to section 537 would be unnecessary. That section then must apply to some other state of things.

What is the effect of the words "subject to the provisions hereinbefore contained" in section 537? I do not think it can possibly be taken to be that the section is to have no application if there has been any departure from any of the previous sections of the Code. Such an interpretation would render the words "error, omission or irregularity in other proceedings" absolutely nugatory. The Code is exhaustive as to procedure. I think the opening words of the section must be read as having reference to sections 529 to 536. The Chapter in which these sections are included is headed "Of Irregular Proceedings" and sections 529 to 536 deal directly with the effect of various irregularities, including some cases of want of jurisdiction. In some cases, the irregu-

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larity is fatal in others not. Then follows section 537 a general saving section which is, however, limited by the foregoing sections in the same Chapter. In one of the sections before section 537, viz., section 535 is a provision that the absence of a charge shall not invalidate proceedings, unless it has in fact occasioned a failure of justice. So that in the present case if no charge at all under section 233 had been framed, a conviction under that section, or two convictions under that section, would not have been invalid unless there had been an actual failure of justice. In view of that section, apart from section 537, it is difficult to see how the petitioner's contention that the trial is bad because there was one charge instead of two, can be supported.

I consider it is impossible to define accurately what is meant by "irregularity" in section 537 and undesirable to attempt such a definition. The Judicial Committee say, "The illustration of the section itself sufficiently shows what was meant." The illustration shows that where a signature by a Magistrate is required, a signature by initials is purely an irregularity. So that where a thing is directed to be done and that thing is in effect done but in the wrong way, the error amounts only to an irregularity and not an illegality. Applying this test, what does section 233 in effect require and what has in effect been done? The section requires that a person is to be informed by a charge of every offence in respect of which he is to be tried. Treating the charge as one of two offences of causing hurt, he has in effect been told that he is to be tried for causing hurt to two persons named. The necessary information has been given to him, but in the wrong way, it has been given in one sentence instead of in two.

I have discussed the case up to this point as if the accused had really been charged with two offences in one charge, that being the footing on which it was argued by Dr. Dwarka Nath Mitter, and all the cases cited on behalf of the petitioner to which I have referred, appear to have been treated on that footing. But in the present case though acts amounting to two offences of causing hurt are alleged, the charge is only of one offence, as if the Magistrate had considered that the hurt caused to two persons amounted only to one offence. Not only is

this indicated by the wording of the charge itself, but support is lent to this view by the fact that the charges are drawn on a form headed "charges with two heads", one is the rioting charge, the other the charge of causing hurt. The conviction is also on that footing. The cases of *Gul Mahomed v. Cheharu Mandal* (1), *Johan Subarna v. Emperor* (5) and *Srish Chandra Mukerjee v. Emperor* (8) could not have been treated on that footing, as in those cases the acts alleged were committed on different occasions, and not as here at the same time.

Now it is somewhat surprising to me that an accused should be allowed to say, "I have been charged with and convicted of one offence, but as I ought to have been charged with and convicted of two, the whole proceedings are bad," and unless the law on the subject is very clear, I should be unwilling to attribute to the Legislature the intention of allowing him to say any such thing.

If the charge is treated as one of one offence only, the Magistrate has merely told him that causing hurt to two persons amounts to one offence, whereas he might have charged, convicted and sentenced him for two. In such a case the provisions of section 233 have not been contravened, for the accused is in effect accused of one offence only.

Whether the charge is treated as one of two offences or one, the result is the same. In one case, I prefer the view taken in *Moharuddi Malita v. Jadu Nath Mandul* (14) that the error is one of form and not of substance and that taken in *Musai Singh v. Emperor* (3) to that taken in the cases cited on behalf of the petitioner. In the other, the provisions of section 233 have not been contravened.

To recapitulate, I am of opinion (1) that the case of *Subrahmaniam Aiyar v. Emperor* (4) is not an authority for the proposition that failure to observe the first part of section 233 is fatal to the trial, (2) that if we are merely to follow authority, we must follow *Moharuddi Malita v. Jadu Nath Mandul* (14) in which the learned Judges made it a distinguishing feature that the offences were committed on the same occasion—a distinction which applies to the present case, and in view of that distinction the cases cited by the petitioner do not apply, (3) that if *Moharuddi Malita v. Jadu Nath Mandul* (14) is not distinguishable from the other cases, it is a more correct

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interpretation of section 537 than the other cases, which do not discuss section 537, (4) that if petitioner had been convicted of one or two offences under section 323 without any charge at all, the defect would not in view of section 535 have been necessarily fatal, much less can it be where in fact there has been a charge under section 323, (5) that if the case be considered from the point of view that the petitioner has been accused of only one offence, though the facts alleged amount to two offences, there has been no contravention of section 233.

In dealing with the case I have not referred to English cases, as reliance on cases decided under the Criminal Law of England is liable to mislead, though such cases may sometimes be useful as illustrating principles. Even in that stronghold of technicality the joining of more charges than one in one count has been held not to be a fatal defect. In the case of *Reg. v. Giddins* (15) the prisoners were charged in one count of assaulting two persons and of stealing from those persons. Objection was taken before trial. Tindal, C.J., decided that Counsel for the prosecution was not to be put to elect on the ground that "it was all one act and one transaction." It is noticeable that this in effect was the ground on which the learned Judges who decided *Moharuddi Malita v. Jadu Noth Mandul* (14) distinguished it from the case of *Gul Mahomed v. Cheharu Mandal* (1).

In a recent case, the case of *Rex. James Andrew Thompson* (16), the Court of Criminal Appeal refused to interfere in the case of a conviction, where there were two counts in each of which a number of offences were alleged. The indictment was bad, but it was held that the appellant had not in fact been prejudiced, as in the deposition and at the trial offences were proved on specific dates. The decision proceeded on one of the sections of the Criminal Appeal Act, which in effect provides what is provided by section 537, Criminal Procedure Code.

In conclusion I may mention that it would be difficult to find a case where a mere technicality, if upheld, would lead to more absurd results than in this case. The petitioner has been sentenced to six months' imprisonment

under section 147 and to two months' under section 323. The sentences are to run concurrently, yet because he has been charged on only one charge instead of two under section 323 the trial in respect to the charge of rioting also is to be held invalid, though it would have been unaffected if there had been no charge and no conviction at all under section 323.

I think the Rule should be discharged and the petitioner committed to jail to serve out the rest of his sentence.

This Rule again came up for hearing before Sharfuddin, J., who delivered the following

JUDGMENT.—This is a reference made to me under section 439 read with section 429 of the Code of Criminal Procedure as Fletcher and Beachcroft, J.J., were divided in opinion as to the interpretation of the first portion of section 233 of the Code.

The facts so far as are necessary for the purposes of the present reference are these:

There was rioting in which hurt was caused by one Ram Subhag Singh to two men, named Khalifa Ahir and Ram Belas Lal. The petitioner was charged with rioting and with hurt caused by him to the above-mentioned two men. The latter charge is under section 323, Indian Penal Code.

The second head of the charge is in the following terms:

"That you, Ram Subhag Singh, on or about the 5th day of July 1914 at Mafitala, appertaining to Mouza Bangra, voluntarily caused hurt to Khalifa Ahir and Ram Belas Lal, and thereby committed an offence under section 323, of the Indian Penal Code, etc. etc."

Ram Subhag Singh, the petitioner, having been found guilty of both the charges, was convicted and sentenced. He moved this Court and obtained a Rule in the following terms:—

"Let the record be sent for and a Rule issue calling on the District Magistrate to show cause why the conviction and sentence passed upon the accused should not be set aside or why such other orders should not be passed as to the Court may seem fit and proper."

The above is an open Rule, but the present reference relates to the first ground

(15) (1842) Car. & Mar. 634.

(16) (1914) 9 Cr. App. Rep. 252; 85 L. J. K. 643; 2 K. B. 99; 110 L. T. 272; 78 J. P. 212; 24 Cox. C. C. 43; 30 T. L. R. 223.

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taken in the application for révision, and that ground is that the joinder in one charge of two distinct offences of causing hurt to two distinct individuals was an illegality which was fatal to the whole trial.

The difference between the two learned Judges of the Bench that heard the Rule is as to whether the first portion of section 233, Criminal Procedure Code, is so imperative as to render the whole trial null and void for the reason that the direction enjoined therein has been disobeyed, and also as to whether the omission complained of is curable by section 537 of the Code.

Section 233 of the Code enacts: "*for every distinct offence of which any person is accused, there shall be a separate charge, and every such charge shall be tried separately except in the cases mentioned in sections 234, 235, 236 and 239.*"

For the purposes of the present reference I am concerned with that portion of the section which I have italicised and which refers only to the framing of the charge.

In the present case the accused was charged in one Court with having caused hurt to two men. On behalf of the petitioner it has been contended that a duplication of two charges in one count was not a mere irregularity which could be cured by section 537 of the Code; and that the omission was an illegality in the mode of trial and in disobedience of an express direction of law and that by reason of this obedience the whole trial vitiates.

Section 537 enacts: "subject to the provisions hereinbefore contained, no finding, sentence, or order passed by a Court of competent jurisdiction shall be reversed or altered under Chapter XXVII, or on appeal or revision on account:—

(a) of any error, omission, or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during trial, or in any inquiry or other proceedings under this Code, or

(b) of the want of or any irregularity in any sanction required by section 195, or any irregularity in proceedings taken under section 476, or

(c) of the omission to revise any list of jurors or assessors in accordance with section 324, or

(d) of any misdirection in any charge to a Jury unless such errors, omission, irregularity, want or misdirection has in fact occasioned a failure of justice.

Explanation:—In determining whether any error, omission or irregularity in any proceeding under this Code has occasioned a failure of justice, the Court shall have regard to the fact that the objection could or should have been raised at an earlier stage in the proceedings."

For the purposes of the present reference, I am concerned with clauses (a), (b), (d) and the explanation. The above section is prefixed by the qualifying words "subject to the provisions hereinbefore contained." A question arises as to whether these qualifying words refer to the part of the Code which precedes section 537 or they refer only to the Chapter where this section finds a place. The question has been raised, though not expressly decided, whether the provisions referred to are the provisions of the entire Code preceding this section or only the provisions of Chapter XLV where this section occurs. The former view was adopted in the case of *Raj Chunder Mozumdar v. Gour Chunder Mozumdar* (17) and in the case of *Nilratan Sen v. Jogesh Chundra Bhattacharjee* (18), and the latter view was put forward by the referring Judges in the case of *In the matter of Abdur Rahman* (12) but the Full Bench did not decide the question.

To my mind it is clear, from the wordings of clause (b) of section 537 and the explanation attached to it, that the qualifying words "subject to the provisions hereinbefore contained" do not refer to the entire Code that precedes that section, because if those qualifying words referred to all the sections of the Code preceding 537, the clause (b) of the section would become meaningless or inoperative. Take the case of giving false evidence in a Court. Under section 195, clause (b), of the Code no Court "shall take cognizance except with the previous sanction or on the complaint of the Court where the offence was committed or some other Court to which such Court is subordinate." If the

(17) 22 C. 176.

(18) 23 C. 983 at p. 990; 1 C. W. N. 57.

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qualifying words in section 537 were to be interpreted in the manner suggested by the learned Vakil for the petitioner, clause (b) of section 537 would conflict with that interpretation. If the qualifying words refer to the entire Code preceding the section, it would mean that trial of an accused for giving false evidence without a sanction previously obtained would be altogether null and void and section 537 would not be able to cure the defect; but clause (b) distinctly provides that in such a case, section 537 can cure the defect if there has not been a failure of justice.

If the words "subject to the provisions hereinbefore contained" referred to all the preceding sections of the Code, then an omission to sign a warrant cannot be cured by this section. Section 75 of the Code requires a warrant of arrest to be in writing and to be signed by the presiding officer. The words used in that section are "shall be in writing, signed by the presiding officer." Clause (a) of section 537 provides that an omission in a warrant is curable by that section under certain circumstances. There is only one illustration attached to this section, which is this, "A Magistrate being required by law to sign a document signs it by initials only. This is purely an irregularity, and does not affect the validity of the proceeding."

Section 68 requires certain formalities with regard to summons and the word used is "shall", but having regard to the new and the only illustration to section 537 of the Code, it is purely an irregularity and cannot, therefore, affect the validity of the proceeding.

In the present case the objection that the charge has not been framed in accordance with the provisions of section 233 of the Code was never taken before the matter came to this Court. In determining whether the omission complained of has occasioned a failure of justice, I must have regard to the fact whether the objection could or should have been raised at an earlier stage in the present proceeding.

If by the duplication of the charges the petitioner was embarrassed, he should have objected to the form of the charge when it was read to him.

On behalf of the petitioner reliance has been placed on the case of *Subramania Aiyar v. Emperor* (4) and some other cases that followed that Privy Council case. The later cases I propose to discuss later on. At present I think it necessary to examine the judgment of their Lordships of the Privy Council and find out from it whether their Lordships held therein that a disobedience to the direction contained in the first portion of section 233 is an illegality not curable by section 537.

The head-notes that prefixed the judgment of their Lordships are incorrect. Those head-notes are to the following effect:

"The appellant was tried at the Criminal Sessions of the High Court and convicted on an indictment, the first count of which contravened the provisions of sections 233 and 234 of the Code of Criminal Procedure (which provide that every separate offence shall be charged and tried separately, except that three offences of the same kind may be tried together in one charge if committed within the period of one year), and did not fall within the provisions of section 235 (1) (which provides that if, in one series of acts so connected together as to form the same transaction more offences than one are committed by the same person, he may be charged with, and tried in, one trial for every such offence). On a case certified under Article 26, Letters Patent, and heard by the Full Court, it was held by the majority of the Court that the union of the first count with the others made the whole indictment bad for misjoinder, but that it was open to them to strike out the first count rejecting the evidence with regard to it, and deal with the evidence as to the remaining counts of the indictment. This was done, with the result that the conviction was upheld on one count only the sentence being reduced. Held by the Judicial Committee that the disregard of an express provision of law as to the mode of trial was not a mere irregularity such as could be remedied by section 537 of the Criminal Procedure Code. Such a phrase as "irregularity" is not appropriate to the illegality of trying an accused person for many different offences at the same time, and those offences being spread over a longer period than by law could have been joined together in one indictment. Nor could such an illegal procedure be

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amended by arranging afterwards what might or might not have been properly submitted to the Jury. To allow this would leave to the Court the function of the Jury, and the accused would never have been really tried at all upon the charge afterwards arranged by the Court. The trial having been conducted in a manner prohibited by law was held to be altogether illegal and the conviction was set aside."

I have reproduced above the whole of the head-notes as I consider it of serious importance. I find, on comparing them with the judgment, that these head-notes contain more than what was held by their Lordships of the Privy Council, and in order to do this, it is, I think, necessary to mention here in some details the facts of that case. In that case the appellant was tried on an indictment in which he was charged with no less than forty-one acts, those acts extending over a period of two years. Their Lordships held this to be in contravention of the provisions of section 234 of the Code (which provides that a person may only be tried for not more than three offences of the same kind if committed within a period of twelve months).

Their Lordships' views as to the scope of section 537 of the Code as I make out are these:—

When a person was tried for 41 offences in direct contravention of the provisions of the section 234, their Lordships observed that the mischief sought to be avoided by the section having been committed, "the effect of the multitude of the charges before the Jury has not been averted by dissecting the verdict afterwards and appropriating the finding of guilty only to such parts of the written accusation as ought to have been submitted to the Jury. It would in the first place leave to the Court the function of Jury and the accused would never have really been tried at all upon the charge arranged afterwards by the Court." Their Lordships did not regard this as curable by section 537. The following remarks by their Lordships manifestly indicate that the illegality referred to was an utter disobedience of the law as contained in section 234 of the Code. Those remarks are:—"Their Lordships are unable to regard the disobedience to an express provision as to a mode of trial as a mere irregularity. Such a phrase as irregularity

is not appropriate to the illegality of trying an accused person for many different offences at the same time and those offences being spread over a longer period than by law could have been joined together in one indictment."

The case before the Privy Council was not that any provision of the section 233 was contravened. The only question before their Lordships was whether the mode of trial in which one indictment contained 41 acts, spread over a period longer than 12 months, was or was not illegal by reason of the provisions of the section 234 of the Code.

For the above reasons, I am of opinion that the head-notes, prefixed by the reporter, are misleading in so far as reference is made therein to the section 233 of the Code.

During the course of arguments a number of authorities has been referred to in support of the contention that a disobedience of the first portion of section 233, Criminal Procedure Code, is an illegality which vitiates the whole trial and not a mere irregularity curable by section 537 of the Code.

I propose now to discuss the other authorities referred to during the course of argument in order to point out, assuming the correctness of the views expressed therein, that the facts of these cases were different from the facts of the present case:

(1) In the case of *Gul Mahomed v. Cheharu Mandal* (1) the charges were:—

1st. "That you, on or about the 15th or 16th day of January 1905, at Khayarbari, committed extortion of a *muchili* a and of Rs. 25 respectively, from Cheharu Mandal and thereby committed an offence punishable under section 384, Indian Penal Code.

2nd. "That you, on or about the 15th of January 1905 at Khayarbari assaulted Cheharu Mandal and thereby committed a offence under section 352, Indian Penal Code."

In the above case the accused was convicted under sections 384 and 352, Indian Penal Code. The convicted person obtained a Rule from this Court. When the Rule came on for hearing Crown was unrepresented. This Court held that, assuming these charges

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arose out of one and the same transaction, and that the claim for Rs. 25 did not constitute extortion, a neglect to observe section 233, Criminal Procedure Code, must be pronounced to be fatal to the case according to the ruling in *Subramania Aiyar v. Emperor* (4), because under that section there should have been a separate charge for the distinct offences.

Apparently, no doubt, the above authority is in support of the contention that to charge the accused in the present case for two acts of hurt caused by him on two different persons in one indictment was in direct contravention of the provisions of section 233, Criminal Procedure Code. In this reported case, it must be remembered that the charges, as framed, referred to acts of the accused on two different dates; it is possible, therefore, the accused may have been embarrassed in meeting with such a charge. In the present case, however, there was one rioting in the course of which the accused is said to have caused hurt to two men simultaneously or almost simultaneously, and during the whole trial he never objected to the alleged misjoinder of the charges; on the contrary, he by examining witnesses for the defence indicated that he was not embarrassed at all.

What the Privy Council has prohibited is any contravention of any mode of trial laid down expressly by the law. To charge an accused person with two acts committed in one and the same transaction and committed simultaneously or almost simultaneously is a matter which was not before their Lordships of the Privy Council. The only passage in their Lordships' judgment which may be construed to have any reference to section 233 of the Code is this: "the policy of such a provision (joinder of charges of more than three offences committed within a year) is manifest and the necessity of a system of written accusation specifying a definite criminal offence is of the essence of Criminal Procedure." At the time, what was present before their Lordships was that 41 acts committed within the space of more than 12 months were included in one charge. I am of opinion that the above quoted passage is not in reference to section 233, but is in reference to section 234 of the Code.

(2) Another case cited on behalf of the petitioner is the case of *Tilakdhari Das v.*

Emperor (6). In this case the Crown was unrepresented.

The facts of this case were:—

The petitioners were in the employ of the Darbhanga Raj, Tilak Dhari being the *patwari*, Chaman Missir a *jeth raiyat*. It was the duty of the *patwari* to collect rents from the *raiya*s and to account for their collections. They collected three sums of money, namely, Rs. 2-12 from a tenant by the name of Kirty Jha and Rs. 6-4 and Rs. 1-4 from another tenant called Bhatoo Thakur, all the three items being collected on one and the same date, the 30th *Bhadra* 1312. The Sub-Divisional Magistrate of Madhubani convicted the petitioners under section 408, Indian Penal Code, in respect of all the three items and sentenced them to certain terms of imprisonment. The charge as framed was as follows:—

That you, on or about the 30th *Bhadra* 1312 *fash*, at Pariharpur, being in service of the Maharaja of Darbhanga and entrusted with the duty of collection of rents from the *raiya*s of Pariharpur and being in charge of the collection of monies, dishonestly misappropriated three sums of collection money, *viz.*—(1) Rs. 2-12, realised from Kirty Jha; (2) Rs. 6-4 from Bhatoo Thakur and Rs. 1-4 from Bhatoo Thakur on 30th *Bhadra* 1312, as shown in 3 receipts, and thereby committed an offence punishable under section 408, Indian Penal Code."

The observations made by Caspersz, J., sitting with Chitty, J., are important as they distinguish that case from the present case. Their observations are:—

"The authorities we have cited doubtless carry the rule laid down by their Lordships of the Privy Council in the case of *Subramania Aiyar v. Emperor* (4) to an extreme length. But we are not prepared, as at present advised, and in a case which has not been fully argued (Crown was unrepresented), to dissent from the cases to which our attention was called. We are of opinion that the irregularity in the procedure of the Sub-Divisional Magistrate is not an irregularity such as can be cured by the provisions of section 537 of the Criminal Procedure Code. We rather think that the irregularity has in fact occasioned a failure of justice and that the petitioner should be re-tried on charges properly framed. There should be separate

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charge for each distinct offence as provided by section 233, Criminal Procedure Code. The two petitioners, being accused of different offences committed in different transactions relating to different *railyats*, should be tried separately."

From the above remarks, it is clear that the omission to frame separate charges in that case was treated as an irregularity and not as an illegality. Separate trial and distinct charges were ordered, but not in consequence of an illegality, but in consequence of an irregularity which had occasioned a failure of justice.

(3) The third case cited was the case of *Budhai Sheikh v. Tarap Sheikh* (7). The acts of this case were these:—

Certain amount of linseed was looted on the 22nd February and certain tobacco on the 23rd February by an unlawful assembly consisting of the same persons, of whom the petitioner was the leader. It was held that the events of the two different dates were not part of the same transaction and the trial was bad under section 239, Criminal Procedure Code, and section 234 of the Code by its term, referred to the case of a single accused, and is not applicable where several persons are jointly tried under section 239 of the Code.

It is important to note that the facts disclosed in this reported case do not disclose that the provisions of the section 233 had been contravened.

(4) The fourth case cited is the case of *Srish Chandra Mukerjee v. Emperor* (8). The charge in this case referred to was of three acts of cheating, i.e., in July, in August, and in October or in November. This Court held that the charge was bad. Here also there were three different transactions and on three different dates. From the report it appears that this Court looked into the evidence on the record of that case, as I find in the judgment the following passage:—

"The only question is whether we should send back the case for re-trial. We think, in the circumstances, it would be highly unprofitable to do so, and especially having regard to the evidence brought to our notice and to the statement elicited from Girish Chandra Ghosh in re-examination." The

conviction for the above reason was set aside.

It appears from this reported judgment, the learned Judges had relied on the case of *Johan Subarna v. Emperor* (5).

(5) The fifth case cited was the case of *Asgar Ali v. Emperor* (2). The charge in this case was to the following effect:—

"That you between the 15th *Jaista* 1318 B. S. (29th May 1911) and the 18th *Agrahayan* 1318 B. S. (4th December 1911) at Rama Ethernagar being entrusted with the collection made on account of *chaukidari* tax, in your capacity of a public servant as a collecting *parchayat* of Union VI of the Thana Dumkul, dishonestly misappropriated a total sum of ten annas and six pies (10 annas 6 pies), to wit, a sum of four annas six pies collected from Atal Mistri between the 15th *Jaista* 1318 (29th May 1911) and the 4th *Bhadra* 1318 (1st August 1911) and a sum of six annas collected from Rajni Nath between the 20th *Asarh* 1318 (5th May 1911) and the 18th *Agrahan* 1318 (4th December 1911) and thereby committed an offence under section 409, Indian Penal Code."

It was held that a single charge relating to several distinct offences was illegal under section 233, Criminal Procedure Code, there should have been a separate head of charge for each of such offences. The case of *Subramania Aiyar v. Emperor* (4) was relied upon.

I consider, however, the charge as framed was perfectly correct and in strict conformity with the provisions laid down in section 222, clause (2), Criminal Procedure Code, which enacts that "when the accused is charged with criminal breach of trust or dishonest misappropriation of money, it shall be sufficient to specify the gross sum in respect of which the offence is alleged to have been committed, and the dates between which the offence is alleged to have been committed, without specifying particular items or exact dates and the charge so framed shall be deemed to be a charge of one offence within the meaning of section 234, provided that the time included between the first and last of such dates shall not exceed one year."

There are other cases also in which it was held that a duplicity in the charge vitiates the trial and those cases appear to

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have followed the case of *Subramania Aiyar v. Emperor* (4) as reported in the head-notes. I have already pointed out that this Privy Council authority has no reference to section 233 of the Code.

Now I desire to discuss the question of duplication. There is an authority of this Court, namely, the case of *Musai Singh v. Emperor* (3) in which the facts were similar to the facts of the present case, and it was held that this was a mere duplicity which had not occasioned any failure of justice. The learned Judges who decided the case refused to interfere. The learned Vakil for the petitioner admitted that he could not distinguish the facts of this reported case from the facts of the present case.

There is no doubt that according to the general principle a duplicity of the charge is not allowed. The indictment must not be doubled, that is to say, no one count of the indictment should charge the accused with having committed two or more offences, for instance, with having committed murder and robbery or the like. But where the offence charged, whether felony or misdemeanour, is one single act, it may be made the subject of a single count. So the indictment may charge the prisoner in the same count with felonious acts with respect to several persons, as in robbery with having assaulted *A* and *B* and stolen from *A* one shilling and from *B* two shillings, if it was all in one transaction (see Archbold's Criminal Pleadings, 24th Edition, page 75).

Section 233 of the Code contains the general law, and the reason of it is that the mind of the Court might not be prejudiced against the prisoner, if he were tried in one trial upon different charges resting upon different evidence. It might be difficult for the Court trying him on one of the charges not to be unfairly influenced by the evidence against him on the other charges. A charge is a first notice, to the prisoner, of the matter whereof he is accused, and it must convey to him with sufficient clearness and certainty that which the prosecution intended to prove against him and of which he will have to clear himself.

In cases similar to the present case the Court has to see whether the accused was

bewildered and embarrassed by the duplicity of the charge.

In the case of *Rex v. James Andrew Thompson* (16), his Lordship the Chief Justice dismissed the appeal remarking "that even assuming the objection raised after plea to the defect in the form of indictment was not too late, no substantial miscarriage of justice has accrued and that we are, therefore, bound to give effect to the proviso in section 4, sub-section (1), of the Criminal Appeal Act, 1907, which is as follows:—'Provided that the Court may, notwithstanding that they are of opinion that the point raised in appeal might be decided in favour of the appellant, dismiss it, if they consider that no substantial miscarriage of justice has occurred'." This provision appears to be similar to that laid in section 537 of the Code.

Section 233, as already observed, provides two things, *first*, for separate charge for each distinct offence, *second*, for separate trial except in four cases mentioned. What their Lordships of the Privy Council have prohibited is if law expressly provides a particular mode of trial, disobedience of that law vitiates the whole trial. I doubt if the framing of charges is a mode of trial, but joint trial of charges as to distinct offences would be a mode of trial and if an accused is tried jointly on several charges not coming under sections 234, 235, 236, 239, that trial would be null and void.

Although illustrations have no force of law, but they go a great way to explain the intention of the Legislature. There is only one illustration attached to section 233 of the Code, which is this:—"A is accused of a theft on one occasion, and of causing grievous hurt on another occasion. A must be separately charged and separately tried for the theft and causing grievous hurt." If the intention of the Legislature had been that separate charge should be framed even in a case where more than one distinct offence has been committed in the same transaction (as in the present case), one would expect an illustration to that effect.

The words "every distinct offence" in section 233 of the Code have some meaning. I understand, when two offences have been committed and each of these two offences has no connection with each other, they

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are distinct offences. The section does not say "for every offence" but "for every distinct offence." The illustration quoted above indicates the meaning of "distinct offence." In the illustration, the two offences were committed on two different occasions, one was theft and the other was grievous hurt.

The decision of the question involved in the present reference depends on whether the omission to frame two charges instead of one against the accused with respect to hurt caused by him to two individuals, is or is not curable by section 537 of the Code as a mere irregularity which has caused no failure of justice. I have already shown that the qualifying expression at the beginning of section 537 refers only to Chapter XLV and that omission in a charge, warrant or summons is not an illegality but is only an irregularity.

"An author must be supposed to be consistent with himself, and, therefore, if in one place he had expressed his mind clearly, it ought to be presumed that he is still of the same mind in another place, unless it clearly appears that he has changed it. In this respect, the work of the Legislature is treated in the same manner as that of any other author; and the language of every enactment must be construed, as far as possible, as to be consistent with every other which it does not in express terms modify or repeal." (See Maxwell's Interpretation of Statutes, 5th Edition, page 253.)

"In determining either what was the general object of the Legislature, or the meaning of its language in any particular passage, it is obvious that the intention which appears to be most agreeable to convenience, reason, justice, and legal principles, should, in all cases open to doubt, be presumed to be the true one." (Maxwell's Interpretation of Statutes, page 309.)

For the above reasons, I am of opinion that the omission complained of is but an irregularity. The objection taken in this Court could and should have been taken at an earlier stage of the proceeding.

The accused was convicted for rioting and hurt and was sentenced to undergo rigorous imprisonment for six months under section 147, and two months under

section 323, Indian Penal Code, and both the sentences were made to run concurrently. He was further ordered under section 106, Criminal Procedure Code, to execute a bond in Rs. 500 with a surety in like amount to keep the peace for a year and in default to undergo simple imprisonment for that period.

I have now to consider as to whether there has been any failure of justice. Ram Subhag, the petitioner, was charged in one count for having caused hurt, in one rioting, to two men, namely, Ram Belas and Khalifa Ahir. The lower Appellate Court's finding is this: "also the individual charge against Ram Subhag of voluntarily causing hurt to Khalifa has been proved, but not the individual charge for voluntarily causing hurt to Ram Belas, for apparently Ram Belas had no marks of injury." From the judgment of the lower Appellate Court, it does not appear what nature of hurt was caused by Ram Subhag to Khalifa.

Referring to the judgment of the trying Court, I find that Court saying, "P. W. No. 11 proves a number of injuries he found on the person of Khalifa, one being a simple fracture of the left ring-finger and the other a compound fracture near the middle part of ulna and radius bones." This witness is a Sub-Assistant Surgeon. It does not, therefore, appear from the judgment of either Court what was the nature of the injury caused by the petitioner. The injury caused by him must have been a simple hurt to Khalifa, as he was charged under section 323, Indian Penal Code. I have been told that the petitioner has already served 19 days in jail, and there can be no doubt that he had to spend a large amount of money in defending himself in two Courts below, and in this Court. In the above circumstances, I reduce his sentence of six months to the portion already served. The order under section 106, Criminal Procedure Code, will stand. He is discharged from the bail bond.

Sentence reduced.

MURGESAN MUDALIAR v. SODIAMMA.

HIRA LAL v. SARASWATI.

LOWER BURMA CHIEF COURT.
CRIMINAL REVISION No. 325B of 1914.

December 8, 1914.

Present:—Mr. Justice Parlett.

A. MURGESAN MUDALIAR—

APPLICANT

versus

SODIAMMA—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 498
—Maintenance of children living with mother—Father's liability.

A father cannot refuse to maintain his children on the ground that they are living with their mother, if they are unable to maintain themselves. If he wants to have them in his custody, he must enforce his rights, if any, in a Civil Court.

Review of the order of the Western Sub-Divisional Magistrate, Rangoon, directing the applicant to pay to the respondent, his wife, Rs. 30 a month for the maintenance of his three daughters at the rate of Rs. 10 each and Rs. 25 for her own maintenance.

Mr. Broadbent, for the Applicant.

Mr. N. C. Sen, for the Respondent.

JUDGMENT.—As regards the children, it is urged in the first place that there has been no neglect to maintain them, as the father is willing to do so provided they are not left with the mother. Reliance is placed on the case of *Man Singh v. Musammat Dharmon* (1) where it was held that when a man offers, in answer to an application to maintain his children, to do so on condition that they live with him, it cannot be said that he refuses to maintain them. It is true that some remarks in two Upper Burma cases, *Maung Pine v. Mi Nyn* (2) and *Maung Ma v. Ma Cho* (3), indicate a similar view but there was no decision on the point, and both in Upper and Lower Burma the contrary has since been expressly held, see *Ma Nyein Me v. Maung Kyaw* (4), *Maung San Hla v. Ma On Bwin* (5), *Mi Gauk v. Nga Po Hmi* (6), *Mi Saw v. S.* (7) and *Nan Saw Shwe v. Maung Hpone* (8). The contention cannot, therefore, prevail and unless and until the father enforces his rights, if any, in a Civil Court

(1) 18 P. R. 1894 Cr.

(2) U. B. R. (1892-96), 1 p. 67.

(3) U. B. R. (1892-96), 1 p. 68.

(4) U. B. R. (1902-03), 1 p. 7.

(5) 2 L. B. R. 46.

(6) U. B. R. (1905), 1 p. 39; 12 Bur. L. R. 33; 2 Cr. L. J. 330.

(7) 7 Ind. Cas. 460; U. B. R. (1910) 1, p. 1; 11 Cr. L. J. 438.

(8) 48 Ind. Cas. 658; 6 L. B. R. 127; 6 Bur. L. T. 51; 14 Cr. L. J. 93.

he must maintain his children, if unable to maintain themselves.

Application rejected.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION PETITION No. 1229
OF 1914.

May 5, 1915.

Present:—Mr. Justice Chamier.

HIRA LAL AND OTHERS—APPLICANTS—

versus

SARASWATI—OPPOSITE—PARTY.

Copyright Act (III of 1914), s. 7 (a)—*Copyright—Translation by author, right in—Copyright Act (XX of 1847).*

Under the old copyright Act "copyright" did not include the exclusive right of translation but the author of a book who made a translation of it was entitled to a copyright in it as if it were an original work.

Criminal revision against an order of the Magistrate of Aligarh.

Mr. E. A. Howard, for the Applicants.

Mr. S. K. Dar, for the Opposite Party.

Mr. R. Malcomson, Assistant Government Advocate, for the Crown.

JUDGMENT.—The applicants have been convicted of an offence under section 7 (a) of the Indian Copyright Act, 1914. Ajudhia Prasad wrote a book in Urdu called "Translation Guide, Part 1", and had it printed in 1897 by the applicants who are the owners of a press. He also wrote a Translation Guide, Part I, in Hindi but died before he could publish it. His widow, the complainant, had the new work printed and published by the applicants in 1911. Three years later the applicants published another edition of the Translation Guide in Hindi, but suppressed the name of the author and claimed to be the proprietors of it. For the applicants it is contended that the complainant had no copyright in the Hindi work. 'Copyright' did not formerly include the exclusive right of translation, but the author of a book who made a translation of it was entitled to a copyright in it as if it were an original work. Therefore even if the Hindi book in question is only a translation of the Urdu book, Ajudhia Prasad, and his widow after him, had copyright in the Hindi book. Section 4 of the Act of 1914 to which Counsel has referred has no bearing upon the case. The application is dismissed.

Application dismissed.

RAMASWAMI MUDALIAR v. MUTHUSWAMI AYYAR.

MADRAS HIGH COURT.

APPEAL AGAINST ORDER No. 224 OF 1914.

July 19, 1915.

Present:—Mr. Justice Oldfield and
Mr. Justice Sadasiva Aiyar.RAMASWAMI MUDALIAR—DEFENDANT
No. 1—APPELLANT

versus

MUTHUSWAMI AYYAR—PLAINTIFF—

RESPONDENT.

*Promissory note—Minor—Guardian—Promissory note
executed by alleged guardian—Liability of minor.*

The executant of a promissory note was described in the body of the note as the guardian of a minor and the necessity for borrowing was stated in it as arising from the minor's father's debt:

Held, that on these facts the minor was not liable on the promissory note.

Appeal against the decree of the Court of the Subordinate Judge of Mayavaram, in Appeal Suit No. 525 of 1913, preferred against that of the District Munsif of Shiyali, in Original Suit No. 258 of 1912.

Mr. S. Muthia Mudaliar, for the Appellant.

Mr. R. Kuppusawmy Aiyar, for the Respondent.

JUDGMENT.—The second defendant is no doubt described in the body of the suit note as the guardian of the 1st defendant, who was at its date a minor; and the necessity for borrowing is stated in it as arising from the 1st defendant's father's debt. We are not, however, prepared to treat these facts alone as sufficient to indicate that 2nd defendant signed as 1st defendant's guardian or did not intend to incur personal liability. We must, therefore, hold that 1st defendant is not liable on the note.

It is urged in the alternative that he is liable on the original debt, for which the note was substituted. But that was not the case relied on in the plaint, nor has it been shown how plaintiff, an assignee of the pro-note alone, could rely on it, or how a suit on the debt could be in time.

In these circumstances, the appeal against order must be allowed, the lower Appellate Court's order being set aside and the District Munsif's decree restored. Plaintiff will pay 1st defendant's costs throughout.

Appeal allowed.

BHURA v. BANARSI DAS.

PUNJAB CHIEF COURT.

CIVIL REVISION PETITION No. 15 OF 1915.

April 28, 1915.

Present:—Mr. Justice Leslie-Jones.

BHURA AND OTHERS—DEFENDANTS—

PETITIONERS

versus

BANARSI DAS AND ANOTHER—PLAINTIFFS

AND ANOTHER—DEFENDANT—RESPONDENTS.

Hindu Law—Mitakshara—Debts—Liability of members of joint Hindu family.

The plaintiffs sued S, his father B, and his brother J, for recovery of a debt incurred by S alone and a decree was passed against them, on the finding that when the debt was incurred all the three defendants were members of a joint Hindu family. It was not shown that the loan was taken either for the benefit of the family or for the purposes of a joint family business:

Held, that under the circumstances B and J were not liable to pay the debt. [p. 481, col. 2.]

There is no presumption that a debt contracted even by the Manager of a Hindu family is contracted for the benefit of the family or firm. [p. 481, col. 2; p. 482, col. 1.]

Petition for revision under section 44 of Act III of 1914, of the decree of the Senior Subordinate Judge, first Class, Rahtak, dated 1st October 1914, varying that of the Munsif, second Class, Jhajjar, dated the 22nd April 1914, decreeing the claim.

Mr. Gullu Ram, for the Petitioners.

Chaudhri Rambhaji Datta, for the Respondents.

JUDGMENT.—The plaintiffs sued Shankar, his father, Bhura, and his brother, Jowahir, for the recovery of a debt incurred by Shankar alone. The Munsif gave a decree against Shankar only, on the ground that although all three defendants were members of a joint Hindu family at the time when the debt was contracted, it had not been shown that the loan was taken either for the benefit of the family, or for the purposes of a joint family business. On appeal to the Subordinate Judge Bhura and Jowahir were held liable without any further finding of fact, merely on the ground that at the time of the loan the family was joint. Bhura and Jowahir have now applied for revision and their petition must succeed. There is ample authority, *e. g.*, *Ganpat Rai v. Munni Lal* (1), for holding that there is no presumption that

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a debt contracted even by the Manager of a Hindu family is contracted for the benefit of the firm or family. The fact has to be proved. There is no evidence on the record to justify an affirmative finding of fact; indeed in the memoranda of appeal, presented to the lower Appellate Court, the appellants made the continued existence of a joint Hindu family the sole basis of their contention. They had sufficient opportunity for meeting the plea of the petitioners, but they made no attempt to establish facts on which liability could be based.

The revision is allowed and the plaintiffs' suit as against the petitioners is dismissed. The petitioners will get costs in the lower Appellate Court and in this Court.

Revision allowed.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL FROM ORDER NO. 106 OF 1915.

July 31, 1915.

Present:—Justice Sir P. C. Banerji, Kt., and Mr. Justice Rafique.

RAM CHAND—PETITIONER—APPELLANT
versus

GAYA DIN TEWARI—OPPOSITE PARTY—
RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 92, suit under, compromised—Trustee appointed declared insolvent—Application to remove trustee if in continuation of suit—Remedy.

In a suit under section 92 of the Civil Procedure Code a compromise was effected by which one G was appointed manager of a temple. Subsequently G was declared insolvent and an application was made to the District Judge to remove him:

Held, that the suit having been decided and a decree made the application could not be in continuation of the suit and was, therefore, not entertainable.

Held, further, that the remedy was a further suit under section 92 of the Civil Procedure Code.

First appeal from an order of the Judge of Agra, dated the 10th March 1915.

Mr. G. L. Agarwala, for the Appellant.

Mr. Mohan Lal Sandal, for the Respondent.

JUDGMENT.—In our opinion the Court below is right. A suit was brought under section 92 of the Code of Civil Procedure

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for removal of certain trustees of a temple. The case was compromised and a decree was made in accordance with the compromise, to the effect that Gaya Din should be the manager of the temple and Ram Chand should be the manager of the temple property. It is said that Gaya Din has been declared insolvent and accordingly an application was made to the District Judge to remove Gaya Din from his office of trustee. The learned Judge has, in our opinion, rightly held that no such application could be made in the Miscellaneous Department. If Gaya Din had committed any act which would entail his removal from the office of trustee, the remedy was a suit under section 92 of the Code of Civil Procedure, but no application in the Miscellaneous Department could be made for his removal. The Court has no authority to entertain an application of this kind. The learned Vakil for the appellant contends that the present application was in continuation of the suit which terminated in a compromise and decree. The suit having been decided and a decree made, there could not be a continuance of the suit. The present application cannot be deemed to be an application for execution of the decree. We dismiss the appeal with costs.

Appeal dismissed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL NO. 1536 OF 1914.

April 19, 1915.

Present:—Mr. Justice Shadi Lal.

RAM LAL AND OTHERS—PLAINTIFFS—
APPELLANTS
versus

THE FIRM OF ARUR CHAND, JIWAN DAS AND RAM SAHAI (REPRESENTATIVES OF DIAL RAM, DECEASED) AND ARUR CHAND
—DEFENDANTS—RESPONDENTS.

Fraud—Document executed to defraud creditors—Suit to set aside document, when maintainable—In pari delicto, potior est conditio possidentis.

A plaintiff is entitled to ask a Court of Justice to give him a decree, declaring that a deed of release

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executed by him was a colourable transaction entered into to defraud his creditors and for enforcing the rights which he possessed prior to the execution of the deed, only if the fraud has not been accomplished but when the object of the fraud has been carried into effect no relief can be granted to the plaintiff. [p. 453, cols. 1 & 2.]

Dogar Mal v. Jamiat, 38 P. R. 1892; *Jiwan Singh v. Jora*, 25 P. R. 1905; 65 P. L. R. 1905, followed.

Second appeal from the decree of the Additional Divisional Judge of the Shahpur Division at Lyallpur, dated the 19th May 1914, reversing that of the Munsif, first Class, Lyallpur, dated the 23rd of December 1913, decreeing that Ram Kishen, plaintiff, is owner of half the shop with the defendants.

Mr. Gokal Chand Narang and Mehta Bahadur Chand, for the Appellants.

Mr. Ganpat Rai, for the Respondents.

JUDGMENT.—The question of law, which arises in this second appeal, is one of some importance and put briefly it comes to this. Is a plaintiff entitled to ask a Court of Justice to give him a decree declaring that a deed of release executed by him was a colourable transaction entered into to defraud his creditors and for enforcing the rights which he possessed prior to that deed? Now, in this case there is no doubt that the defendants were a party to the fraud and it is clear that the purpose of the fraud has been accomplished. The cases, in which a contemplated fraud has not gone beyond the stage of intention, have, therefore, no bearing upon the issue before me. There was considerable diversity of judicial opinion in India as to whether, when the intended fraud had not been carried into execution, the Court should or should not relieve a person from the consequences of the deed executed by him with intent to commit fraud. But the matter has recently been set at rest by a judgment of the Privy Council in *Petherpermal Chetty v. Munandy Servai* (1), wherein their Lordships held that when the purpose of the fraud has not been effected, there is nothing to prevent the plaintiff from repudiating the transaction as being a colourable one and recovering possession of the property.

The point which I have to determine is whether a plaintiff, who has fraudulently executed a deed of release, can, after the

object of the fraud has been carried into effect, claim relief from the consequences of the fraudulent transaction against a person who is *in pari delicto*. Now, there is a ruling of this Court in *Jiwan Singh v. Jora* (2) to the effect that a defendant, who is a party to the fraud, is allowed to put forward the plea that the contract, which the plaintiff wants to enforce, was fraudulent and that, as a matter of fact, he was not entitled to the rights he purported to obtain under it. The *ratio decidendi* of that judgment is that a person cannot invoke the help of a Court of Justice in giving effect to a fraud and that a defendant in possession of the property, through *in pari delicto*, is permitted to show the real nature of the transaction. But the case of a plaintiff stands on quite a different footing. The maxim *in pari delicto, potior est conditio possidentis* is fully applicable to him and I see no valid reason why a Court of Equity should help a person who does not come with clean hands.

As observed by Mellor J., in *Taylor v. Chester* (3), the maxim *in pari delicto, potior est conditio possidentis* is as thoroughly settled as any proposition of law can be. It is a maxim of law established, not for the benefit of plaintiffs or defendants, but is founded on principles of public policy, which will not assist a plaintiff, who has paid over money or handed over property in pursuance of an "illegal or immoral" contract, to recover it back, for the Courts will not assist an illegal transaction in any respect: per Lord Ellenborough in *Edgar v. Fowler* (4); *Collins v. Blantern* (5); Lord Mansfield in *Holman v. Johnson* (6). The same principle is enunciated in Kerr on Fraud and Mistake, 4th Edition, page 436, where the learned author observes: "It is a general rule that a Court of Justice will not interpose actively in favour of a man who is *particeps criminis* in an illegal or fraudulent transaction. The Court will take the objection as to the illegality of the transaction, even although the defendant himself does not. Where both parties are

(2) 25 P. R. 1905; 65 P. L. R. 1905.

(3) (1869) 4 Q. B. 309; 10 B. & S. 237; 38 L. J. Q. B. 225; 21 L. T. 359.

(4) 3 East 222; 7 R. R. 433; 102 E. R. 582.

(5) 2 Wils. 341; 95 E. R. 847; 1 Sm. L. C. 369.

(6) Cowp. 343; 98 E. R. 1120.

(1) 35 C. 551 (P. C.); 12 C. W. N. 562; 7 C. L. J. 528; 5 A. L. J. 290; 14 Bur. L. R. 108; 10 Bom. L. R. 590; 18 M. L. J. 277; 4 M. L. T. 12; 4 L. B. R. 226; 35 J. A. 98.

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equally offenders against the law, the maxim *potior est conditio possidentis* prevails, not because the defendant is more favoured, where both are equally criminal, but because on the principle of public policy the Court will not assist a plaintiff, who has paid over money or handed over property in pursuance of an illegal or immoral contract, to recover it back. If, accordingly, a deed has been executed, or a conveyance made, to enable a party to contravene the provisions of an Act of Parliament, no suit in equity will lie to set aside the deed or recover the estate. The party executing it cannot be heard to allege his own fraudulent purpose. He is estopped from confirming the operation of his deed within the limits of his intended fraud." The principle is fully established that *allegans turpitudinem suam* shall not be heard. The rule of law laid down in a judgment of this Court reported as *Dogar Mal v. Jamiat* (7) is also to the effect that a plaintiff is precluded from alleging that he effected the fictitious transaction in fraud of his creditors.

Upon a consideration of the law bearing upon the subject, I am satisfied that the plaintiff in this case cannot, after deceiving his creditors, be allowed to avoid his deed on the ground of fraud. The conclusion arrived at by the learned Divisional Judge is, therefore, correct, and I dismiss this appeal with costs.

Appeal dismissed.

(7) 38 P. R. 1892.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL NO. 441 OF 1913.

August 3, 1915.

Present:—Mr. Justice Spencer and
Mr. Justice Kumaraswami Sastri.
MAILTHI HENGSHU AND ANOTHER—
PLAINTIFFS—APPELLANTS

versus

SOMA AND OTHERS—DEFENDANTS—
RESPONDENTS.

Landlord and tenant—Alienation, whether works relinquishment or forfeiture of tenancy—Land-cess, right to recover—Madras Local Boards Act (V of 1884).

Where a lease-deed contained the following clause: "If while without alienating the land, in any manner, I am enjoying the said land through posterity, I find that I do not require the land, I shall relinquish the

land to you and obtain from you the value of the improvement which I have made thereon".

Held, that under the clause an alienation did not indicate relinquishment or forfeiture.

Parameshri v. Vittappa Shanbaga, 12 M. L. J. 189; 26 M. 157, referred to.

Under Act V of 1884, a landlord is entitled to recover land-cess from the tenant even where the lease-deed does not contain a provision to that effect.

Second appeal against the decree of the District Court of South Canara, in Appeal Suit No. 133 of 1911, preferred against that of the District Munsif of Pattur, in Original Suit No. 289 of 1910.

Mr. H. Balakrishna Rao, for the Appellants.

Mr. B. Sitarama Rao, for the Respondents

JUDGMENT.—It is *first* contended that the landlord can compel the tenant to surrender the land on the strength of the following clause in the lease-deed (Exhibit A):—"If, while without alienating the land in any manner I am enjoying the said land through posterity, I find that I do not require the said land, I shall relinquish the land to you and obtain from you the value of the improvements which I have made thereon".

In our opinion this clause does not work a forfeiture, but is rather intended to secure for the tenant a right to relinquish his holding at his option. In fact the case in which the tenant alienates the land is in terms excluded from the conditions upon which he is allowed to relinquish it. The landlord, therefore, cannot rely on the fact that the land has been alienated as indicating a desire to relinquish, and thus work the clause to the tenants' disadvantage when forfeiture does not follow from the act of alienation. We do not see any material distinction between this case and that dealt with in *Parameshri v. Vittappa Shanbaga* (1).

The *second* contention, which is that the landlord is entitled to recover half the land-cess from the tenant, is a good one. Madras Act V of 1884 does not restrict this right to cases in which the lease-deed contains a provision to that effect.

We modify the decree by allowing Rs. 4-11-6 disallowed by the lower Courts and in other respects we dismiss the second appeal with costs.

Appeal partly allowed; Decree modified.

(1) 26 M. 157; 12 M. L. J. 189.

JAGAN NATH v. HAKIM.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 805 OF 1913.

June 7, 1915.

Present:—Mr. Justice Chevis and

Mr. Justice Shadi Lal.

JAGAN NATH—PLAINTIFF—APPELLANT
versus

HAKIM AND OTHERS—DEFENDANTS—

RESPONDENTS.

Assault—Compensation for assault—Costs incurred in prosecuting assailant, if allowable.

A plaintiff in claiming damages for a criminal assault is not entitled to include in his claim costs incurred by him in successfully prosecuting the defendant for the hurt caused to the plaintiff by the defendant. [p. 486, col. 1.]

Second appeal from the decree of the Divisional Judge of the Sialkot Division, dated the 13th January 1913, varying that of the District Judge, Sialkot, dated the 29th May 1912, decreeing claim for Rs. 364.

Mr. Nand Lal, for the Appellant.

Mr. Devi Chand, for the Respondents

JUDGMENT.—This appeal and the cross-appeal No. 888 of 1913 arise out of an action brought by the plaintiff, Jagan Nath, against the defendants for damages for assault and battery. The Court of first instance assessed the damages at Rs. 364.

The plaintiff and the defendants both preferred appeals to the Divisional Judge, who dismissed the appeal of the latter and accepting that of the former enhanced the amount to Rs. 614. Both parties being dissatisfied with the decision of the lower Appellate Court have appealed to this Court and these appeals may conveniently be disposed of by one judgment.

The damages awarded by the lower Courts include, *inter alia*, an item of Rs. 164, which represents the costs incurred by the plaintiff in successfully prosecuting the defendants for causing hurt, and for the reasons to be set forth hereafter we are of opinion that the plaintiff is not legally entitled to recover the expenses of the criminal litigation. In regard to the remaining items, the learned Judge of the lower Appellate Court has, after full consideration of the evidence, decided that the plaintiff is entitled to the medical expenses incurred by him and also to damages for mental and physical injuries, and has estimated the amount of damages with reference to all the circumstances of the case. It is clear that there is no principle

of law involved which would justify interference in a second appeal, and the decision being based upon facts is obviously not open to objection in this Court. The dictum of the learned Chief Judge in *Shib Ram v. Hamir Singh* (1) that the question of the *quantum* of damages can be considered in second appeal, which has been cited before us, is no authority for the proposition that a finding as to the amount of damages arrived at after a consideration of all the relevant facts is liable to be disturbed in second appeal, when the legal liability is beyond dispute and the contest is confined to the sum of money which should be paid by one party to the other. The report of that case does not show on what grounds the decision on damages was attacked, and we doubt very much whether the brief observation contained therein was intended to lay down the broad proposition which the learned Counsel for the plaintiff wants to deduce from it.

In England the amount of damages to be awarded is a question for the Jury and in India the same function is performed by the Subordinate Courts. We think the decision of the lower Courts estimating the amount of damages is a question of fact, unless such amount is beyond the legal limits if there are any, [vide *Banee Madhub Chatterjee v. Bholanath Banerjee* (2); *Joheerooddeen Mahomed v. Dabee Pershad Singh* (3); *Joheerooddeen Mahomed v. Dabee Pershad Singh* (4); *Jogeswar Sarma v. Dinaram Sarma* (5)] or it is assessed upon a wrong principle of law. In the case before us we do not find any such error as would constitute a justification for our interference in second appeal.

Coming now to the item of Rs. 164 which has been allowed in lieu of the expenditure incurred by the plaintiff in the criminal action brought against the defendants, we are clear that the costs incurred in criminal proceedings are no part of the consequences of the wrong done by the defendants and they cannot, therefore, be recovered. It is manifest that the plaintiff was not bound to prosecute his assailants and that he might have obtained full

(1) 27 Ind. Cas. 645; 1 P. R. 1915; 1 P. L. R. 1915.

(2) 10 W. R. 164.

(3) 13 W. R. 22.

(4) 13 W. R. 391.

(5) 3 C. L. J. 140.

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satisfaction for the wrong done him without entering upon the criminal prosecution. The fact that he voluntarily resorted to a Criminal Court to get the defendants punished, is absolutely no reason for throwing upon them the liability for the expenditure incurred for a merely collateral purpose. We cannot regard it as damages which flowed from their wrongful act.

The case of an accused in a malicious prosecution bringing a civil suit against his prosecutor and recovering as part of the damages the money spent by him in defending himself in the criminal action is for obvious reasons not parallel and no argument can, therefore, be deduced from it. The accused in that case has no alternative but to resist the indictment brought against him by the defendant, and a case of that kind clearly stands upon a different footing. Nor does the fact that under section 545, Criminal Procedure Code, the Criminal Court is empowered to order the whole or any part of the fine recovered from the convict to be applied in defraying expenses incurred in the prosecution, constitute a valid argument for holding that such expenses can be obtained by a civil suit. There is no principle of law governing the award of damages for tort upon which the claim of the plaintiff can be sustained, and the conclusion reached by us is fully supported by the decisions of the Allahabad and Calcutta High Courts in *Ohandan v. Sumera* (6), *Fazal Imam v. Fazal Rasul* (7), *Ohuramoni Dasi v. Baidya Nath Naik* (8). The only case, in which the contrary rule is enunciated, is an earlier judgment of the Allahabad High Court in *Ram Lal v. Tula Ram* (9), and it is noteworthy that it was expressly dissented from in the two subsequent judgments of that Court which are cited above.

Upon an examination of the general principles and the decided cases we have no hesitation in holding that the Courts below have erroneously decided that the expenses of the criminal prosecution should form part of the damages awardable to the plaintiff in an action of this kind. The result is that we dismiss the Appeal

No. 805 of 1913 preferred by the plaintiff, and accepting the appeal of the defendants (No. 888 of 1913) we modify the decree of the lower Appellate Court by reducing the decretal amount of Rs. 614—164=450. In view of all the circumstances of the case we direct the parties to bear their own costs in this Court and to comply with the orders of the lower Courts as to costs incurred therein.

Appeal dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 2807 OF 1913.

July 21, 1915.

Present:—Mr. Justice Oldfield and
Mr. Justice Sadasiva Aiyar.

P. C. MUTHU CHETTIAR—PLAINTIFF—

APPELLANT

versus

MUTHUSAMI PILLAI—DEFENDANT—

RESPONDENT.

Landlord and tenant—Wet crop raised on dry lands—Improvements not made at tenant's expense—Right to claim wet rate—Custom, legality of.

A custom to pay enhanced rent if wet crops are cultivated on dry lands (provided that the wet crops are not raised with the help of the improvements at the tenant's sole expense) is not illegal. [p. 487, col. 1.]

Sattappa Pillai v. Raman Chetti, 17 M. 1; *Suppa Pillai v. Nagayasami Thumbichi Naicker*, 31 M. 19; 17 M. L. J. 511; 3 M. L. T. 103, followed.

Second appeal against the decree of the District Court of Madura, in Appeal Suit No. 202 of 1912, preferred against the decree of the Court of the Deputy Collector of Melur Division, in Summary Suit No. 2 of 1911.

Mr. G. S. Ramachandra Aiyar (with him Mr. K. S. Jayram Aiyar), for the Appellant.

Mr. C. S. Venkatachariar, for the Respondent.

This second appeal coming on for hearing on the 9th November 1914 and 13th November 1914, the Court (Sadasiva Aiyar and Hannay, JJ.) delivered the following

JUDGMENT.—Following *Sattappa Pillai v. Raman Chetti* (1) and *Suppa Pillai v. Nagayasami Thumbichi Naicker* (2), we hold that a custom to pay enhanced rent if

(6) A. W. N. (1887) 104.

(7) 12 A. 166; A. W. N. (1890) 19.

(8) 32 C. 429.

(9) 4 A. 97; A. W. N. (1881) 143.

(1) 17 M. 1.

(2) 31 M. 19; 17 M. L. J. 511; 3 M. L. T. 103.

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wet crops are cultivated on dry lands (provided that the wet crops are not raised with the help of the improvements effected at the tenants' sole expense) is not illegal. In the present case, the help of the water of the Periyar Channel cannot be said to be the help due to the tenants' improvements, even though the tenant might pay water rate to the *Circar*. There was no permanent work done by the tenant which improved the holding.

We shall, therefore, request the District Court to submit a finding on the evidence on record on the question "whether by custom, the plaintiff is entitled to charge the wet rate claimed if wet crops are raised on dry lands by the tenant with the help of water not obtained by any improvements effected by the tenant himself."

The findings should be submitted in four weeks from receipt of records and ten days will be allowed for filing objections.

After the return of the finding in the negative of the lower Appellate Court upon the issue referred by the High Court for trial, the Court delivered the following

JUDGMENT.—We accept the finding and dismiss the second appeal with costs.

Appeal dismissed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 1363 OF 1914.

November 2, 1914.

Present:—Mr. Justice Chevis.

MR. F. A. GREGORY—JUDGMENT-DEBTOR—
APPELLANT

versus

MR. H. THOMSON—DECREE-HOLDER—
RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXI, r. 46—Execution of decree—Jurisdiction of execution Court to issue prohibitory order to person outside its territorial jurisdiction.

A decree passed by a Court at Jubbulpore was transferred for execution to a Court at Ambala. The latter Court issued a prohibitory order to the Examiner of Accounts, Lahore, and to the Executive Engineer, Saharanpur, directing them not to make any payments to the judgment-debtor, a contractor, to whom money was due on contracts on account of work done under the Executive Engineer, Saharanpur. It was contended for the judgment-debtor that the Ambala Court had no jurisdiction to issue the prohibitory orders:

Held, that the contention was valid, for there was nothing to show that the judgment-debtor could have claimed payment at Ambala and that the mere fact that the judgment-debtor resided at Ambala and the work done by him was done partly in the Ambala District and his claims had first to be passed by the Examiner of Accounts at Lahore did not confer jurisdiction on the Ambala Court. [p. 488, col. 1.]

Second appeal from the order of the Divisional Judge, Ambala Division, dated the 7th May 1914, affirming that of the District Judge, Ambala, dated the 3rd April 1914, issuing prohibitory orders to the Examiner of Accounts, Lahore, and to the Executive Engineer, Saharanpur.

Mr. Obedulla, for the Appellant.

Lala Madan Gopal, for the Respondent.

JUDGMENT.—This judgment will cover the connected Appeal No. 899 of 1914. In both of these cases Mr. Gregory is the judgment-debtor, decrees having been passed against him at Jubbulpore. Recently Mr. Gregory has been working as a contractor for the North-Western Railway, the work done by him being done partly in the Ambala District and partly in the Saharanpur District. Mr. Gregory was residing in Ambala, that is to say, Ambala seems to have been his head-quarters while the work was being done. Payment had to be obtained from the Executive Engineer, Saharanpur, but the claims had first to be passed by the Examiner of Accounts at Lahore.

The Jubbulpore Court having, at instance of the decree-holders, issued non-satisfaction certificates, the decrees were transferred to the District Judge of Ambala, who issued prohibitory orders to the Examiner of Accounts, Lahore, and to the Executive Engineer, Saharanpur. The only question which has been argued before me is whether the District Judge had jurisdiction to issue such orders.

In one case, where the value of the original suit was over Rs. 5,000, the District Judge's order has been attacked by appeal direct to this Court, in the other the order has been upheld on appeal by the Divisional Judge, and so the judgment-debtor has lodged a second appeal to this Court.

Now it seems perfectly obvious that an executing Court's jurisdiction is limited to its own local limits, otherwise there would

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be no need at all for the Court which passed the decree to send the decree for execution to another Court. The Ambala Court cannot execute a decree in the Sharanpur District any more than the Jubbulpore Court could. *Begg, Dunlop and Co. v. Jagannath Marwari* (1) also is a clear authority on the point.

But for the decree-holders it is urged that as Mr. Gregory's claims on the Railway were payable at Ambala, and as he could have brought a suit at Ambala to recover his money from the Railway, the Ambala Court had jurisdiction. There is nothing to show that Mr. Gregory could have claimed payment at Ambala. It was work done under the Executive Engineer of the Railway, and presumably Mr. Gregory would have to go to the head-quarters of the Railway Division (i. e., Saharanpur) to get paid. But as a matter of fact I understand that the usual practice in such cases is for the Executive Engineer to give the contractor a cheque payable at a Government Treasury. It would probably have suited Mr. Gregory best, under ordinary circumstance, to get a cheque on the Ambala Treasury, but I presume it would be open to him to take a cheque on the Saharanpur Treasury, and in that case I think it is clear that the Ambala Court could not issue a prohibitory order. And apparently it is the issuing of the cheque, not the cashing of the cheque, which a Court may prohibit in such cases, see *Bhagwandas Kishordas v. Abdul Husein Mahomed Ali* (2), and the issue of the cheque would surely be a transaction to be effected in Saharanpur. I am, therefore, of opinion that the prohibitory orders issued by the Ambala Court are without jurisdiction.

Then it is urged on behalf of the decree-holders that it is only the garnishee, and not the judgment-debtor, who can raise objection as to want of jurisdiction, but no authority is cited for the proposition that a judgment-debtor cannot raise such an objection, and as he is a person who is directly interested in the matter, I fail to see why he cannot object. I note too that the prohibition is addressed partly to him, see Order XXI, rule 46, the prohibition forbidding the creditor from recovering as well as the debtor from paying

(1) 11 Ind. Cas. 417; 89 C. 104; 14 C. L. J. 228; 16 C. W. N. 402.

(2) 3 B. 49.

the debt which the decree-holder seeks to attach.

Finally I am asked to delay orders so that the decree-holders may have time to get action taken under section 46 of the Civil Procedure Code. But such action can only be taken by the Court which passed the decree, and as long as execution proceedings are pending in the Ambala Court, I fail to see how the Jubbulpore Court can take action. To have execution proceedings pending in two different Courts at one and the same time would lead in many cases to utter confusion and was, I am sure, never contemplated by the framers of the Procedure Code, and the very terms of the *proviso* to section 46 seem to make it clear that it applies only to decrees which have not yet been transferred.

I accept these appeals and set aside the prohibitory orders passed by the District Judge of Ambala as bad for want of jurisdiction. The judgment-debtor has succeeded purely on technical grounds and I leave parties to bear their own costs of these execution proceedings both in the Ambala Courts and in this Court.

Appeal accepted.

MADRAS HIGH COURT.

LETTERS PATENT APPEAL NO. 340 OF 1914.

July 30, 1915.

Present:—Mr. Justice Oldfield and

Mr. Justice Sadasiva Aiyar.

O. M. NAGOOR MEERA SAHIB—

DEFENDANT—APPELLANT

versus

SOOKULAL SOWCAR—PLAINTIFF—

RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 115—Presidency Small Cause Court, decision of, if subject to revision by High Court—Jurisdiction—Presidency Small Cause Courts Act (XV of 1882), ss. 19A, 38—Right to apply for new trial, whether in nature of appeal—Order returning plaint for presentation to proper Court—Application for new trial not made—Revision to High Court, if competent.

A High Court can exercise revisionary jurisdiction over a Presidency Small Cause Court. [p. 490, col. 2.]

Haladhar Maiti v. Choytonna Maiti, 30 C. 588; 7 C. W. N. 547; *Ramdin Bania v. Sew Baksh Singh*, 6 Ind. Cas. 473; 14 C. W. N. 806; 37 C. 714; *Venkataramanujulu Naidu v. Ramaswami Naidu*, 30 Ind. Cas. 353; 2 L. W. 709; 18 M. L. T. 164; 29 M. L. J. 353, followed.

The jurisdiction under section 38 of the Presidency Small Cause Courts Act is not of an appellate nature and a person against whom an order is made (in this

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case one returning a plaint for presentation to the proper Court) is not bound to appeal to the Full Bench of the Presidency Small Cause Court before invoking the revisional jurisdiction of the High Court. [p. 491, col. 1.]

Sadasook Gambir Chand v. Kannayya, 19 M. 96 and *Srinivasa Charlu v. Balaji Rau*, 21 M. 232, followed.

Appeal, under clause 15 of the Letters Patent, against the judgment of the Hon'ble Mr. Justice Hannay, in Civil Revision Petition No. 598 of 1913 on the file of the High Court, preferred against that of the Court of Small Causes, Madras, in Small Cause Suit No. 6522 of 1913.

FACTS.—The suit was to recover arrears of rent alleged to be due under a rental agreement executed by the defendant in favour of the plaintiff. By a separate document of even date with the suit rental agreement, the defendant purported to mortgage usufructually to the plaintiff certain immoveable properties of his, agreeing to repay the principal by 40 monthly instalments of Rs. 650 each, the interest for the said 40 months having been paid in advance on the date of the loan. The rent purporting to be payable under the rental agreement was Rs. 162-8-0, which represented the stipulated interest at 10 annas per cent. per mensem on the principal sum advanced, viz., Rs. 26,000 and this sum was apportioned on the several properties mortgaged. The rental agreement, in addition to referring to the above rent as payable (though it was actually paid in advance in the shape of interest), provided that such payments should go towards gradual reduction of the interest and principal due under the mortgage-bond. Six of the monthly instalments payable under the mortgage-deed were duly paid and default was committed in respect of the others. Plaintiff, thereupon, instituted this suit in the Presidency Small Cause Court, which the defendant contested. The learned second Judge returned the plaint under section 19A of the Presidency Small Cause Courts Act, 1882, for presentation to the proper Court, as he held that the lease in suit was not an independent transaction but only part and parcel of the mortgage arrangement and that he had no jurisdiction to hear the suit, which was in effect not for rent but to

recover instalments due under the mortgage transaction. Against this order, the plaintiff preferred a civil revision petition, Civil Revision Petition No. 598 of 1913, and Hannay, J., who heard this petition, set aside the order of the Small Cause Court Judge. The judgment of the learned Judge was as follows:—

"The preliminary objection is taken that no revision petition lies, as the proper course was for the petitioner to have applied to the Small Cause Court under section 38 of the Presidency Small Cause Courts Act. The order in this case is an order returning a plaint for presentation to the proper Court. It is not an order having the force of a decree, and it has been held in *Chinnathambi Mudaliar v. Veerabadriah Naidoo* (1) that the orders referred to in section 38 are orders having the effect of a decree. The preliminary objection is, therefore, overruled.

"On the merits I think the order of the Judge cannot be supported. The plaintiff merely sues for rent upon an agreement executed by the defendant. The agreement was, no doubt, executed contemporaneously with a mortgage between the same parties and it contains references to the mortgage. It provides that the rent is to be applied in the first place in reduction of interest under the mortgage and in the second place in reduction of the instalments of principal payable thereunder. That is merely a term providing for appropriation of the rent under the mortgage, and though the plaint recites that the rent sued for will be credited accordingly there is no prayer as regards that matter. The only prayer is for recovery of the arrears of rent claimed. The proper appropriation of the rent will be a matter for disposal in connection with the mortgage, but the mere fact that a term relating to such appropriation appears in the rental agreement is not sufficient, in my opinion, to support the conclusion of the Small Cause Court Judge that the Court has no jurisdiction to entertain the suit for rent upon the agreement.

"The order of the lower Court is set aside and the lower Court will be directed to take the plaint upon the file and proceed to determine it according to law. The respondent will pay the petitioner's costs of this petition."

(1) 26 M. 163.

NAGOOR MEERA SAHIB v. SOOKULAL SOWCAR.

Against this judgment the defendant preferred an appeal under the Letters Patent.

Messrs. V. C. Seshachariar and A. Narayana Sarma, for the Appellant:—This Court has no jurisdiction to revise an order of the Presidency Small Cause Court. The learned Judge of the Small Cause Court was right in holding that he had no jurisdiction. The mortgage-deed and the rental agreement represent one transaction. The suit was in effect to compel payment of the principal money due under the mortgage-bond and as such related to immoveable property, and the Small Cause Court had no jurisdiction under section 19, Presidency Small Cause Courts Act, to try the same. The next objection is that no revision lay as other remedies were open which the plaintiff did not avail himself of. Section 38 of the Presidency Small Cause Courts Act provided a right of appeal to a Full Bench of that Court against the order in question.

[Mr. O. P. Venkataraghavachariar, continuing.] Any order in the suit is appealable. It cannot be denied that the suit was contested. It is not that only orders having the force of a decree are appealable to the Full Bench. There is nothing in the section to warrant such a restricted construction. *Chinnuthambi Mudaliar v. Veerabadrach Naidu* (1) is not correctly decided. The order in question is one having the force of a decree, as it put an end to the suit so far as the Small Cause Court was concerned. The nature of jurisdiction exercised by the Full Bench in applications for new trial is that of an Appellate Court. *Sadasook Gambir Chand v. Kannayya* (2) and *Srinivasa Charlu v. Balaji Rau* (3) are not good law and require reconsideration in light of the ruling in *Johan Smidt v. Ram Prasad* (4). See also the judgment of Sir Arnold White, C.J., in *Madurai Pillai v. Muthu Chetty* (5) where the right to apply for a new trial is styled as the right of appeal. Further the Chapter is headed "New Trials and Appeals." It is a rule of interpretation of Statutes that every word used therein is intended for some specific purpose, and is not a surplusage. The word "appeals" must,

therefore, refer to some section and section 38 is the only section in the Chapter to which it can be applied. Headings to divisions of an Act are portions of the Act itself, and not mere marginal notes: *John Lang v. Kerr Anderson & Co.* (6). They are in the nature of a preamble: *Latham v. Lafone* (7), *Hammersmith and City Ry. v. Brand* (8) and *Reg. v. Local Government-Board* (9) per Brett, L. J.; Maxwell on Interpretation of Statutes, 3rd Edition, page 71*. The plaintiff, having failed to appeal, is not entitled to come up to the High Court in revision. *Jagannatha Mudaliar v. Vathiyar Appa, sawmy Mudalair* (10). A revision petition does not lie against an order returning a plaint by the Small Cause Court, as that order is final. Vide *Shamshudin Routhem v. Asa Bivi Ammal* (11). Such an order confers jurisdiction on the ordinary Court: *In re Hausambhai Abdulabhai* (12) and *Mahamaya Dasya v. Nitya Hari Das Bairagi* (13). If the order in question is held only to be interlocutory, then also no revision is competent.

Mr. M. A. Tirunarayanachariar, for the Respondent, was not called upon.

JUDGMENT.—In a recent case *Venkataramanjulu Naidu v. Ramaswami Naidu* (14), we followed the decisions in *Haladhar Maiti v. Choytonna Maiti* (15) and *Ramdin Bania v. Sew Baksh Singh* (16) and held that the Court could exercise revisionary jurisdiction over the Presidency Small Cause Court.

We have been shown no reason now for taking a different view. It is argued that in the present case there could be no revision, because respondent-plaintiff had an appeal open to him under section 38 of the Presidency Small Cause Courts Act. But we

(6) (1878) 3 A. C. 529 at pp. 536, 542.

(7) (1867) 2 Ex. 115 at pp. 117, 119; 36 L. J. Ex. 97; 15 W. R. 453; 15 L. T. (N. S.) 627.

(8) (1869) 4 H. L. 171; 38 L. J. Q. B. 265; 21 L. T. 238; 18 W. R. 12.

(9) 10 Q. B. D. 309 at p. 321; 52 L. J. M. C. 4; 48 L. T. 173; 31 W. R. 72; 47 J. P. 228.

(10) 24 Ind. Cas. 782; 1 L. W. 233.

(11) 10 M. L. J. 313.

(12) 20 B. 283.

(13) 23 C. 425.

(14) 30 Ind. Cas. 353; 18 M. L. T. 164; 29 M. L. J. 353; 2 L. W. 709.

(15) 30 C. 588; 7 C. W. N. 547.

(16) 6 Ind. Cas. 473; 14 C. W. N. 806; 37 C. 714.

(2) 19 M. 96.

(3) 21 M. 232.

(4) 12 Ind. Cas. 11; 38 C. 425; 16 C. W. N. 25.

(5) 22 Ind. Cas. 775; 1 L. W. 172 at p. 176; 15 M. L. T. 156; (1914) M. W. N. 216; 26 M. L. J. 227.

*See 5th Edition, page 83.—Ed.

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follow the decisions of *Sadasook Gambir Chand v. Kannayya* (2) and *Srinivasa Charlu v. Balaji Rau* (3), and hold that the jurisdiction under section 38 is not of an appellate nature. In these circumstances we think that the learned Judge had jurisdiction to pass his order.

We have been shown no reason for dissenting from that order, or the learned Judge's exercise of his discretion in passing it.

The Letters Patent Appeal is dismissed with costs.

Appeal dismissed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 1832 OF 1913.

June 5, 1915.

Present:—Mr. Justice Chevis and
Mr. Justice Shadi Lal.

JAS RAM—DEFENDANT—APPELLANT
versus

ATTAR CHAND AND OTHERS—PLAINTIFFS—
RESPONDENTS.

*Limitation Act (IX of 1908), Sch. I, Arts. 64, 85—
Punjab Loans Limitation Act (I of 1904)—Acknow-
ledgment—Novation—Accounts stated.*

Dealings between the parties began about the beginning of 1905, and balances were struck in May, July and November 1905. The dealings were of various kinds, entries had to be made sometimes to defendants' debit and sometimes to their credit. The last balance wound-up with the words *baqi deone* and it was contended for the plaintiff that they amounted to a promise to pay:

Held, that the words were simply equivalent to the English phrase 'balance due' and, though an acknowledgment, did not amount to a promise to pay and that, therefore, Article 85 and not Article 64 was applicable to the claim and that the mere fact that accounts were kept by one side alone was no sufficient reason for holding that the account was not an open, mutual and current account within the meaning of Article 85. [p. 492, col. 1.]

Second appeal from the decree of the Additional Divisional Judge of Shahpur at Lyallpur dated the 14th July 1913, reversing that of the Subordinate Judge, second Class, Lyallpur, dated the 30th July 1912, dismissing the suit.

Mehta Bahadur Chand and Mr. Gokal Chand, for the Appellant.

Mr. Nanak Chand, for the Respondents.

JUDGMENT.—The plaintiffs sue for an amount due on *bahi* accounts. The first Court held that Article 85 of the first Sche-

dule of the Limitation Act applied, and dismissed the suit as time-barred. The Divisional Judge on appeal held that Article 64 applied, and the period of limitation being six years under the Punjab Loans Limitation Act, he held the claim to be within time and gave the plaintiffs a decree. The defendants appeal.

Limitation is the only question for decision in this appeal. The nature of the dealings between the parties is stated in the judgment of the first Court (see page 5 of the paper-book). Dealings between the parties began about the beginning of 1905 and balances were struck in May, July and November 1905. The last is the balance in question. The wording of this balance will be found on page 5 of the paper-book. For the plaintiffs it is contended that this is a case of an "account stated," within the meaning of Article 64. Defendants contend that Article 85 applies, and that the period of limitation is only three years. The real question is whether the balance is merely an acknowledgment of an existing debt or whether it also contains a promise to pay.

Ganga Prasad v. Ram Dayal (1) lays down that a mere acknowledgment of a debt is neither an account stated, nor is it evidence of a new contract. Various older rulings are cited, and the difference between the law in England and in this country is pointed out, and it is also pointed out that if such an acknowledgment were an "account stated" within the meaning of Article 64 or mere evidence of a new contract, section 19 of the Limitation Act would be a dead letter.

In *Ratta Ram v. Musammam Nano* (2) a Full Bench ruling, it is also held that if the statement of account is nothing more than a mere acknowledgment this is not a fresh contract, and does not amount to an account stated. This ruling has been followed in later rulings of this Court [vide *Ganpat v. Daulat Ram* (3)] and we have no hesitation in following it.

Next comes the question whether this

(1) 23 A. 502; A. W. N. (1901) 150.

(2) 3 P. R. 1878.

(3) 68 P. R. 1904; 123 P. L. R. 1904.

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particular balance contains a promise to pay. It certainly winds up with the words *bagi deone*, but we are unable to draw any distinction between this phrase and the phrase *bagi dena rahe*, which is to be found in *Pala Mal v. Tulla Ram* (4), or the phrase *baki dena* found in *Ranchhoddas Nathubhai v. Jeychand Khushalchand* (5). As far as we can see all three phrases are simply equivalent to the English phrase "balance due," and though an acknowledged debt, do not amount to a promise to pay.

We hold, therefore, that Article 64 is inapplicable.

Counsel for the plaintiffs has not argued that any other Article applies, though he contends that Article 85 does not apply to such a case. For the defendants it is contended that if Article 85 does not apply, Article 83 applies at least to a part of the case. The dealings between the parties were of various kinds. Entries had to be made sometimes to defendants' debit, sometimes to their credit. The mere fact that accounts are kept by one side alone is no sufficient reason for holding that the account is not an open, mutual and current account within the meaning of Article 85; see *Lakshmayya v. Jagannatham* (6).

We hold that Article 85 is applicable and the claim is time-barred.

We, therefore, accept this appeal and reversing the decision of the lower Appellate Court, we restore that of the first Court dismissing the suit. The plaintiff will pay costs as ordered by that Court, but we leave the parties to bear their own costs in the Divisional Court and in this Court, as possibly the plaintiff would have sued in time, had he not been misled into thinking that he would be in time under the Punjab Loans Limitation Act if he sued within six years.

Appeal accepted.

(4) 119 P. R. 1908; 206 P. W. R. 1908.

(5) 8 B. 405.

(6) 10 M. 199.

ODDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL NO. 18 OF 1915:

March 5, 1915.

Present:—Mr. Lindsay, J. C., and
Mr. Stuart, A. J. C.

RAM DHANI—DEFENDANT—APPELLANT
versus

Chaudhri MAQBUL AHMAD KHAN

AND OTHERS—PLAINTIFFS AND OTHERS—
DEFENDANTS—RESPONDENTS.

*Court Fees Act (VII of 1870)—Ad valorem fee—
Appeal against final decree—Civil Procedure Code (Act
V of 1908), O. XXXIV, r. 3, stamp necessary for appeal
from decree under.*

If any proceedings, which have terminated in a final decree under Order XXXIV, rule 3, are made the subject of an appeal, the appeal must be treated as an appeal from the decree and must be stamped accordingly and an *ad valorem* fee should be paid. [p. 493, col. 1]

Appeal against the decree of the Subordinate Judge of Gonda, dated the 18th January 1915.

Babu Rudra Datta Sinha, holding brief of Babu Aditya Prasad, for the Appellant.

JUDGMENT.—This case is up to-day for discussion of the Court-fee which is payable upon the memorandum of appeal. The office has reported that the memorandum of appeal has been filed on a two-rupee stamp. The stamp officer, however, has suggested that an *ad valorem* fee is required, inasmuch as what has been appealed against is a decree which has been passed by the Court of first instance under the provisions of Order XXXIV, rule 3. This rule contemplates the passing of a final decree in a foreclosure suit and, as the office remarks, an alteration has been made in the law since the introduction of the new Code of Civil Procedure. Under the Transfer of Property Act, and while the sections relating to foreclosure suits were incorporated in that Act, the Court was merely required to pass an order for foreclosure, or, in case the mortgage was redeemed, for the delivery of the property to the person redeeming; but now under the provisions of Order XXXIV, rule 3, it is quite clear that what the Court is directed to do in such cases is to prepare a final decree. It follows, therefore, that if any proceedings which have terminated in

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the final decree under this rule are made the subject of appeal, the appeal must be treated as an appeal from the decree and not as an appeal against the order. We may point out that this view is confirmed by a reference to the provision of Order XLIII, rule (1), clause (O). From this clause it appears that the only order which is appealable in proceedings taken under rule 3 is an order refusing to extend the time for the payment of the mortgage-money. It seems to us to follow necessarily that any other appeal must be treated as an appeal against the final decree and must be stamped accordingly. We allow the appellant one month to make good the deficiency in the Court fee reported by the office.

Order accordingly.

MADRAS HIGH COURT.

LETTERS PATENT APPEAL No. 299 of 1914.

July 16, 1915.

Present:—Mr. Justice Oldfield and

Mr. Justice Sadasiva Aiyar.

KAYAROHANA CHETTIAR—

DEFENDANT—RESPONDENT—APPELLANT

versus

NAĠALINGA CHETTIAR—PLAINTIFF—

PETITIONER—RESPONDENT.

Contract Act (IX of 1872), s. 151—Provincial Small Cause Courts Act (IX of 1887), s. 25—Proper caution and care—Question of fact—Finding—High Court's interference.

The standard of caution and care prescribed in section 151 of the Contract Act is a question of fact, and where a subordinate Court has given a definite finding on it, a High Court cannot in the exercise of its powers of revision, under section 25 of the Provincial Small Cause Courts Act, reverse that finding. [p. 494, col. 1.]

Thomas Giblin v. McMullen, (1868) 2 P. O. 317; 5 Moore, P. C. (N. S.) 434; 38 L. J. P. C. 25; 21 L. T. 214; 17 W. R. 445; 16 E. R. 578; *Sreemant Raja Yerlagadda Mallikarjuna Prasada Naidu Bahadur v. Rayapati Venkata Vasudeva Row*, 9 Ind. Cas. 169; 9 M. L. T. 329; 21 M. L. J. 156, referred to.

Appeal, under clause 15 of the Letters

Patent, against the judgment of the Hon'ble Mr. Justice Seshagiri Aiyar, reported in 25 Ind. Cas. 939, in Civil Revision Petition No. 438 of 1913, preferred against the decree of the Court of the Subordinate Judge of Nagapatam, in Small Cause Suit No. 2530 1912.

Mr. G. S. Ramachandra Aiyar, for the Appellant.

Mr. T. V. Venkatarama Aiyar, for the Respondent.

JUDGMENT

OLDFIELD, J.—The plaintiff entrusted his bundle, containing Rs. 430, to the 1st defendant to be kept whilst the two went to a godown ten feet distant for a short time. The 1st defendant put it in an unlocked box, in which he had money of his own. When the two went away the 1st defendant's nephew was in the shop, though he was not actually asked to mind it. On the return of the plaintiff and the 1st defendant the money was gone. The Subordinate Judge held that the 1st defendant was not negligent and dismissed the plaintiff's Small Cause suit. A learned Judge of this Court revised this decision, passing the decree for the plaintiff which is before us on appeal. The facts stated above are all that are material, except perhaps what the learned Judge and the Subordinate Judge have not referred to, though they doubtless had it in mind, that there is no allegation in the plaintiff's evidence of his having told the 1st defendant anything regarding the amount of the money entrusted.

It is, no doubt, the case that this Court has before now interfered in revision with Small Cause decrees, based on a flagrant misinterpretation or disregard of evidence. But we do not understand the learned Judge to have done so in this case or to have based his judgment on anything except what he held to be the lower Court's mistake of law.

That mistake was, as we understand him, not its adoption of the measure of care actually taken by the 1st defendant to preserve his own money in the box as the test, by which his conduct in connection with the plaintiffs had to be tried, instead of the care which a man of ordinary prudence would take, as section 151 of the Indian Contract Act prescribes. For he refers to the former only in connection with an argument advanced in support of the lower Court's judgment, not in connection with the judg-

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ment itself. The learned Judge's ground of decision was that negligence was not established and he treated this as matter of law, because it involved an inference from the facts found.

With all due respect we do not think this sustainable. There are no doubt cases such as *Thomas Giblin v. McMullen* (1), in which the question whether there is any evidence of negligence is dealt with as one for the Judge, not the Jury; and there are others in which the question, whether proof of gross negligence or ordinary negligence was necessary; and had been given, was treated as one of law. But the present case does not resemble them and we have been shown nothing in support of the general proposition which the learned Judge's judgment involves. The Subordinate Judge, as his judgment shows, tested the 1st defendant's conduct with reference to the proper standard, that is prescribed in section 151 of the Indian Contract Act, the care which a man of ordinary prudence would take in similar circumstances; and it is not shown that he made any mistake in applying that test. The result of his application of it must then be accepted as final.

In these circumstances we must allow the Letters Patent Appeal, set aside the decision under appeal and restore that of the Subordinate Judge. The respondent will pay the appellant's costs in this Court.

SADASIVA AIYAR, J.—I agree. It is not shown that the Subordinate Judge misunderstood the law or that the inference of fact at which he arrived, namely, that there was no such negligence on the part of the 1st defendant as a man of ordinary prudence acting in respect of his own affairs might have acted as the 1st defendant did is a perverse finding of fact. Nor is it shown that the only possible inference on the facts proved was the contrary inference. [See *Sreemant Raja Yerlagadda Mallikarjuna Prasada Naidu Bahadur v. Rayapati Venkata Vasudeva Row* (2).]

Appeal allowed.

(1) (1868) 2 P. C. 317; 5 Moore P. C. (N. S.) 434; 38 L. J. P. C. 25; 21 L. T. 214; 17 W. R. 445; 16 E. R. 578.

(2) 9 Ind. Cas 169; 9 M. L. T. 329; 21 M. L. J. 156.

ALLAHABAD HIGH COURT.

EXECUTION SECOND CIVIL APPEAL NO. 1828
OF 1914.

July 27, 1915.

Present:—Justice Sir P. C. Banerjee, Kt., and
Mr. Justice Rafique.

MADHO RAM AND OTHERS—DECREE-HOLDERS
—APPELLANTS
versus

NIHAL SINGH AND OTHERS—JUDGMENT-
DEBTORS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXXIV, rr. 4, 5—*Application for decree absolute—Limitation—Computation of period of limitation—Limitation Act* (IX of 1908), Sch. I, Art. 181—*Mortgage suit—Preliminary decree—Appeal—Decree affirmed by Appellate Courts—Application made three years after expiration of period allowed for payment by first Court, if maintainable.*

An application for an order absolute for sale under Order XXXIV, rule 5, of the Civil Procedure Code, is governed by Article 181 of Schedule I of the Limitation Act, 1908, and the period of limitation should be computed from the time when the right to apply first accrued. [p. 496, col. 2; p. 497, col. 1.]

A preliminary decree under Order XXXIV, rule 4, of the Civil Procedure Code, was made on the 27th of February 1909. The decree allowed a period of six months to the judgment-debtor to pay the amount of the decree and that period expired on the 26th of August 1909. Meanwhile the judgment-debtor appealed. The decree was affirmed by the lower Appellate Court on the 25th of January 1911 and by the High Court on the 25th of January 1912. The decree-holder applied on the 25th of April 1913 under Order XXXIV, rule 5, for a decree absolute:

Held, that the application, having been made beyond three years from the date of the expiration of the period for payment, was barred by time under Article 181 of Schedule I to the Limitation Act, 1908. [p. 497, col. 1.]

Held, further, that the subsequent decrees by the Appellate Courts only affirmed the right given by the Court of first instance and did not give rise to a fresh right unless the decree of the Court of first instance was in any respect varied by the Appellate Courts [p. 497, col. 1.]

Execution second appeal from the decision of the District Judge of Saharanpur, dated the 26th August 1914.

FACTS.—This was a decree-holder's appeal. The decree-holder obtained a decree for sale against the respondent on the 27th of February 1909. Before he could apply for an order absolute for sale under Order XXXIV, rule 5, the judgment-debtor appealed to the District Judge who confirmed the decree of the first Court on 25th January 1911. He appealed to the High Court and the High Court too dismissed his appeal

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confirming the decrees of the two lower Courts on 25th January 1912. The decree-holder then applied for an order absolute on 25th April 1913. There was no extension of time for payment in either of the original decrees of the lower Courts. The first Court dismissed the application of the decree-holder as barred by time and the lower Appellate Court on appeal upheld that order. The decree-holder appealed to the High Court.

Mr. Durga Charan Banerjee, (with him Dr. Surendra Nath Sen), for the Appellant:—I admit that under the old Act the application was an application in execution, but now this is an application in the suit itself and Article 181 of the Limitation Act would apply. The application must be made when the right to apply accrues. The right to apply accrued in this case when the decree became final.

[BANERJEE, J.—Suppose a decree is made and the judgment-debtor appeals, is not the decree-holder bound to apply for execution of the decree within three years of the decree?]

Before the expiry of six months fixed for payment, when the judgment-debtor takes up the matter in appeal and the matter becomes *sub judice*, the right to apply accrues only when the final decree is made. The appeal being preferred there was a likelihood of the decree being reversed.

[BANERJEE, J.—If the decree were reversed, the whole proceeding falls to the ground. There is nothing to prevent the application being made. The right to apply accrued when the six months allowed by the Sub-Judge expired].

If the right to apply accrued on several dates, why should not the decree-holder apply later?

[BANERJEE, J.—Take the case of an instalment bond. The plaintiff is bound to sue on first default and failure to do so will destroy his right].

The distinction is that there is danger of the right being lost. Suppose the decree were reversed by the lower Appellate Court and were restored by the High Court. The right to apply will accrue on the decree of the High Court.

There will be no difference, I submit, in

this case and the present case. The decrees of the lower Appellate Court and of the High Court give a fresh right to apply.

We will have to introduce the word "first" in the words of the Article and the words will be "right to apply first accrues." This we have no justification for doing.

The decree of the first Court becomes merged in the decree of the Appellate Court.

Article 182 provides that application may be made from the date of the original and the date of the Appellate Court's decree, the date of the High Court's decree and so forth, showing that where it was meant to give specific directions, they were inserted in the Article. The words of Article 181 are different and we can apply within the time allowed from the date of any of the decrees.

[RAFIQUE, J.—Can the judgment-debtor pay if time is not extended by the High Court, although the decree of the lower Courts is affirmed?]

No. He has no right to pay. The decree in this case never became final and was *sub judice* and the decree-holder could not apply to have it declared final. Final decree is the decree of the Appellate Court.

Mr. Nehal Chand, for the Respondent:—Supposing the judgment-debtor appeals and the proceedings in appeal take some years, and the judgment-debtor withdraws his appeal, when would the right to apply accrue?

It is alleged by the other side that the right to apply accrued several times. I submit that he was, therefore, bound to apply as soon as the right accrued first.

Where the decrees of the Appellate Courts were meant to give a starting point for limitation, provision was specially made for them under Article 182, Limitation Act.

Article 181 makes no such provision and the decree-holder was bound to apply within the time allowed by law from the date when his right accrued first, and not from any later date.

Under the old Limitation Act it was held that an application for order absolute under the Transfer of Property Act fell under Article 178 of that Act.

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I rely on *Ali Ahmad v. Naziran Bibi* (1), *Udit Narain v. Jagannath* (2).

Cause of action once accrued cannot be said to accrue again because there was a fresh denial. It was so held in *Baldeo Prasad v. Ibn Haidar* (3).

He also referred to *Gaya Din v. Jhuma Lal* (4).

Mr. Durga Charan Banerjee, in reply:—The first Court's decree becomes either embodied in the Appellate Court's decree or is revived by the later decree. In any case there is a right to apply when the decree in appeal is made.

JUDGMENT.—This appeal arises out of an application made under Order XXXIV, rule 5, of the Code of Civil Procedure, for a final decree in a suit for sale upon a mortgage. The preliminary decree under Order XXXIV, rule 4, was made on the 27th of February 1909. That decree allowed a period of six months to judgment-debtor to pay the amount of the decree, and that period expired on the 26th of August 1909. Meanwhile the judgment-debtor appealed, with the result that the decree of the Court of first instance was affirmed by the lower Appellate Court on the 25th of January 1911, and on second appeal, by the High Court on the 25th of January 1912. Neither the first Appellate Court nor this Court extended time for payment of the mortgage-money. The present application was made on the 25th of April 1913. It was contended on behalf of the judgment-debtors, that is the mortgagors, that the application was beyond time. This contention was allowed by the Court of first instance and the decision of that Court was affirmed by the lower Appellate Court. The decree-holders have preferred this appeal and it is urged on their behalf that limitation should be computed either from the date on which the decree of the Court of first instance was affirmed by the lower Appellate Court or when the decree of this Court was made. In order to consider whether the application is barred by limitation or not it is first, of all necessary to determine what Article of the

first Schedule of the Limitation Act is applicable to the present case. It is clear that Article 182 does not apply and there being no other Article which is applicable, the only Article which can be applied is Article 181. Rule 5 of Order XXXIV provides that where payment is not made within the time fixed, the Court shall on application made in that behalf by the plaintiff pass the final decree for the sale of the mortgaged property or a sufficient part thereof. Therefore, it is necessary that an application should be made by the plaintiff in order to obtain a final decree under that Order. The application is thus an application in the suit and since the passing of the present Code of Civil Procedure it can no longer be said to be an application in execution or for the execution of a decree. It is, therefore, manifest that Article 182 cannot apply and as stated above, since there is no other Article which is applicable, the only Article which would govern an application of this kind would be Article 181. This has been held by the Bombay High Court in *Datto Atmaram Hasabnis v. Shankar Dattatraya* (5), following the decision of Jenkins, C. J., in *Amolak Chand Parak v. Sharat Chandra Mukherjee* (6). Under the old Limitation Act also it was held by this Court in *Ali Ahmad v. Naziran Bibi* (1), and *Udit Narain v. Jagannath* (2), that an application for an order absolute for sale under the Transfer of Property Act was governed by Article 178 of the Limitation Act of 1877, which corresponds to Article 181 of the present Act. The next question to be considered is, when did the right to apply accrue as provided in the 3rd column of that Article? There can be no doubt that after the expiry of the six months allowed by the decree of the Court of first instance, the decree-holders-plaintiffs became entitled to apply for final decree. The mere fact that an appeal was preferred from the preliminary decree did not take away that right or postpone it. This is conceded by the learned Vakil for the appellants, but he urges that he also acquired the right to apply when the decrees of the Appellate Courts, namely, that of the first Court of Appeal and of the High Court were passed.

(1) 24 A. 542; A. W. N. (1902) 160.

(2) 1 A. L. J. 15.

(3) 27 A. 625; 2 A. L. J. 371; A. W. N. (1905) 136.

(4) 28 Ind. Cas. 910; 13 A. L. J. 510; 37 A. 400.

(5) 21 Ind. Cas. 318; 38 B. 32; 15 Bom. L. R. 841.

(6) 11 Ind. Cas. 943; 33 C. 913; 16 C. W. N. 49.

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It seems to us that limitation should be computed from the time when the right to apply first accrued. That right accrued, as we have said above, when the six months granted by the Court of first instance to the judgment-debtors expired. The passing of the subsequent decrees by the Appellate Courts only affirmed that right and did not give rise to a fresh right, unless the decree of the Court of first instance was in any respect varied by the Appellate Courts. We think that the analogy of the decision of the majority of the Full Bench in *Gaya Din v. Jhumman Lal* (4) applies. That was a case in which the question was, whether the money sought to be recovered became due under Article 132 of the first Schedule when default was first made in the payment of instalments. It was held that the money became due when the first default was made. On the same principle limitation must be computed, in a case like the present, from the time when the plaintiffs' right to make an application for a final decree first accrued. Admittedly the right first accrued in this case on the 26th of August 1909, and more than three years having expired from that date when the present application was made, it is beyond time. We accordingly dismiss the appeal with costs, including fees on the higher scale.

Appeal dismissed.

ODDH JUDICIAL COMMISSIONER'S
COURT.

FIRST CIVIL APPEAL No. 88 OF 1914.

May 18, 1914.

Present:—Mr. Stuart, A. J. C.

Saiyed WASI ALI—JUDGMENT-DEBTOR—

APPELLANT

versus

JANG BAHADUR SINGH—DECREE-HOLDER

—RESPONDENT.

Court Fees Act (VII of 1870), s. 4—Ad valorem fee—Civil Procedure Code (Act V of 1908), O. XXXIV, r. 6, appeals against decrees under.

An *ad valorem* fee is payable on appeals against decrees passed under Order XXXIV, rule 6, of the Code of Civil Procedure.

Appeal against the decree of the Sub-ordinate Judge, Bara Banki, dated 14th April 1914.

JUDGMENT.—I agree with the view of the Assistant Registrar. A Court-fee of Rs. 550 is required. Let the deficiency be made up within two months. The appeal will be admitted as soon as the deficiency is made up.

The following is the report of the Assistant Registrar:—Appeals from decrees passed under section 90 of the Transfer of Property Act were always filed in this Court as appeals in proceedings in execution of decree under section 244, Act XIV of 1882, on a stamp of Rs. 2. Section 90 has been repealed. Its provisions are now embodied in rule 6, Order XXXIV, Code of Civil Procedure of 1908. This is an appeal from a decree passed under that rule. It is headed as an appeal under section 47, Code of Civil Procedure, *i. e.*, as an execution of decree appeal and bears a court-fee label of Rs. 2. I beg to bring it to the notice of the Court that in accordance with the ruling of the Calcutta High Court reported as *Lakhi Narain Jagdeo v. Krittibas Das* (1), an *ad valorem* fee of Rs. 550 is payable on this memorandum of appeal.

(1) 19 Ind. Cas. 971; 18 C. L. J. 133.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1284 OF 1912.

April 14, 1915.

Present:—Mr. Justice Coutts-Trotter and

Mr. Justice Kumaraswami Sastri.

AYYAKUTTI MANKONDAN—PLAINTIFF

—APPELLANT

versus

PERIYASAMI KAVANDAN AND ANOTHER

—DEFENDANTS—RESPONDENTS.

Transfer of Property Act (IV of 1882), s. 83—Amount due on mortgage, meaning of—Deposit of amount found due, effect of—Redemption piecemeal, if permitted.

The words "amount remaining due on the mortgage" in section 83 of the Transfer of Property Act mean the amount which a Court finds as due, and not the whole amount stipulated for payment under the terms of the mortgage document. [p. 498, col. 2.]

Scarles v. Sadgrave, 5 El. & Bl. 639; 25 L. J. Q. B. 15; 2 Jur. (N. S.) 21; 4 W. R. 53; 26 L. T. (O. S.) 189; 103 R. E. 658; 119 E. R. 619; *Vencatarama Aiyar v. Rangaswami Aiyangar*, 17 Ind. Cas. 368; 23 M. L. J. 583; (1912) M. W. N. 1175, distinguished.

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the rates payable in respect of the neighbouring lands and applying this rate he decreed the plaintiffs' claim to the extent of Rs. 187-14. The defendant went in appeal to the District Judge. He has allowed the appeal and dismissed the suit entirely. In his judgment he remarks that the Court of first instance acted irregularly in treating the suit as one under section 127 of the Oudh Rent Act. It certainly was not open to the Assistant Collector to take action under this section, for it never was the case of the plaintiffs, at any rate in the plaint as originally framed, that the defendant was in occupation without the consent of the landlord. On the contrary the allegation is clear, namely, that he was holding as a tenant of the plaintiffs and under a liability to pay a grain rent. The learned Judge is, in my opinion, quite correct in saying that the case should not have been dealt with under section 127. The learned Counsel who appears for the appellants here has pointed out that an application for amendment of the plaint was made on the 17th of November 1914 by which the plaintiffs asked for an additional relief, that is to say, they wanted it to be put in the plaint that if no rate of rent was proved to have been agreed upon, an occupation rent should be allowed under the provisions of section 127. No such amendment could properly be allowed in a case of this kind so as to raise a new case inconsistent with the case raised in the pleadings. It is clear from the judgment of the first Court that the plaintiffs failed entirely to show that there had been any estimate of the produce for the years in suit by way of *kankut* or that there had been any arrangement for the division of the produce. The plaintiffs relied principally upon the statistics of other years and induced the Court to strike a *مند* rate, which was applied so as to arrive at the amount said to be owing to the plaintiffs. I do not think this was allowable. The plaintiffs having put up a definite case of a grain rent it was for them to show how much grain had been raised in the years in suit and how much of that grain was due to them and further to show what the market-rate of the grain was in each of the years in suit. The plaintiffs having failed to prove the case set up in the plaint, I do not see my way to interfere

in second appeal and grant a decree which could only have been allowed in a suit which was differently framed. In my opinion the decision of the lower Court is correct and I dismiss this appeal with costs.

Appeal dismissed.

PUNJAB CHIEF COURT.

CIVIL REVISION PETITION No. 224 OF 1915.

May 27, 1915.

Present:—Sir Donald Johnstone, Kt.,
Chief Judge.

BRIJ LAL—PLAINTIFF—PETITIONER
versus

JAISHI RAM AND OTHERS—DEFENDANTS—
RESPONDENTS.

Hindu Law—Joint family—Debt incurred by one of the members—Liability of other members.

It is not a correct statement of Hindu Law to say that when a debt was contracted by one member of an admittedly joint Hindu family, it is necessary for the plaintiff to show that the debt was raised for joint family purposes, on the contrary the presumption would be the other way [p. 501, col. 1.]

Bichha Lal v. Jai Pershad, 45 P. R. 1899; *Mul Chand v. Sadhu Singh*, 59 P. R. 1893; *Raghunathji Tarachand v. Bank of Bombay*, 2 Ind. Cas. 173; 34 B. 72; 11 Bom. L. R. 255, referred to.

Ganpat Rai v. Munni Lal, 13 Ind. Cas. 34; 34 A. 135; 9 A. L. J. 84, not followed.

Petition, under section 44 of Act III of 1914, for revision of the order of the Senior Subordinate Judge, Kangra, dated the 11th January 1915, affirming that of the Munsif, second Class, Nurpur, dated the 12th August 1914, dismissing plaintiff's claim.

Bakhshi Tek Chand, for the Petitioner.

Lala Durga Das, for the Respondents.

JUDGMENT.—This was a suit by one Brij Lal against four persons, Jaishi Ram, Shiam Lal, Nihalu and Kanshi, but of these defendants No. 4 was a *pro forma* defendant and no relief was asked for against him. As to the other three, the case for the plaintiff was that they were members of a joint Hindu family, that certain transactions were entered into between defendant No. 1 and himself, and that defendant No. 1 was acting (*karkun*) on behalf of the joint family and struck a balance for Rs. 300 on a certain date. Defendant No. 1 could not be found and proceedings were *ex parte* against him. He did appear at the first hearing and pleaded that he had not understood the account, but thereafter he never appeared in Court again. Defendants Nos. 2 and 3 on

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the other hand objected that at the time of agreement defendant No. 2 was a minor, that defendant No. 3 had no connection with this debt, that the business was not joint, and that the money was not raised for the joint business of the family. There was also another question about a settlement of the dispute by a *panchayat*, but we have nothing to do with that now.

The first Court held that defendants Nos. 2 and 3 were not liable and gave an *ex parte* decree against defendant No. 1 for Rs. 500. The findings of that Court are not very precise, but, so far as I can understand them, they are that it is not proved, that the business was joint that it has not been proved that defendant No. 1 was manager of the family or that he was competent to carry on dealings on behalf of the family, that defendant No. 3 was the oldest member of the family and the natural manager, and that defendant No. 1 was a man of dissipated character. The lower Appellate Court admitted that when the balance was struck the family was joint. It then proceeded to argue the case on the basis of *Ganpat Rai v. Munni Lal* (1), which ruling is not accepted in the Punjab as being sound.

In my opinion it is not a correct statement of Hindu Law to say that, when a debt was contracted by one member of an admittedly joint Hindu family, it is necessary for the plaintiff to show that the debt was raised for joint family purposes. My opinion is on the contrary that the presumption would be the other way, and in support of this opinion I need only quote Mayne's Hindu Law, 8th Edition, pages 443 and 444, *Bichha Lal v. Jai Pershad* (2), *Mul Chand v. Sadhu Singh* (3) and *Raghunathji Tarachand v. Bank of Bombay* (4). Two rulings have been put forward on the other side, namely, *Hari Shanker v. Babu Ram* (5) and *Suraj Kumar v. Baldeo Das* (6).

I have seen these rulings but it does not seem to me that they help. In the latter, for instance, it was positively proved that the members of the Hindu family, who actually contracted the debt, carried on a separate shop of their own *apart from the family* and *actually* raised the loan for *that separate* shop. Now in the present case nothing like this has been proved. No doubt the lower Appellate Court says that it holds that the debt in the present case was not raised for joint family purposes, but there is really no explanation of what the meaning of this remark is. There is no proof whatever on the record that the defendant No. 1 carried on a separate business of his own at all, and a portion at least of the account leading up to the balance in suit makes it clear that a considerable part, at all events, of the debt was on account of joint family business. It seems to me that both the lower Courts have been misled in this case by directing their attention too much to the alleged bad character and dissipated habits of defendant No. 1. He may have been of bad character, but it does not in the least follow that this small debt of Rs. 300 was not raised by him in the ordinary way of family business.

This is no doubt only a revision, but both the Courts below seem to me to have taken so wrong a view as to how cases of this kind ought to be dealt with that I have no hesitation in interfering. For these reasons I allow this revision and amend the decree of the lower Courts making it against defendants Nos. 1, 2 and 3 jointly and severally. Defendants Nos. 2 and 3 will pay plaintiff's costs in all the Courts.

Revision allowed.

(1) 13 Ind. Cas. 34; 34 A. 135; 9 A. L. J. 84.

(2) 45 P. R. 1899.

(3) 59 P. R. 1893.

(4) 2 Ind. Cas. 173; 34 B. 72; 11 Bom. L. R. 255.

(5) 18 Ind. Cas. 746; 241 P. W. R. 1912; 73 P. L. R. 1913.

(6) 18 Ind. Cas. 701; 48 P. R. 1913; 60 P. L. R. 1913; 23 P. W. R. 1913.

JAGAN NATH v. SURAJ BAKHSH SINGH.

COURT OF THE BOARD OF REVENUE,
UNITED PROVINCES.

REVENUE PETITION No. 44 of 1913-14

OF PARTABGARH DISTRICT.

November 12, 1914.

Present:—Mr. Tweedy, S. M., and

Mr. Holms, J. M.

JAGAN NATH AND OTHERS—PLAINTIFFS—

APPELLANTS

versus

Babu SURAJ BAKHSH SINGH—

DEFENDANT—RESPONDENT.

Res judicata.—Case decided in favour of one party—Decision, adverse, on one point not affecting ultimate favourable decision of case, effect of—Appeal, party not entitled to, effect of.

Where a point in a case is found against a party, and the case is ultimately decided in his favour, and thus he is not entitled to appeal against that decision, the finding on that point does not operate against him as *res judicata* in a subsequent case. p. 503, col. 1.]

Appeal from the decree of the Officiating Commissioner, Fyzabad, dated the 17th July 1914, upholding that of the Assistant Collector, Partabgarh, dated the 9th March 1914.

i FACTS.—The defendant sued the plaintiffs in the Civil Court for redemption of mortgage of some plots of land, effected by Madho Singh, the defendant's ancestor, in favour of Bhagwan, the plaintiffs' ancestor. The suit was decreed and the defendant was awarded possession of the plots.

Thereupon the plaintiffs brought a suit in the Rent Court against the defendant for recovery of possession over those plots under the provisions of section 108, clause (10), of the Oudh Rent Act, on the ground that they had occupancy rights in respect of the plots in suit. The defendant contended that the suit was not maintainable in the Rent Court, inasmuch as the relation between the parties was not that of landlord and tenant but that of mortgagor and mortgagee, by virtue of which he had got the redemption-decree and possession in pursuance of that decree. He also denied the allegation as to the existence of occupancy rights. The Court of first instance held that the plaintiffs were not occupancy but simply ordinary tenants, as appeared from the entries in the revenue papers prepared at the time of the recent Settlement, and that the relation of landlord and tenant did exist between the parties, and in view of the provisions of section 68, clause

(2), of the Oudh Rent Act decreed their claim and ordered them to be put back in possession until such time as they were not ejected by notice. An appeal from the decree was taken by the defendant on the ground that the relation between the parties was one of mortgagor and mortgagee and not one of landlord and tenant, but it was dismissed as even the Appellate Court held that the latter relationship existed between the parties.

Some time later, the defendant issued a notice of ejectment against the plaintiffs, and they contested it principally on three grounds—*firstly*, that they and their ancestors were occupancy tenants of the plots entered in the notice, *secondly*, that they were tenants of those plots at a favourable rate of rent, and *lastly*, that they were tenants holding under a special agreement, for they alleged that the mortgage transaction above referred to had been entered into on the condition that even after the redemption of the mortgage the plots would remain in the holding of the plaintiffs' ancestor or his heirs at a rental of Rs. 4 a year per *bigha*. The defendant pleaded that the plaintiffs could not urge any of the grounds mentioned above, because the decision of the Rent Courts in the previous suit for recovery of possession, declaring that the plaintiffs were not occupancy but mere tenants, finally determined the status of the plaintiffs as between them and the defendant. The plaintiffs contended that the said decision could not operate as *res judicata*, inasmuch as they had after all succeeded in the case and thus, not being entitled to appeal from that decision, could not have it corrected by the Appellate Courts so far as it stood against them.

The Assistant Collector dismissed the suit, and his order was upheld in appeal by the Commissioner.

Babu Ishri Prasad, for the Appellants.

Thakur Lal Behari Singh, for the Respondent.

JUDGMENT.

HOLMS, J. M.—Both the Assistant Collector and the Commissioner have followed the decision of the Courts in the suit for recovery of possession and have not tried the case on its merits. As plaintiffs in the suit for possession, the present appellants

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succeeded on the ground that the relationship of landlord and tenant existed, and they were not entitled to appeal against the finding of the lower Court that they were not occupancy tenants. The questions in the present suit then are not *res judicata* by reason of the decisions in the former suit and should be tried on their merits.

I would, therefore, set aside the orders of the lower Courts and direct that the suit be re-heard, fresh evidence being taken if the Court thinks necessary. This view is not contested by the respondent. The appellants have filed along with their grounds of appeal before me a copy of a judgment, which is new evidence in the case and which he does not refer to at all in his grounds of appeal. Such attempts to bring fresh evidence on the record surreptitiously must be stopped. Appellants will, therefore, bear the whole costs in the appeal before me.

TWEEDY, S. M.—I concur.

Order set aside; Case remanded.

ODDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 410 OF 1913.

May 19, 1915.

Present:—Mr. Lindsay, J. C.TILAK RAM and ANOTHER—PLAINTIFFS—
APPELLANTS*versus*

SITA RAM—DEFENDANT—RESPONDENT.

Appeal, second.—*Fact, finding of, arrived at only in first appeal, binding effect of*.—*Sufficiency of evidence*.—*Wajib-ul-arz, entry in, as proof of custom recorded therein*.—*Custom, proof of*.—*Jus tertii*.—*Third party entitled disclaiming interest, effect of*.—*Title to property*.—*Conveyance of property not effected by statements unless evidenced by some Act within law.*

Where a Court of first instance comes to no definite finding on an issue of fact and the first Appellate Court does come to such a finding on that issue after an examination of the evidence, the second Appellate Court is concluded by the finding of the first Appellate Court. [p. 504, col. 1.]

The question whether a particular *wajib-ul-arz* is sufficient proof of a custom recorded in it is a question not of law but of fact, as it is a question regarding the weight or value to be attached to it. And it cannot be contended as a matter of law that a *wajib-ul-arz*, if un rebutted, is conclusive proof of custom. [p. 504, col. 1.]

Pragi v. Baiju, 4 O. C. 71 and *Lalman v. Nand Lal*, 20 Ind. Cas. 894; 17 O. C. 1, followed.

Musammatt Mohammad-un-nissa v. Musammatt Nasibun, 1 O. C. 80, dissented from.

Lekraj Kuar v. Mahpal Singh, 5 C. 744 (P. C.); 6 C. L. R. 593; 7 I. A. 63; 4 Sar. P. C. J. 93; 3 Suth. P. C. J. 705; Rafique and Jackson's (P. C.) No. 61; 4 Ind. Jur. 423, referred to.

Where the plaintiffs claimed to recover a property from the defendant on the ground that they had a better title to it than he had and the defendant pleaded that there was a third party in existence who was best entitled to the property, but the plaintiffs produced that party as a witness and he disclaimed all title to it:

Held, that the plaintiffs could not succeed simply because of the third party's statement, inasmuch as such statement alone could not, in the absence of some act within the law having the effect of transferring the property to the plaintiffs, operate as a conveyance of the property to the plaintiffs. [p. 505, col. 1.]

Appeal from the decree of the District Judge, Sitapur, dated 19th August 1913, reversing that of the Subordinate Judge, Kheri, dated the 20th February 1913.

Mr. St. G. Jackson and Babu Sita Ram, for the Appellants.

Pandit Gokaran Nath Misra, for the Respondent.

JUDGMENT.—The appellants here were plaintiffs in the Court of first instance in a suit brought to recover possession of certain immoveable property, which once belonged to one Puran. The plaintiffs claimed that they were the nearest reversioners of Puran. Puran after his death had been succeeded by his widow, *Musammatt Jasoda* who died on the 20th of October 1911, and it was from this latter date that these plaintiffs alleged they had become entitled to the property. The defendant in possession is one Sita Ram who, on the pedigree filed, appears to be more remotely related to the deceased Puran than are the plaintiffs. According to the pedigree which was put in Puran left two daughters, *Musammatt Kaunsilla* and *Musammatt Shitabo*, and both of these daughters have sons, the son of *Musammatt Shitabo* being one Ram Narain who appeared in the case as plaintiffs' witness No. 5. Kaunsilla's son, it appears, is illegitimate but Ram Narain, the son of Shitabo, is admittedly of legitimate descent. Clearly, therefore, if the ordinary Hindu Law applies, the plaintiffs were not entitled to get possession of Puran's estate in the presence of Ram Narain who is Puran's daughter's son. In the plaint no definite custom was set up

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by the plaintiffs. They merely alleged in a vague way that by law and custom they were entitled to possession of this property. Various pleas were raised by the defendant, the principal one of which was that the plaintiffs had no title to succeed to this property in the presence of the daughter's son, Ram Narain. An issue was struck in the first Court as to whether under the family custom daughters and their sons were excluded from inheritance by cousins and collaterals. The learned Subordinate Judge who tried the suit came to no definite finding upon this issue of custom. On the other grounds he decided in favour of the plaintiffs and decreed their claim. When the case, came in appeal before the learned District Judge, he had to decide the issue as to the custom which was pleaded and after an examination of the evidence, he has come to the conclusion that no custom is proved by which in this family daughter's sons are excluded from inheritance. The learned Judge has referred to all the evidence in the case. The oral evidence he has referred to as scanty and being of practically no value, and as for the *wajib-ul-arz* which was produced and which provides only that daughters do not in any circumstances obtain a share, he held that not to be sufficient proof of the custom upon which the plaintiffs relied. The question of custom is raised here in second appeal but it appears to me that I am concluded by the finding of the learned District Judge. The law on this point has been clearly laid down in the case reported as *Pragi v. Baiju* (1), decided by Mr. Spankie. In his judgment in that case he stated that the question whether a particular *wajib-ul-arz* is sufficient proof of a custom recorded in it is a question not of law but of fact, as it is a question regarding the weight or value to be attached to it. I followed this ruling of Mr. Spankie and adopted the same view of the law in a case reported as *Lalman v. Nand Lal* (2). The learned Counsel for the appellants referred to a case reported as *Musammāt Mohumad-yinnissa v. Musammāt Nasibun* (3), in which Mr. Blennerhassett has ruled that a *wajib-ul-arz* is sufficient proof of custom and if not

rebutted is conclusive. This was Mr. Blennerhassett's interpretation of the judgment of their Lordships of the Privy Council in the case of *Lekraj Kurr v. Mahpal Singh* (4), which is reported in Rafique and Jackson's Oudh Privy Council Decisions, 2nd Edition, at page 359. The construction placed upon their Lordships' ruling by Mr. Blennerhassett was discussed by Mr. Spankie in *Pragi v. Baiju* (1) and, he differed from Mr. Blennerhassett's view and held that the Privy Council had laid down no such rule. I agree with Mr. Spankie's view of the matter and it cannot be contended now that as a matter of law a *wajib-ul-arz*, if unrebutted is conclusive proof of a custom. I adhere to the view which I took in *Lalman v. Nand Lal* (2) and hold that the sufficiency of evidence being a question of fact the decision of the lower Appellate Court that the evidence in this case is insufficient is binding upon me. The only other point which was argued was in connection with the *jus tertii* which was set up by the defendant in this case. As I have already mentioned, one of the pleas taken in defence was that Ram Narain, the daughter's son of Puran, had a better right to the property than the plaintiffs. Ram Narain appeared as a witness for the plaintiffs and in his evidence he stated that he did not consider himself entitled to succeed to Puran's property and that he did not claim it. He is a young man of 23 years of age and he gave as his reason for not wanting this property the existence of a custom by which he says that daughter's sons are excluded by collaterals. It appears, however, that, after the death of *Musammāt Jasoda*, Ram Narain tried in the mutation proceedings to have his name recorded in respect of this property but was unsuccessful in his application, and it is a title late in the day now for it to be argued that Ram Narain's attitude towards this property is that of one who disclaims entry upon his inheritance. It has been argued that because Ram Narain in his evidence has given up all claim to the property and that as his right was the only right which was set up by the defendant as an obstacle to the plaintiffs' right to get the property in this case, (4) 5 C. 744 (P. C.); 6 C. L. R. 593; 7 I. A. 63; 4 Sar. P. C. J. 93; 3 Suth. P. C. J. 704; Rafique and Jackson's P. C. No. 61; 4 Ind. Jur. 423.

(1) 4 O. C. 71.

(2) 20 Ind. Cas. 894; 17 O. C. 1.

(3) 1 O. C. 80.

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the decision of the Court below ought to have been in favour of the plaintiffs. The learned Judge refused to accept this argument. He said that the mere fact that Ram Narain had stated in his evidence that he made no claim to the property would not necessarily vest the title to the property in the plaintiffs. This view of the learned Judge is undoubtedly correct. If the custom of exclusion of daughter's sons has not been established the position is that the estate has vested in Ram Narain after the death of the widow *Musammam* Jasoda, and if that is so Ram Narain's interest could only pass to the plaintiffs by some act within the law which would, have the effect of transferring the estate to the plaintiffs. A mere declaration on the part of Ram Narain that he does not want the property cannot, as the lower Court observes, operate as a conveyance of the property to the plaintiffs in this case.

These are the only points which have been raised in second appeal. I decide them both against the appellants. The appeal fails and is dismissed with costs.

Appeal dismissed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 2906 OF 1914.

April 19, 1915.

Present:—Mr. Justice Shadi Lal.

Musammam SHARAF NOOR—PLAINTIFF—
APPELLANT

versus

AHMAD—DEFENDANT—RESPONDENT.

Appeal, second—Appellate Court not omitting to consider evidence on record—Findings of fact—Punjab Courts Act (III of 1914), s. 41.

Where an Appellate Court has not omitted to consider evidence on the record, no second appeal will lie to the Chief Court on questions which are purely those of facts.

Second appeal from the decree of the District Judge, Attock, dated the 13th October 1914, reversing that of the Munsif, first Class, Campbellpur, dated the 28th April 1914, decreeing the claim.

Mr. *Nihal Chand Mehra*, for the Appellant.
Mr. *Miran Bakhs*, for the Respondent.

JUDGMENT.—It is clear that the entry in the marriage register, which is signed by the parties, is clearly to the effect that Rs. 200 was fixed as dower and that the whole

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of it was deferred. The learned District Judge has considered the evidence produced by the appellant to show that half of it was intended to be prompt dower and has come to the conclusion that it cannot be believed. He has not omitted to consider any portion of the evidence, and I do not see how his finding, which is clearly one of fact, can be challenged in second appeal.

I am, therefore, constrained to hold that no good ground for interference in second appeal is made out. The appeal is accordingly dismissed and the parties are directed to pay their own costs in this Court.

Appeal dismissed.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 670 OF 1914.

June 23, 1915.

Present:—Sir Henry Richards, Kt., Chief
Justice, and Mr. Justice Rafique.

JAHANGIR AND ANOTHER—DEFENDANTS—
APPELLANTS

versus

SHEORAJ SINGH—PLAINTIFF—

RESPONDENT.

Evidence Act (I of 1872), s. 32 (6)—Old pedigree—Authorship of statements in old pedigree, whether necessary to prove—Admissibility of evidence, objection as to, when to be taken and decided.

Neither section 32 of the Evidence Act nor its clause 6 provide that it is necessary to show who it was that made the statements referred to therein. [p. 506, col. 2.]

Where an old pedigree, which was found to be genuine, was made long before the question in dispute had arisen and it was impossible to show who in fact had made the statements contained in the pedigree:

Held, that the pedigree was admissible in evidence. [p. 506, col. 2.]

The proper time to object to the admissibility of evidence is at the trial when the evidence is tendered and it is then that the Court should rule as to the admissibility or inadmissibility of the evidence. [p. 506, col. 1.]

Second appeal from a decree of the District Judge of Moradabad.

Dr. *Surendra Nath Sen*, for the Appellants.
Mr. *Nihal Chand* (for Mr. B. E. O'Connor with him Mr. A. H. C. Hamilton), for the Respondent.

JUDGMENT.—This appeal arises out of a suit brought by the plaintiff for a

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declaration that a certain deed of gift made by one *Musammatt* Sanjia in favour of the defendant should be held to be null and void after her death. The Court of first instance dismissed the plaintiff's suit. The lower Appellate Court gave him a decree.

Having regard to the fact that this is a second appeal, the learned Vakil on behalf of the defendant-appellant was bound to admit that the only question that could be argued, was the admissibility in evidence of a pedigree relied upon by the plaintiff, on the strength of which the lower Appellate Court decreed the plaintiff's claim. Objection to the admissibility of evidence taken at a late stage in litigation is not to be encouraged. The proper time to object to the admissibility of evidence is at the trial when the evidence is tendered and it is then that the Court should rule as to the admissibility or inadmissibility of the evidence. When the objection is taken at the proper time, the party wishing to produce the evidence may be able to take steps to make the evidence admissible. If the objection is not taken until a late stage in the litigation, it may mean that an Appellate Court is obliged to decide against the party on a technical ground or the time of the Court is taken up in re-trying matters which ought to have been disposed of at the original hearing, the result being loss of public time and additional and unnecessary expense to the litigants.

The document in question is an alleged pedigree showing the relationship of a number of persons and amongst others of Hulas (the husband of *Musammatt* Sanjia) with one Bhusa. The document, according to the finding of the Court below, was an ancient document and genuine. A witness of the name of Jiraj produced the document. It had been filed in mutation proceedings, the record of which case was sent for. Jiraj identified the document and stated that he had received it as a family pedigree from his grandfather. No objection appears to have been taken to the admissibility of this document in evidence in the Court of first instance, although its genuineness was not admitted. In the lower Appellate Court it was objected to, on the ground

that it was inadmissible because no evidence was adduced to show who had made it. We think that having regard to the stage at which objection as to the admissibility of the document is made, we should treat it as a document, produced by Jiraj who proved that he received it from his grandfather, as being a document which contained the particulars of the family relationship. We must also assume that the statements made by the witness Jiraj are true, they having been believed by the lower Appellate Court. The question is whether under these circumstances the document is or is not admissible in evidence. Section 32 of the Evidence Act provides that "statements, written or verbal, of relevant facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which, under the circumstances of the case, appears to the Court unreasonable, are themselves relevant facts in certain cases." Clause 6 is as follows:—"When the statement relates to the existence of any relationship by blood, marriage or adoption between persons deceased, and is made in any Will or deed relating to the affairs of the family to which any such deceased person belonged, or in any family pedigree, or upon any tomb stone, family portrait, or other thing on which such statements are usually made, and when such statement was made before the question in dispute was raised." We assume for the purposes of our decision that it was impossible to show who in fact had made the statements contained in the pedigree, that the pedigree was made before the question in dispute had arisen and necessarily that it was impossible to call as witness the person who had made the material statements contained in the pedigree. The question is whether on these assumptions the document was admissible. We think that it was. Neither the section nor the clause provide that it is necessary to show who it was that made the statements. In the case of an old pedigree it would be generally quite impossible to give evidence as to who was the author of the statements. We may point out that in the present case we are not called upon

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to express any opinion as to the genuineness of the document, or the weight to be attached to the evidence. In our opinion the decision of the Court below was correct and ought to be affirmed. We accordingly dismiss the appeal with costs.

Appeal dismissed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL NO. 2820 OF 1914.

April 30, 1915.

Present:—Mr. Justice Leslie-Jones.

ALI MOHAMMAD AND OTHERS—PLAINTIFFS
APPELLANTS*versus*MAMURA AND OTHERS—DEFENDANTS—
RESPONDENTS.

Alienation—Necessity—Antecedent creditor third party—Money borrowed from third person by an agriculturist for trade—Second appeal—Punjab Courts Act (III of 1914), s. 41.

Santa Singh v. Waryam Singh, 24 Ind. Cas. 361; 19 P. R. 1915; 147 P. W. R. 1914; 207 P. L. R. 1914 has no application to a case where the antecedent creditor is a third person. A finding that the alienation was for necessity cannot be disturbed in second appeal.

Second appeal from the decree of the District Judge, Hissar, dated the 6th of August 1914, confirming that of the Munsif, first Class, Hissar, dated the 14th of August 1913, dismissing the claim.

Mr. Nihal Chand Mehra, for the Appellant.

Mr. Asquith, for the Respondents.

JUDGMENT.—This judgment relates to Civil Appeals Nos. 2820 and 2821 of 1914 against the concurrent decisions of the lower Courts, which have declined to grant to the minor plaintiffs a declaration against two alienations effected by their father. The Appeal No. 2820 is barred by limitation, but on the merits also the appellants have no case for a further appeal. It was found by the lower Courts that the alienations were effected for valid necessity. They failed in their contention that their father contracted his debts owing to gambling and immorality, and now they desired to adopt the plea of the alienees that some of the debts were con-

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tracted for the purpose of carrying on business in cattle, and relying on the recent ruling of *Santa Singh v. Waryam Singh* (1) to get the alienations set aside on the ground that the carrying on of a trade in animals is not a necessary purpose. *Santa Singh v. Waryam Singh* (1) is, however, of no assistance to them, for this reason that the loans in question had been taken from third parties.

The appeals have been dealt with adequately and it does not appear to me that the plaintiffs have any equities on their side.

Both the appeals are dismissed with costs.

Appeal dismissed.

(1) 24 Ind. Cas. 361; 19 P. R. 1915; 147 P. W. R. 1914; 207 P. L. R. 1914.

MADRAS HIGH COURT.

FIRST CIVIL APPEAL NO. 335 OF 1913.

April 27, 1915.

Present:—Sir John Wallis, Kt., Chief Justice
and Mr. Justice Tyabji.

VEERAPPA CHETTIAR—PLAINTIFF—

APPELLANT

versus

VISVANADHA AIYAR—DEFENDANT—

RESPONDENT.

Registration Act (XVI of 1908), s. 35—Interlineation at end of deed—Denial of execution by executant—Deed, if can be registered.

Where there is an interlineation at the end of the deed and the parties are not prepared to admit it, a Sub-Registrar is justified in refusing to register the deed. In such cases the executant must be taken to have denied the execution within the meaning of section 35 of the Registration Act. [p. 507, col. 2.]

Appeal against the decree of the Court of the Subordinate Judge of Kumbakonam, in Original Suit No. 41 of 1913.

Mr. G. S. Ramachandra Aiyar, for the Appellant.

Mr. T. V. Muthukrishna Aiyar, for the Respondent.

JUDGMENT.—We agree with the Subordinate Judge that the passage at the end of the deed was an interpolation and that under section 20 of the Registration Act, the Sub-Registrar was justified in refusing to register the deed as the parties were not prepared to admit the interlineation. We also think there was

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a denial of execution by the defendant within the meaning of section 35. We do not think the plaintiff is entitled to have the document registered as the deed of the defendant. As incidental to the dismissal of the plaintiff's suit for the registration, we think that we should at the same time order the registration of the execution of the deed by the plaintiff to be cancelled. The appeal is dismissed with costs.

The memorandum of objections is dismissed with costs.

Appeal dismissed.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 1143 OF 1914.

June 17, 1915.

Present:—Mr. Justice Tudball.

LACHMI NARAIN—PLAINTIFF—APPELLANT
versus

RAM SARUP AND ANOTHER—DEFENDANTS—
RESPONDENTS.

Easement—Right to flow water—Diversion of route—Obstruction.

The right of a dominant owner to pass his water across the servient owner's land is not interfered with if the servient owner diverts the direction of the route of water on his own land. [p. 509, col. 1.]

Second appeal from a decree of the Additional Subordinate Judge of Bareilly.

Mr. Girdharilal Agarwala, for the Appellant.

Dr. Surendro Nath Sen, for the Respondents.

JUDGMENT.—This is a plaintiff's appeal which arises out of a suit brought by him in an attempt to maintain his right of easement. The map filed with the plaintiff will explain the case. The plaintiff's case was that there was a hole in the wall between his compound and the compound of the defendants, that through this hole the rain water which fell in his compound and also the rain water which came from the roof of the house of one Mohammad Raza Khan and also the daily dirty water used in his house used to flow through the *mohri* A on to the defendants' land and thence to the public drain which runs in front of defendants' house, that this easement had been in existence for many many years and

that shortly before the suit the defendants had blocked up the hole with stones and bricks and thus prevented the flow both of the daily water and the rain water. The defendants denied that they had blocked up this hole in the wall or that they had blocked up any drain. They admitted that the plaintiff had a right to drain off all rain water from his compound through this hole across the defendants' land to the public drain. This right they did not for an instant contest; but they contested the plaintiff's right to send his dirty "domestic" water through that hole on to their land. This they said had never come through the *mohri* A. According to the written statement of the defendants the drain is still in existence now as it used to be. But it will be remembered that it was the plaintiff's case that drain ran straight from *mohri* A in a straight line across the compound of the defendants and so on to the public drain. The presiding officer of the Court below apparently inspected the locality. He found that the drain did not run straight across the compound and that where, according to the plaintiff, the old drain used to run across the compound the defendants had built a cowshed and that the drain had now taken a circuitous route instead of a direct route across the compound. The Court below held that there was no doubt whatsoever that the plaintiff had passed not only the rain water from the house but also dirty water after domestic use through this drain and had done so regularly. It refused to accept the evidence of the defendants' witnesses, which was to the opposite effect. But it came to a curious conclusion. It held that because some eight or ten years ago the defendants had built their cowshed and had diverted the course of the drain across their compound, this was an obstruction to the exercise by the plaintiff of his right and that as this occurred more than two years before the suit the plaintiff failed to show that he had exercised his right peaceably and without obstruction up to a date within two years of the suit. As to the rain water the plaintiff's case was decreed; as to the passage of soiled water the plaintiff's claim was dismissed. The plaintiff comes here on second appeal. The point taken is that the mere diversion of the drain across

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the defendants' land is not an obstruction to the exercise, by the plaintiff, of the right which he claims. The right which the plaintiff claims is clearly right to pass his water, both soiled and rain water, through the *mohri* A across the defendants' land to the public drain. The fact that the defendants diverted the direction of the old route taken by the water in former days and now pass it by another route does not, in my opinion, constitute an obstruction to the exercise of the plaintiffs' right at all. The plaintiff's right to flow water both dirty and rain water through the *mohri* A on to the defendants' land was not obstructed by the drain being diverted. It was immaterial to the plaintiff whether the defendants built the drain all round their compound or in a zigzag course so long as his right to pass water through the drain was not interfered with. Because the defendants have slightly altered the course of the drain it is impossible to say that the plaintiff's right has in any way been interfered with. The obstruction of which the plaintiff complained was an obstruction created within a period of six months before suit by the blocking up of the *mohri* A with bricks and stones. This the defendants totally denied having done. They do not claim a right to do so. The plaintiff claimed an injunction against the defendants ordering them to remove all obstructions from the *mohri* A and to leave it open and clear, so that both rain water and daily waste water might flow through it without hindrance and forbidding them ever to block it again and that a perpetual injunction might be issued against them restraining them from ever closing the aforesaid *mohri* and preventing the flow of daily waste water there through. The plaintiff's claim in regard to rain water has been decreed. He is equally entitled to a decree in respect of the daily waste water. I, therefore, order that in addition to the decree already passed in his favour he will have a decree declaring him entitled to pass his daily waste water through the *mohri* A on to the defendants' land and a perpetual injunction as against the defendants restraining them from blocking up the *mohri* A or in any way obstructing the plaintiff in passing his rain water as well as daily waste water through that

mohri across the defendants' land to the public drain. The plaintiff will have his costs in all Courts.

Appeal allowed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL NO. 199 OF 1913.

July 2, 1914.

Present:—Mr. Justice Chevis and
Mr. Justice Shadi Lal.

MUZUFFAR KHAN AND OTHERS—
DEFENDANTS—APPELLANTS

versus

WAISAKHI RAM—PLAINTIFF AND ANOTHER
—DEFENDANT—RESPONDENTS.

Punjab Alienation of Land Act (XIII of 1900), ss. 6, 9—Consideration—Bond in favour of mortgagee non-agriculturist by agriculturist in lieu of mortgage-bond—Consideration.

Where A in consideration of the money due to C, executed a registered mortgage-deed of his land in favour of B, which transaction did not contravene the provisions of the Punjab Alienation of Land Act and B executed a registered bond for the same amount in favour of C:

Held, that the bond by B in favour of C was with consideration although the execution of the mortgage-deed in favour of C by A would have infringed the provisions of the said Act. [p. 610, col. 1.]

Second appeal from the decree of the Divisional Judge, Attock Division at Campbellpur, dated the 5th November 1912, reversing that of the District Judge, Mianwali, dated the 6th July 1912, dismissing plaintiff's claim.

Mr. *Fazl Elahi*, for the Appellants.

Mr. *Nand Lal*, for the Respondents.

JUDGMENT.—The plaintiff's suit for the recovery of the money due on a bond dated the 22nd of August 1908, has been decreed by the learned Divisional Judge, and the sole point which has been argued before us and which requires determination in this appeal is whether the defendants executed the document without receiving any consideration.

The facts are correctly stated in the judgment of the lower Appellate Court and need not be repeated here at length. We observe that the execution of the bond is admitted by the defendants and it is clear that they received Rs. 595 in cash from the plaintiff and paid that sum to Khan Zaman. It appears that the latter owed Rs. 2,080 to the

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plaintiff and that in pursuance of an agreement the plaintiff released Khan Zaman from his obligation to pay that debt and accepted in lieu thereof the liability of the defendants for that sum. It was for this reason that on the 22nd August 1908 two deeds were executed, the bond in dispute for Rs. 595 plus Rs. 2,060=Rs. 2,675 by the defendants in favour of the plaintiff, and a registered mortgage-deed by Khan Zaman in favour of the defendants for Rs. 4,571, consisting of Rs. 2,675 mentioned above and Rs. 1,896 which was due to the plaintiff on a previous mortgage of the land effected in his favour by Khan Zaman, which mortgage the defendants agreed to redeem.

It is clear that the mortgage-deed of 22nd August 1908, as it stands, does not contravene the provisions of the Punjab Alienation of Land Act and that if we accept the contention of the appellants that the transaction should be treated as an alienation in favour of the plaintiff, it would certainly infringe the terms of that enactment. The mortgage-deed is a registered document and the onus lies heavily on the defendants to establish the *benami* nature of the transaction. The learned Divisional Judge has, after a consideration of all the facts and circumstances, recorded his finding against the contention of the appellants and nothing has been urged before us which would justify us dissenting from that finding.

It is not disputed that if the mortgage is treated as an alienation in favour of the defendants, the bond in suit was with consideration. We think the defendants are liable under the bond which they admittedly executed in favour of the plaintiff and for which they received consideration. We accordingly uphold the judgment and decree of the learned Divisional Judge and dismiss the appeal with costs.

Appeal dismissed.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL NO. 137 OF 1911.

July 29, 1914.

Present:—Mr. Justice Woodroffe and

Mr. Justice Coxe.

MURALIDHAR ROY CHOWDHURY AND

OTHERS—PLAINTIFFS—APPELLANTS

versus

MOHINI MOHAN KOR AND ANOTHER—

DEFENDANTS - RESPONDENTS.

Succession certificate not produced in Court of first instance—Certificate necessary—Admission of certificate by Appellate Court—Conditions.

A party who fails to produce the necessary succession certificate in the Court of first instance, should be permitted to do so by an Appellate Court on payment of costs for non-production of the certificate in the Court of first instance.

Appeal against the decree of the District Judge, Dacca, dated the 21st of September 1910, affirming that of the Subordinate Judge, second Court of that district, dated the 9th August 1909.

Dr. D. N. Mitra and Babu Rishendra Nath Sircar, for the Appellants.

JUDGMENT.

WOODROFFE, J.—In this case the only question that arises is, whether or not a succession certificate was necessary and whether the appellants who failed to produce such certificate in the Court of first instance should have been permitted to do so by the lower Appellate Court before whom the certificate was produced.

I think that the Court should have admitted the certificate, making such order as to costs as was proper by reason of the non-production of the certificate in the Court of first instance.

We, however, now set aside the decree of the District Judge and remit the appeal to him for a re-hearing. The succession certificate is filed here and will go back with the other records to him.

As the appellants are responsible for not producing the certificate, we will make no order as to costs in the present appeal and do not disturb the order as to costs made by the lower Appellate Court.

COXE, J.—I agree.

KUTHALEDATH NARAYANA v. COCHIN SIRCAR.

MADRAS HIGH COURT.

LETTERS PATENT APPEALS NOS. 133 TO 135
OF 1913.

July 12, 1915.

Present:—Mr. Justice Oldfield and
Mr. Justice Sadasiva Aiyar.KUTHALEDATH NARAYANA
MOOTHOD AND OTHERS—PLAINTIFFS—
APPELLANTS

versus

THE COCHIN SIRCAR, REPRESENTED BY
MR. A. R. BANERJI, DEWAN OF COCHIN,
NOW BY MR. J. W. BHOSE.
DEWAN OF COCHIN—DEFENDANT—
RESPONDENT.*Civil Procedure Code (Act V of 1908), s. 86—Ruling Chief, suit against—Consent of Governor-General, when necessary—Defendant pleading privilege and also on merits—Waiver—Jurisdiction—Mere objection to jurisdiction, whether sufficient to show submission.*

The plaintiff, a temple servant, alleged that the defendant, a Ruling Chief, having usurped the position of the trustee of the temple, had used that power in wrongfully dismissing the plaintiff from service:

Held, that the suit as framed was not against the diety of the temple, as represented by the Ruling Chief, but was against the Ruling Chief himself and that, therefore, it was not maintainable without the consent of the Governor-General in Council, under section 86 of the Code of Civil Procedure. [p. 512, col. 1.]

The privilege of not being liable to be sued without the consent of the Governor-General in Council is not waived if, after pleading it, the defendant pleads also on the merits of the case. [p. 511, col. 2.]

Chandulal Khushalji v. Awad bin Umar Sultan Nawaz Jung Bahadur, 21 B. 351, not followed.Per *Sadasiva Aiyar, J.*—Merely to object to the jurisdiction of a Court is enough to show that the defendant did not voluntarily submit to its jurisdiction. [p. 512, col. 2.]*Parry & Co. v. Appasami Pillai*, 2 M. 407; 5 Ind. Jur. 188, followed.*Veeraraghava Iyer v. Muga Sait*, 26 Ind. Cas. 287; 27 M. L. J. 535; 1 L. W. 887; 16 M. L. T. 479; (1915) M. W. N. 162, distinguished.*Boissiere & Co. v. Brockner & Co.*, (1889) 6 T. L. R. 85; *Guiard v. DeClermont and Donner*, (1914) 30 T. L. R. 511; 83 L. J. K. B. 1407; 3 K. B. 145; 111 L. T. 293, referred to.

Appeals, under clause 15 of the Letters Patent, against the judgment of the Hon'ble Mr. Justice Tyabji reported in 21 Ind. Cas. 930, presented against the orders of the Court of the Subordinate Judge of South Malabar at Calicut, in Original Suits Nos. 32, 40 and 26 of 1911.

FACTS.—See the judgment appealed against reported in 21 Ind. Cas. 920.

The plaintiff, a temple servant, instituted a suit against His Highness the Rajah of

Cochin urging that as the trustee of the temple, His Highness wrongfully dismissed him. The Subordinate Judge of Calicut dismissed the suit on the ground that no suit was maintainable against a Ruling Chief without the sanction of the Governor-General in Council. In this case the Governor-General in Council after communicating with His Highness had declined to grant the sanction.

The plaintiff appealed to the High Court and His Lordship, Mr. Justice Tyabji, upheld the view of the Subordinate Judge. (See 21 Ind. Cas. 930.) Against that judgment a Letters Patent Appeal was filed by the plaintiff.

Mr. T. R. Ramachandra Aiyar (with him Mr. N. A. Krishna Aiyar), for the Appellants, contended (1) that the suit substantially was against the trust and it was only incidentally as against the Rajah who was the trustee. In such cases no permission was required. (2) That His Highness had put in a written statement in which, although he objected to the suit being maintained against him, he pleaded on the merits and consequently there was a waiver of the privilege.

Mr. C. V. Ananthakrishna Aiyar, on behalf of His Highness, the Respondent, supported the judgment of the lower Court and submitted that the privilege was an absolute one and as a fact there was no waiver.

JUDGMENT.

OLDFIELD, J.—The question in these appeals is whether His Highness the Rajah of Cochin was legitimately impleaded as a defendant in the connected suits in the absence of consent by the Local Government under section 86, Code of Civil Procedure.

It is urged, *firstly*, that the absence of such consent is immaterial, because His Highness had waived his privilege by proceeding, after pleading it, to plead also on the merits. I do not consider whether the course of his pleading did in fact amount to a waiver, because, in my opinion, the recognition of cases of waiver, as excepted from the ordinary provisions of international law as understood in England, cannot be imported into the clear language of the Indian Code. The contrary view was, no doubt, taken in *Chandulal Khushalji v.*

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Awad bin Umar Sultan Nawaz Jung Bahadur (1). But with all respect I find the reasoning therein inconclusive and doubt whether the reference to the supposed intention of the Legislature is permissible or, if permissible, whether it is sufficiently comprehensive.

Secondly, it is argued that the suits are really against the deity of the suit temple, represented by the Rajah, and that, as they are not against the Rajah himself, the section is inapplicable. Reference to the plaints shows that the suits are for relief against the Rajah and others, on the ground that the first mentioned has usurped the position of trustee and has used the power thus obtained to plaintiffs' prejudice. The suits are, therefore, not against the deity, as represented by the Rajah.

In these circumstances the appeals fails and must be dismissed with cost.

SADASIVA AIYAR, J.—I entirely agree with the judgment just now pronounced by my learned brother. Mr. Ramachandrier relied on certain *obiter dicta* found in the judgments of the learned Chief Justice and of Justice Seshagiri Aiyar in the case of *Veeraraghava Iyer v. Muga Sait* (2) for the proposition that it is not enough merely to object to the jurisdiction to show that there was no voluntary submission by the defendant to the jurisdiction of the Court. The case of *Parry & Co. v. Appasami Pillai* (3) distinctly held otherwise. The learned Chief Justice guardedly says that, because there are two English cases, *Boissiere & Co. v. Brockner & Co.* (4) and *Guiard v. DeClermont and Donner* (5), which hold that such mere objection is insufficient, *Parry & Co. v. Appasami Pillai* (3) "is probably no longer law." Seshagiri Aiyar, J., first says that he would hesitate to follow *Parry & Co. v. Appasami Pillai* (3) owing to the decision of Cave, J., in the former case; the learned Judge then says that "the conditions of existence in this country may not justify the application of the principle enunciated by Cave, J.," and finally says

that it was "unnecessary to decide" in that particular case "which of the two" conflicting decisions [*Parry & Co. v. Appasami Pillai* (3) or *Boissiere & Co. v. Brockner & Co.* (4)] "should be followed." I am prepared to follow *Parry & Co. v. Appasami Pillai* (3) as it has not been overruled and as the reasoning therein seems to me sound and I am not prepared to follow the English cases *contra*.

I agree that the appeals should be dismissed with costs.

Appeals dismissed.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 829 OF 1914.

June 30, 1915.

Present:—Sir Henry Richards, Kt., Chief Justice, and Mr. Justice Piggott.

KAULESHAR PRASAD MISRA—

DEFENDANT—APPELLANT

versus

ABADI BIBI—PLAINTIFF—RESPONDENT.

Transfer of Property Act (IV of 1882), s. 54—Sale—Consideration postponed, effect of—Public policy.

In a sale-deed there was a stipulation that the price should be paid within one year provided that possession was obtained within that time, that if possession was not so obtained, then the payment of the price should be postponed, and further that in the event of the vendee not getting the property the price should not be paid at all.

Held, that the deed was a sale-deed within the meaning of section 54, Transfer of Property Act. [p. 513, col. 1.]

There is nothing contrary to public policy in providing that the payment of the consideration should be postponed in certain events and that it should not be paid at all in the event of the property being lost. [p. 513, col. 1.]

Second appeal from a decree of the District Judge of Ghazipur.

Mr. M. L. Agarwala (with him Messrs. Gulzari Lal and Haribans Sahai), for the Appellant.

The Hon'ble Mr. Abdul Raoof (with him Dr. Tej Bahadur Sapru and Mr. S. M. Sulaiman), for the Respondent.

JUDGMENT.—This appeal arises out of a suit brought by the plaintiff for possession of a bungalow and compound. The plaintiff's title is as follows:—The property they say belonged to one Ali Ahmad, who died in March 1910, leaving certain heirs who

(1) 21 B. 351.
(2) 26 Ind. Cas. 287; 27 M. L. J. 535; 1 L. W. 887; 16 M. L. T. 479; (1915) M. W. N. 162.
(3) 2 M. 407; 5 Ind. Jur. 188.
(4) (1889) 6 T. L. R. 85.
(5) (1914) 30 T. L. R. 511; 53 L. J. K. B. 1407; 3 K. B. 145; 111 L. T. 293.

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are the defendants of the fourth party. They made a deed in her (plaintiff's) favour on the 4th of July 1913. The defendants' title on the other hand is as follows:—Ali Ahmad, they allege, executed a sale-deed in the year 1889, in favour of one *Musammāt Idan*. *Musammāt Idan* died in 1912, leaving as her heir the defendant of the third party, Ramzan, and Ramzan by a sale-deed, dated the 30th June 1913, sold the property to the appellant, Pāndit Kauleshar Prasad Misra. Both the Courts below have decreed the plaintiff's claim. Both Courts have found that the sale-deed of 1889 was a fictitious sale-deed under which no possession passed or was intended to pass that *Musammāt Idan* was the mistress of Ali Ahmad, that Ali Ahmad continued to be the owner and in possession of the property notwithstanding the sale-deed. This it seems to us is a finding of fact which we in second appeal are bound to accept.

The appellant, however, contends that there is a flaw in the plaintiff's title. In the sale-deed of the 4th of July 1913, there is a stipulation that the price should be paid within one year provided that possession is obtained within that time, that if possession was not obtained, then the payment of the price should be postponed, and further that in the event of the vendee not getting the property, the price should not be paid at all. It is contended that the consideration for this contract is opposed to public policy, being a gambling transaction. It is further contended that there being a condition attached to the payment of the consideration, the transaction is not a sale within the definition of that expression contained in section 54 of the Transfer of Property Act. In our opinion there is nothing contrary to public policy in providing that the payment of the consideration should be postponed in certain events and that it should not be paid at all in the event of the property being lost. It certainly was not a gambling transaction. Section 54 defines a "sale" as "a transfer of ownership in exchange for a price paid or promised, or part paid and part promised." In our judgment the stipulations in the present deed did not prevent the transaction amounting to a "sale" within the definition.

It is next contended that Ramzan, the appellant's vendor, was the ostensible owner of the property in suit with the consent, express or implied, of the real owners, and that the appellant took all reasonable care to ascertain that Ramzan had power to make the transfer in his favour. The Courts below have found that Ramzan was not the ostensible owner with the consent, express or implied, of the real owners, and they have further found that under the circumstances of the present case the appellant did not take reasonable care to ascertain the title of his vendor. In our opinion these are questions of fact upon which we must accept in second appeal the findings of the Courts below.

The result is that the appeal fails and is dismissed with costs.

Appeal dismissed.

PUNJAB CHIEF COURT.

FIRST CIVIL APPEAL No. 585 OF 1904.

April 23, 1906.

*Present:—*Mr. Justice Johnstone and
Mr. Justice Lal Chand.

CHANDA SINGH—PLAINTIFF

—APPELLANT

vs.

Sodhi HARBANS SINGH—DEFENDANT

—RESPONDENT.

Pleader and client—Pleader paying pre-emption money for his minor client on ground that pre-empted property was sold to him by his next friend—Alienation declared invalid—Right of Pleader to get back his money—Lien—Pleader commencing to act without fee—His incompetency to claim fee from his client's representative—Contract Act (IX of 1872), ss. 64, 65, 68, 70.

An alienation of a minor's property in dispute by his next friend, who is neither a *de jure* nor a *de facto* guardian is wholly a nullity. [p. 515 col. 1.]

Where a Pleader paid pre-emption money out of his own pocket for his minor client and claimed the pre-empted property on the ground of its sale to him by the minor's next friend, which was neither proved nor valid, all that the Pleader can ask under section 65 of Act IX of 1872 is a simple money-decree at the most without any lien on the property, as sections 64, 65 and 70 of the Act do not apply in such a case. [p. 516, col. 2.]

A Pleader accepting to conduct a case without charging any fee from his client is not entitled

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to claim any remuneration for his services from the representative of his client when he dies. In the absence of any contract to the contrary the inference is that gratuitous services continued. [p. 515, col. 2.]

First appeal from the decree of the Court of the Subordinate Judge, first Class, Ferozepur, dated the 27th May 1904, dismissing the claim.

Mr. *Pestonji Dadabhoy* and *Sardar Kharak Singh* and *Rai Sahib Lala Sukh Dyal*, for the Appellant.

Mr. *Grey*, for the Respondent.

JUDGMENT.

JOHNSTONE, J.—In brief, the history of the case is as follows:—

One Harbans Singh, minor, sued for pre-emption of the land in suit sold by *Musammât Fateh Bano* to *Sham Sunder* and others. On 23rd December 1901 he secured a decree conditional on payment of Rs. 8,968-8-0 within two months. Chanda Singh, Pleader, present plaintiff, had been retained for the minor in the case by the next friend, Bhagat Singh, and it was he who paid in the pre-emption money on 20th January 1902 on behalf of the minor. He also, again expressly on behalf of the minor, on 16th March 1902, having executed the decree and got possession, put in the usual *dakhnama*.

Meantime, on 23rd January 1902, Chanda Singh appealed in the name of the minor to the Divisional Court for reduction of the purchase-money, but this was returned in May 1902 for presentation in the Chief Court, and that appeal, together with a cross-appeal by vendee, is now pending in this Court. On 7th June 1902, Bhagat Singh aforesaid applied to the Revenue Authorities asking that the land should be mutated in favour of Chanda Singh on the ground that it had been by oral contract transferred to the latter, but *Musammât Ishar Kaur*, mother of the minor, objected, and the application was disallowed. Then Chanda Singh himself on 19th May 1902 applied to this Court for an order that his name should be substituted for the minor's in the pre-emption appeals aforesaid on the ground of an oral purchase of the land by him from the minor, and on 10th July 1902, the Hon'ble Mr. Justice Rattigan granted the application, supported as it was by the affidavits of Chanda Singh and Bhagat Singh, "subject to all just exceptions

at the hearing" and on 6th August 1902, Chanda Singh filed his present suit in the Court of the Subordinate Judge, Ferozepur, for possession of the land on the score of the aforesaid alleged purchase, or in the alternative for recovery of the money paid in by him *plus* other smaller sums which need not be specified here. He prayed that if only money was awarded to him, it should be made a charge on the land. Thereafter on the 18th September 1902, three petitions were filed in this Court, the *first* to the effect that inasmuch as the pre-emption money was paid by Chanda Singh on behalf of the minor the latter's name should remain on the record of the appeals aforesaid as plaintiff, the *second* for removal of Bhagat Singh from the position of next friend under section 446, Civil Procedure Code; and the *third* for cancellation of Chanda Singh's power-of-attorney and for an inquiry into his alleged professional misconduct. On 5th February 1903, the Hon'ble Mr. Justice Reid sent these petitions down to the Divisional Judge for report, and a lengthy report was made on the 5th May 1903, and finally the three petitions were disposed of by the Hon'ble Mr. Justice Reid, by orders directing:—

1. That the minor's name do remain in the record of the pre-emption case.

2. That the name of *Musammât Ishar Kaur* be substituted for that of Chanda Singh (Bhagat Singh?) as minor's guardian *ad litem* (next friend?).

3. That Chanda Singh's power-of-attorney (with his consent) be cancelled, and that the matter of Chanda Singh's conduct do lie over, with leave to either party to mention it at or after the hearing of the pre-emption appeals.

Meantime the present suit was proceeding and it was ended on 27th May 1904, on which day the Subordinate Judge in an elaborate judgment ruled:—

- (a) that the land was not duly sold to plaintiff by an authorised person on behalf of the minor;
- (b) that the money paid into Court by plaintiff is his own money and not money received by him from the minor's lately deceased father, *Sardar Partab Singh*,

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- (c) that by law plaintiff is not entitled to receive back from the minor the sum deposited in Court;
- (d) that plaintiff is entitled to no fee for conducting the pre-emption suit, he claims Rs. 372;
- (e) that plaintiff has not proved that he really advanced to Partab Singh and Bhagat Singh sums of money amounting to Rs. 316-1-3 in connection with the pre-emption suit;
- (f) that the other small items claimed be all disallowed.

Plaintiff appeals to this Court for his whole claim; but his learned Counsel stated plainly before us that he did not press for the land. This is intelligible, as pre-emption appeals are still pending, and perhaps the pre-emption decree will be set aside or will be so modified as to make the bargain a bad one. However, we have to consider whether there was a legal sale of the land to the plaintiff or not. After considering the evidence carefully I think no legal sale is proved. The property is a valuable one, plaintiff himself puts it down at Rs. 15,000, and yet no deed of sale was written or even suggested. The only person who could sell lawfully was *Musammam* Ishar Kaur and the sale by Bhagat Singh would be wholly a nullity. He may have been next friend of the minor in the suit; but he was not the guardian, either *de jure* or *de facto*, of the minor's property. On the 19th July 1902, before the Assistant Collector, first grade, in the mutation dispute, Chanda Singh said: "The contract of sale was verbally made with Bhagat Singh. *Musammam* Ishar Kaur did not make any contract of sale, nor could she enter into any by law. On 2nd January, Bhagat Singh told me that I should deposit the money and consider the land sold to me." In his plaint Chanda Singh alleges that in accordance with the wish and consent of *Musammam* Ishar Kaur and other relatives, Bhagat Singh asked him to pay the purchase-money and take the land in lieu thereof. He also says that he with the same permission took possession as proprietor, an assertion which is quite contrary to the real facts.

Musammam Ishar Kaur herself said on 2nd November 1902, when examined by the local Commissioner, that her late husband had paid some Rs. 9,000 to Chanda Singh previously, and that it was this money the latter paid

into Court. Of this there is no proof whatever, and I must hold that the money was Chanda Singh's own. But the lady goes on to say that she never agreed that Chanda Singh should become proprietor, and she has always consistently said this. The letters relied upon as showing that she agreed to the sale to Chanda Singh are not conclusive. They are not written by her and none of them is even signed by her, though she can write her name and can read Gurmukhi. I would hold, in short, that she did not sell to Chanda Singh and never consented to such a sale.

As regards the claim for money, I am unable to see under what law or on what principle of equity the money claimed should be made a charge on the land. It is either money lent or money had and received, and all that plaintiff can ask for is a simple money-decree at the most.

Then as regards the item of Rs. 372, I agree entirely with the lower Court that plaintiff cannot claim it. He says expressly that he was working for the minor's father gratuitously, and thus no fee is allowable during that person's life-time. Thereafter, it is not stated or proved that any contract was made by Chanda Singh with Bhagat Singh or *Musammam* Ishar Kaur for fees, and so the inference is that gratuitous services continued.

As to the item of Rs. 316-1-3, I agree with the lower Court that the no-production of Chanda Singh of his alleged written agreement with Partab Singh is most suspicious, and that the item is not established. I am strongly of opinion that that agreement was never returned to *Musammam* Ishar Kaur and the suspicion I entertain about Chanda Singh's *bona fides* is much deepened by a circumstance that occurred in the course of the proceeding in the lower Court.

When Lala Kaushi Ram, Pleader for the plaintiff, was in the witness box, he was asked about a copy of the agreement which he said he saw with plaintiff after he became plaintiffs' Pleader, but, relying on his privilege as a legal adviser, he refused to answer the question put, which was: "Whether witness stated," to so and so, "that the plaintiff was going to base his suit on the agreement in question, and that he (witness) dissuaded him" from doing so by telling him that it would be dismissed at once and that he would be found guilty of professional misconduct. If Chanda

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Singh were a man of any sort of honesty, I think he would have given his Pleader leave to answer the question.

I cannot find any proof of the other small items either; and the only questions remaining are whether plaintiff should have a decree for the Rs. 8,330-11-9 item, and if so, on what terms and conditions. In connection with this certain sections of the Contract Act have been referred to and several rulings. Section 64 to my mind is wholly inapplicable because, even if the contract by Bhagat Singh were a contract voidable by the minor, which it is not, how could it be said that the minor has rescinded it, when he has not yet reached an age at which he can rescind anything? Section 68 quoted by Mr. Pestonji has obviously no bearing on the case. Section 70 cannot apply, because Chanda Singh, on his own showing and allegations, did not pay for the minor but for himself, holding himself as having become pre-emptor and purchaser of the minor's decree. Section 65 is rather more in point in my opinion. Its first clause seems to me probably to cover the present case; for we may safely say that Chanda Singh, however mistakenly, thought he was really buying the land or the rights of the minor under the decree. That agreement with Bhagat Singh and others, which he made, has now been "discovered to be void" and the minor has undoubtedly received some "advantage" and he must restore that "advantage." Apart from this, on general principles of equity, the minor cannot be allowed simply to keep all this money and the land too.

Mr. Grey has argued that, being a plaintiff Chanda Singh cannot claim on the score of equity, because it is only who seeks equity that must do equity, not a person like the minor who seeks nothing. I do not assent to this application of the principle: but I need not discuss the matter at length, as, in my opinion, section 65, Contract Act, is sufficient authority.

Lastly, but what must the minor restore? The section does not say that plaintiff is entitled to a decree for the immediate re-payment of any sum of money paid by plaintiff to or for defendant. It says plaintiff must restore the "advantage" received. In ordinary cases the test of the proper relief would be that it should restore the parties

to the condition of affairs before the contract was made. [See illustration (a) to section 65.] But here this is impossible for the minor has, by the action of the plaintiff, been landed in the litigation in the Chief Court, the result of which no one can foresee. It is not fair to say that it is open to the minor's guardian to decline to claim the payment into Court as being made on behalf of the minor and so to let the land go; for the minor had a distinct right to pre-emption; and his guardian is right (or may be right) in insisting upon the minor's keeping his decree. Nor is it fair to say that the minor should now be made to pay Rs. 8,000 odd back on demand, for he would have to borrow that money, or sell his other property to raise it; and this too would not be a return to the condition of affairs before the agreement with Bhagat Singh. I would pass a decree in favour of Chanda Singh in the following terms:—

(I) This decree not to be capable of execution until after the decision of the pre-emption appeals.

(II). The decree to be a simple money-decree for Rs. 8,330-11-9, the claim for the land being dismissed.

(III). If the result of the pre-emption appeals is that the minor's right of pre-emption is denied and so his suit is dismissed, the money deposited by Chanda Singh in the pre-emption case to be re-paid to him and not to the minor.

(IV). Ditto, if the pre-emption money is increased in appeal and the minor fails to pay the added sum and so his suit is dismissed.

(V). If the pre-emption money is reduced in appeal, Chanda Singh, and not the minor, is to draw so much of the money already in Court as is not required for payment to the vendee. As regards the sum still due thereafter to the plaintiff from the defendant under this decree, three months' grace to be allowed to the minor to raise the same. After that, decree be executed by plaintiff in the ordinary way.

(VI). If the pre-emption money remains the same, three months' grace be allowed to the minor to raise the sum of Rs. 8,330-11-9 now decreed. After that the decree to be capable of execution in the ordinary way.

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I would make plaintiff pay defendants' costs.

For myself I would rather have had the pre-emption appeals decided before the present case; but it was at plaintiff's own request, I understand, that it was directed that this case should come first.

I would not at this stage take any action regarding what seems to be Chanda Singh's unsatisfactory and regrettable conduct, but leave that matter to be dealt with by the Bench that disposes of the pre-emption appeals.

LAL CHAND, J.—I agree with my learned colleague that the plaintiff is not entitled to get possession of the land in suit as vendee and that he is entitled to get a money-decree for the sum and on terms as proposed by my learned colleague.

Appeal partly accepted.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 444 of 1914.
July 19, 1915.

Present:—Mr. Justice Srinivasa Aiyangar.
KRISHNASWAMI AIYAR—PETITIONER
versus

T. A. RANGASWAMI NAYADU—

PLAINTIFF—RESPONDENT.

Surety—Security-money, when legally payable to judgment-creditor—Notice to surety.

Without a finding that the conditions of a surety bond were not complied with and without a finding that a notice was duly served upon the surety calling upon him to show cause why his security amount should not be utilised for payment to the judgment-creditor, a Court is not entitled to pay the surety's money to the judgment-creditor.

Petition, under section 25 of Act IX of 1887, praying the High Court to revise the order of the Subordinate Judge of Kumbakonam, in Execution Application No. 52 of 1914, in Small Cause Suit No. 1670 of 1910.

Mr. S. Muthiah Mudaliar, for the Petitioner.

Mr. V. Mahadeva Aiyar, for Mr. T. Muthiah Pillai, for the Respondent.

JUDGMENT.—The lower Court does not find that there was service of the previous notice calling upon the surety to show cause why his security amount should not be

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utilised for payment to the judgment-creditor. Without a finding that the conditions of the bond had not been complied with and without a finding that the service was proper, the lower Court was not entitled to pay the surety's money to the judgment-creditor. I reverse the order of the lower Court and remand the petition for inquiry according to law in the light of the above observations. Costs will be provided for in the revised order.

Petition allowed; Suit remanded.

PUNJAB CHIEF COURT.

FIRST CIVIL APPEAL No. 377 of 1902.

January 5, 1907.

Present:—Mr. Justice Johnstone and
Mr. Justice Shah Din.

SHAM SUNDAR AND OTHERS—DEFENDANTS
APPELLANTS

versus

Sodhi HARBANS SINGH—PLAINTIFF—

RESPONDENT.

Pre-emption—Claim based on foreclosure of mortgage with conditional sale—Presumption that pre-emptor is suing for his own benefit—Plea of equal right of pre-emption, if allowed for first time in appeal—Owning land under building, if give status of land-owner—Vendee to prove improvements and produce accounts—Vendee, right of, to get price paid in good faith—Compensation for litigation and improvements, when allowed—Compound interest—Costs—Punjab Pre-emption Act (II of 1905), ss. 12, 16—Use of title by Pleader.

Unless the contrary is clearly established, it is to be presumed that a plaintiff sues for his own benefit. [p. 519, col. 1.]

A plea of the vendee that he has got an equal right of pre-emption with the pre-emptor cannot be raised for the first time in appeal specially where the materials on the record are insufficient to support it. [p. 519, col. 1.]

A person owning a plot of land under building is not a land-owner within the meaning of and for the purposes of section 12 of Act II of 1905, even if it is assessed with some land revenue. [p. 519, col. 2.]

Phallu v. Mukarrab, 153 P. R. 1888 and *Man Singh v. Dip Singh*, 96 P. R. 1898, followed.

Kirpa Ram v. Ude Ram, 77 P. R. 1896, not followed.

It is the duty of the vendee or mortgagee to establish his claim for improvements by the most satisfactory evidence and production of accounts if any. [p. 520, col. 1.]

Section 16 of Act II of 1905 does not expressly allow a Court to award to vendees more than the

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market value or what they paid in good faith for the bargain, but the section is not exhaustive and equities are not excluded. A party who asks for equity must show that he has acted throughout fairly and honestly. So a vendee is not generally entitled to get compensation for litigation connected with the pre-empted property, but under special circumstances, he may be allowed to get it. [p. 520, col. 1.]

Compound interest is not interest on interest it is interest on a sum or sums which were interest, but which on default, etc., at once became principal. [p. 520, col. 2.]

When the vendee opposes the pre-emptor's claim on several grounds including inadequacy of the price, the latter is entitled to get his costs although the former succeeds in getting much more than what was offered by the pre-emptor. [p. 521, col. 1.]

A Pleader cannot arrogate to himself, if any, title which he is not authorized to use by any competent authority. [p. 521, col. 2.]

Appeal against the decree of the District Judge, Ferozepur, dated the 23rd December 1901, decreeing pre-emption on payment of Rs. 8,330-11-9.

Mr. *Shadi Lal*, R. B., for the Appellants.

Pandit *Sheo Narain*, for the Respondent.

JUDGMENT.—This appeal and No. 390 of 1902 are cross-appeals and can be conveniently disposed of together. The facts have been set forth and also the pleadings at length by the learned District Judge in his judgment dated 23rd December 1901, and I need not repeat them here.

As the case has been argued before us the points for decision are these:—

(1). Did the pre-emptor, Partab Singh (original plaintiff), sue not for his own benefit, but for the benefit of the Pleader Chanda Singh? If for his own benefit, then is there any reason why in view of what has happened after his death the suit should not be entertained?

(2). Have the vendees an equal right of pre-emption with plaintiff?

(3). Is there any reason for increasing the sum of money to be paid by plaintiff?

(4). Is there any reason for reducing that sum?

After hearing arguments and giving the whole case my best attention, I have arrived at the conclusion that the decision of the learned District Judge should be upheld in every particular except that compound interest should be allowed.

As to the first question, the theory of the appellants-vendees is that Chanda Singh and Partab Singh were intimate friends; that the former had a right of pre-emption, while the latter had not; that the latter, who is an experienced Pleader and apparently a man of some means, put up the former, who was poor, to sue, intending to take over the bargain from him after a successful issue of the suit. There are some indications of the extreme personal interest which Chanda Singh took in the case after the death of Partab Singh, as the history of the matter thereafter shows. Chanda Singh was Partab Singh's Counsel in the case. When Partab Singh died, Chanda Singh was instrumental in getting one Bhagat Singh, uncle of the minor plaintiff, who is a son and heir of Partab Singh, made next friend of the minor for the suit; and Chanda Singh from that time at least seems to have provided the sinews of war for the struggle with the vendees. When the decree was obtained, it was Chanda Singh who paid in the decretal money into Court, and who took possession of the land under a *dakhnama* in which he called himself Pleader for the decree-holder. He then applied for mutation of the land in his own name, on the ground that Bhagat Singh had sold the land to him by an oral sale. This was in the end refused, the minor's mother objecting. He then sued for possession on the basis of his alleged oral purchase and (in the alternative) for recovery of the money he had paid in (which was still in Court) together with further sums which he claimed as due to him, making the minor sole defendant. That case was fought out up to the Chief Court, where it was heard by a Division Bench consisting of Johnstone and Lal Chand, JJ., the result being that it was finally held that there was no valid sale of the land by the minor to Chanda Singh, who was only entitled to the refund of the sum he had actually deposited in Court on behalf of the minor. As to the time and manner of this refund, these were made dependent on the decision of the appeals now under consideration. Chanda Singh had already applied to be made appellant and respondent respectively in these appeals in place of the minor; but this has not been done. Lastly, in his statement in the mutation case before Lala Amir

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Chand, Revenue Officer, Chanda Singh said things which show his personal interest at that time, July 1902. In my opinion all of this goes no further than to show that after Partab Singh's death Chanda Singh saw his opportunity. It does not show that Partab Singh was not suing for his own benefit. There is no proof that Partab Singh would have been unable to pay for the bargain he was suing for. I would hold, then, that Partab Singh sued for his own benefit, or at least that the contrary is not established; and I can see no reason in these circumstances why present plaintiff's suit should be dismissed, because a crafty Pleader has attempted to make profit out of his position—an attempt, I may note, which has completely failed by the resolution and courage of the plaintiff's mother.

Turning to the second question, I observe that one looks in vain at the vendees' pleas, put in before the framing of issues, for any assertion or contention that their right to purchase was equal to that of the plaintiff. They did plead limitation and were successful on the point in the first Court, but the Appellate Court took the opposite view and remanded the case for re-trial on the merits. It is suggested that the last sentence in paragraph 2 of the original pleas involves a denial of the plaintiff's superior right, but the whole of that paragraph must be read together. If this is done, it becomes at once apparent that the closing sentence—"No right of pre-emption accrues to the plaintiff"—refers to the plea of limitation, and not to any theory of the possession by the vendees of pre-emptive power. It was only after the remand for re-trial that the vendees pleaded that they had an equal right with plaintiff by reason of their ownership of a minute plot of six *marls* of land in the *mauza* in which the land in suit is situated. This circumstance, coupled with the fact that the mortgagees-vendees issued a notice in March 1892 to pre-emptors, which they would hardly have done if they also had a right of pre-emption under section 12 of the Laws Act, shows that the view of the Court below is justified that the plea was an afterthought.

But, even if the plea be taken seriously, it seems to me clear that it must fail. The six *marlas* aforesaid is to all intents and purposes *abadi* land. It was apparently "cultur-

able" in 1886-87, but soon after it was built over and sold to the vendees. At that time it does not appear to have been assessed to land revenue, and it is not till after the remand for re-trial aforesaid that we find a too minute assessment of nine pies shown against it in the papers. It appears to have been a plot really of no use except for building on. Mr. Shadi Lal for the vendees insists that it is "land" within the meaning of the word in the Laws Act. (He also suggests that it might be taken that the plot and also the land in suit are really part of the city of Ferozepur, in which case section 12 of the Act would not apply and plaintiff's suit would at once fail. This suggestion, I think, we should absolutely decline to consider. We have no materials to decide it upon, and it is an entirely new suggestion, not altogether consistent with vendees' reliance upon section 12 and their ownership of six *marlas*). In support of the applicability of section 12 to the vendees' case Mr. Shadi Lal refers us to *Kirpa Ram v. Ude Ram* (1) and Mr. Shiv Narain relies upon *Phallu v. Mukarrab* (2) and *Man Singh v. Dip Singh* (3), in which the case of 1896 is discussed. In my opinion it is possible to be too pedantic in these cases. I do not think it can have been the intention of the law to allow a party, simply because he owns a minute plot of land, described at the time in the papers as unassessed and as *ghair mumkin abadi* and covered with buildings, to pose for pre-emption purposes as a land-owner in the village. I prefer to take the rulings of 1888* and 1898† as my guide and to hold that the plaintiff's right of pre-emption is distinctly the superior one.

Questions (3) and (4) naturally go together, the latter being the net outcome of the cross-appeal by the plaintiff. As stated before us the vendees claim the following sums:—

(1). Improvements—			
Two Wells	...	...	1,000
One Drain	...	...	50
Three <i>jhailars</i>	...	...	150
Two <i>kothas</i>	...	...	200
Total			1,400

(2). Reclamation of land, Rs. 200.

(1) 77 P. R. 1896.

* (2) 153 P. R. 1888.

† (3) 96 P. R. 1898.

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(3). Litigation expenses in past cases,
Rs. 2,850;

and a large sum on account of interest which I will discuss later.

As regards (1) and (2), I have carefully noted all the evidence on the record on which the vendees rely and I find it vague and unsatisfactory. The Court below has allowed Rs. 700 as to (1) which I think fair and equitable. No doubt wells, etc., were made, but the amount claimed is extravagant and it is supported by no documentary evidence, not even by vendees' books. No doubt before the remand vendees were ready to produce their books; but on retrial it was certainly their duty to prove their case; and whether they were served with a notice to produce the books or not, it can hardly be said that they have proved the expenditure of Rs. 1,600 when they have not put in their accounts. This is sufficient reason also for disallowing (2).

As to (3) we have nothing but the vaguest details of figures, and the vendees' Counsel admits he cannot give us chapter and verse. He details five suits and states what was spent in each; but there is no proof whatever of actual figures. It is also rather doubtful whether under the law a pre-emptor is bound to pay such items to the vendees. I do not think I need discuss this point in an elaborate way, but a few remarks will not be out of place.

Section 16 of the Act does not expressly allow a Court to award to vendees more than the market value or what they paid in good faith for the bargain; or to mortgagees, who have foreclosed, more than the total sum due on the footing of the mortgage or the market value. But the section has more than once been held not to be exhaustive, and it only lays down what is to be allowed as price to be paid. I do not think it was intended to exclude equities; but on the other hand, a party who asks for equity must show that he has consistently done equity and has acted throughout fairly and honestly. Here plaintiff sued for pre-emption and the vendees met him with an unwarrantable plea of time bar, causing immense delay in the disposal of the case and great annoyance and loss to the plaintiff. Then, not having in the first trial pleaded a right of pre-emption equal to that of plaintiff, after remand they put forward that plea,

which has been found artificial and made-up. A good deal of the litigation for the expenses of which they demand compensation would never have been launched against them, had they met plaintiff's claim in the proper spirit and fought him at most on the question of how much he should be made to pay them. Whatever, then, may be the general principle applicable to such a claim as this of the vendees, it seems to me fairly clear that they are entitled to nothing under the head now being considered.

As regards interest the Court below has allowed to the vendees Rs. 4,268-8-0 on the principal sum, which is Rs. 4,000—Rs. 680 of the interest having been paid. The calculation has been made at simple interest at 15 per cent. per annum upto 26th November 1892, on which date defendant-vendees got actual possession, but the vendees before us claim compound interest, with yearly rests upto 6th February 1894, when the four months' grace given under the compromise expired. I confess I am unable to see why the calculation should be carried up to February 1894. No doubt it is not stated in the deed that when mortgagee gets possession interest shall cease; but this is usually understood, and in any case equity would require that from the interest between 21st November 1892 and 6th February 1894, the profits of the land should be deducted.

As to *simple* versus *compound* interest, it is contended for plaintiff that section 16 of the Act only contemplates simple interest; but this is a narrow view. Interest on the principal sum may be, in my opinion, simple or compound. Compound interest is not interest on interest, it is interest on a sum or sums which were interest but which, on default or liquidation, immediately become principal. I would thus allow compound interest.

Looking at the cross-appeal I find that all the grounds in it have been waived by the learned Pleader for the plaintiff, except that relating to the land taken up by the Government out of the land in suit. It is said that Government paid to the vendees Rs. 222 on this account, and that this should be deducted from the amount to be paid by plaintiff. There is nothing on the record about this, as the acquisition by Government occurred after the decree in this case

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was passed. The item is disputed and I do not think we should go into it at all.

It is urged that the Court below should not have given plaintiff costs against the vendees, inasmuch as plaintiff in the first instance offered the inadequate sum of Rs. 4,934 as due to vendees under the deed of mortgage of 13th November 1889, date of expiry of year of grace under the Regulation, the suit having been filed on 18th March 1896. But this does not take account of the facts already noted that vendees resisted the claim on other grounds besides the inadequacy of the offer. I would leave the order of the lower Court *in re* costs undisturbed.

My calculation of principal and interest from 12th October 1885 to 21st November 1892, at 15 per cent. per annum with compound interest upon yearly rests, allowing for the three payments shown at foot of page 173, brings out a total of Rs. 9,478. To this add Rs. 700 as allowed in addition by the Court below for improvements, and we have the total sum to be paid as Rs. 10,178.

In the Court below Rs. 8,330-11-9 was the net sum to be deposited (and actually deposited) by plaintiff after deduction of his costs, which amounted to Rs. 637-12-3. Plaintiff must have those costs and also his costs upon the present appeal in this Court, inasmuch as he has virtually won the day here. The costs here amount to Rs. 100 and if this and the sum of Rs. 637-12-3 aforesaid be deducted from the sum of Rs. 10,178 aforesaid, the net sum demandable of him is Rs. 9,440-3-9. He must make up this amount within two months or the suit will stand dismissed with costs. I would accept the appeal and modify the decree of the first Court in this sense.

As regards Chanda Singh, Pleader's conduct, I think we should send this file to the learned Chief Judge for orders as to the procedure to be adopted. It seems to me fairly clear that the Pleader has acted improperly. I need only refer to the following parts of the record:—

(1). The discussion of question (1) at the beginning of this judgment.

(2) The marginal references in that part of the judgment.

(3), The petitions connected with the order of Reid, J., referred to in one of those marginal notes.

I would recommend as a first step that Chanda Singh (who, I may say in passing, is probably not entitled to use the title of Sardar which he arrogates to himself) be asked to explain his conduct in writing.

Appeal partly accepted.

ALLAHABAD HIGH COURT.

LETTERS PATENT APPEAL No. 37 OF 1915.

July 2, 1915.

Present:—Sir Henry Richards, Kt., Chief Justice, and Mr. Justice Piggott.

RAM NATH TEWARI—DECREE-HOLDER—
APPELLANT

versus

CHATTERPALMAN TEWARI—

JUDGMENT-DEBTOR—RESPONDENT.

*Limitation Act (IX of 1908), s. 6, applicability of—
Civil Procedure Code (Act V of 1908), s. 48—Limitation—Minority—Execution.*

As section 6 of the Limitation Act applies only to cases dealt with by the Statute itself it does not exempt a minor from the provisions of section 48, Civil Procedure Code. [p. 522, col. 1.]

Letters Patent Appeal from the decision of Mr. Justice Chamier, reported in 27 Ind. Cas. 865.

Mr. Sarat Chandra Chaudhri (with him Mr. Iswar Saran), for the Appellant.

Mr. Girdhari Lal Agarwala, for the Respondent.

JUDGMENT.—This is an execution appeal. It appears that a decree was obtained by minors on the 22nd of May 1901. There were several applications for execution leading up to one on the 6th of February 1912, which was dismissed on the 3rd of December 1912. The present application for execution was made on May the 27th, 1913. It thus appears that the last application for execution was more than twelve years from the date of the decree. The judgment-debtors resisted execution relying on section 48 of the Code of Civil Procedure. This section provides that "where an application to execute a decree, not being a decree granting an injunction, has been made, no order for the execution of the same

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decree shall be made upon any fresh application presented after the expiration of twelve years" from the various dates specified in the section. It is admitted that had the decree-holders been persons of full age, the present application would be clearly barred. It is, however, contended that being minors they are still entitled to execute the decree. The first Court allowed the objection of the judgment-debtors. The lower Appellate Court reversed the Court of first instance. The learned Judge of this Court reversed the lower Appellate Court and restored the order of the Court of first instance.

Section 6 of the Indian Limitation Act, IX of 1908, provides as follows: "Where a person entitled to institute a suit or make an application for the execution of a decree is, at the time from which the period of limitation is to be reckoned, a minor or insane, or an idiot, he may institute the suit or make the application within the same period after the disability has ceased, as would otherwise have been allowed from the time prescribed therefor in the third column of the first Schedule." It is admitted that the provision of this section does not help the present decree-holders. It might have given them a right to execute their decree notwithstanding the expiration of the three years' limit laid down in Article 182 of the Schedule I, but it does not give them any exemption from the provisions of section 48 of the Code of Civil Procedure. In the case of *Moro Sadashiv v. Visaji Raghu Nath* (1), Sergeant, C J., held in a case similar to the present that section 7 of the former Limitation Act (which corresponds to section 6 of the present Limitation Act) only applied to cases dealt with by the Statute itself.

He, however, goes on to say:—"The question referred to us must be decided by the general principles of law as to the disability of minors, to which the provisions of the Civil Procedure Code must, in the absence of anything to the contrary, be deemed to be subject. The general principle is that time does not run against a minor; and the circumstance that he has been represented by a guardian, does not affect the question." If we were to accept this statement of the

law it would mean that a minor party to a suit through his guardian, whether as plaintiff or as defendant, is not bound to take any of the steps provided by the Code of Civil Procedure within the periods therein limited. For example it would be open to a minor judgment-debtor to re-open by way of appeal a question which had been finally decided years before. Just in the same way if a suit had been decided against a minor he might delay presenting his appeal for many years. The learned Judge of this Court has referred to the judgment of Sir Meredith Plowden in *Jhandu v. Mohan Lal* (2), and also to the decision of *Rebala Ramana Reddi v. Rebala Babu Reddi* (3). In our opinion the judgment of the learned Judge of this Court was correct and ought to be affirmed. We dismiss the appeal with costs.

Appeal dismissed.

(2) 128 P. R. 1894.

(3) 18 Ind. Cas. 586; 37 M. 186; 13 M. L. T. 79; (1913) M. W. N. 114; 24 M. L. J. 96.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 863 OF 1913.

July 16, 1915.

Present:—Mr. Justice Seshagiri Aiyar.

SELLAM IYENGAR—DEFENDANT No. 2—
PETITIONER

versus

PA. VA. DU. VEE VEERAPPA CHETTI

AND OTHERS—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 11—Res judicata—Suit for execution of lease and recovery of rent decided by Munsif on Regular Side—Munsif incompetent to entertain suit for arrears alone—Munsif's decision relating to rent, whether operates as res judicata.

In a suit for the execution of a deed of lease and for arrears of rent a Munsif raised and decided on the Regular Side an issue relating to rent. Had the suit been solely for recovery of the rent it would have been beyond the jurisdiction of the Munsif. In a subsequent suit for arrears of rent filed in the Small Cause Court:

Held, that the decision of the Munsif operated as *res judicata*, although he was not competent to entertain a suit brought to recover rent alone. [p. 523; col. 1.]

Petition, under section 25 of Act IX of 1857, praying the High Court to revise the decree and judgment of the Temporary Subordinate Judge of Sivaganga, in Small Cause Suit No. 734 of 1912, dated 15th August 1913.

KALYAN SINGH v. JAGAN PRASAD.

Mr. A. Srinivasa Aiyangar, for the Petitioner.

Messrs. K. N. Aiyar Aiyar and K. Raja Aiyar, for the Respondents.

JUDGMENT.—The plaintiff agreed to grant a lease of a house site to the 1st defendant in July 1906. The latter sub-let portions of the site to the 2nd and 3rd defendants and directed them to pay the plaintiff Rs. 1-12-0 and 1-8-0 a month respectively. Owing to the failure of the 1st defendant to carry out the terms of the agreement, the plaintiff instituted Original Suit No. 92 of 1911 on the file of the Manamadura District Munsif for the execution of the lease-deed and for arrears of rent. Defendants Nos. 2 and 3 were impleaded as parties as they were in possession. One of the issues raised in that suit was, "which defendant is liable for what portion of the rent?" The Munsif decreed that defendants Nos. 2 and 3 in this suit, who were defendants Nos. 4 and 5 in the former suit, were liable to pay Rs. 1-12 and Rs. 1-8-0 respectively and passed a decree to that effect.

The present suit is solely for arrears of rent and has, therefore, been filed in the Small Cause Side of the Subordinate Court of Sivaganga. The Subordinate Judge held that the previous decision was not *res judicata* and passed a decree jointly and severally against all the defendants for the arrears.

The 2nd defendant has filed this revision petition against that judgment. I am unable to agree with the Subordinate Judge on the question of *res judicata*. Mr. Raju Aiyar contends that as under section 16 of the Mofussil Small Cause Courts Act, Small Cause Courts alone are competent to entertain suits for arrears of rent, the previous decision by the District Munsif of Manamadura on the Regular Side is not *res judicata*. The District Munsif was competent to adjudicate on the claim for arrears, although he was not competent to entertain a suit brought to recover arrears alone.

The competency of the Munsif to decide an issue relating to arrears is not affected by the fact that a suit instituted solely for that purpose is beyond his jurisdiction. The decision in the case of *Raja Simhadri Appa Rao v. Ramachandrudu* (1) is directly in

point. I do not think the observation of the learned Judges in the case of *Avanasi Gounden v. Nachammial* (2) affects this question. The observations relating to the test of appealability, which was doubted in the latter judgment, do not question the *ratio decidendi* of the decision in *Raja Simhadri Appa Rao v. Ramachandrudu* (1).

In the view I have taken of the effect of the former decision, the question in this case was directly in issue in the former case and is, therefore, *res judicata*.

In modification of the decree of the Subordinate Judge, I direct that defendants Nos. 2 and 3 do pay to the plaintiff Rs. 1-12-0 and Rs. 1-8-0 a month respectively regarding the arrears claimed and that the 1st defendant be held liable for any balance that the plaintiff may be unable to recover from the two other defendants.

Each party do bear his own costs throughout.

Petition allowed.

(2) 29 M. 195; 16 M. L. J. 41; 1 M. L. T. 25.

ALLAHABAD HIGH COURT.

LETTERS PATENT APPEAL No. 15 OF 1915.

June 19, 1915.

Present:—Sir Henry Richards, Kt., Chief Justice, and Mr. Justice Rafique.

KALYAN SINGH AND OTHERS—DECREE-HOLDERS—APPELLANTS

versus

JAGAN PRASAD—JUDGMENT-DEBTOR—RESPONDENT.

Execution proceedings—Judgment-debtor failing to raise objection as to amount due under decree, if he can raise such objection subsequently—Civil Procedure Code (Act V of 1908), s. 11, Explanation 4—Res judicata.

The provisions of the Code of Civil Procedure as to *res judicata* are not expressly made applicable to execution proceedings. [p. 524, col. 1.]

If it is ever considered expedient to make all the provisions of section 11 of the Code applicable to execution proceedings, it should be done by the Legislature, not by the Judges. [p. 524, col. 2.]

If a judgment-debtor does not take exception to the amount set forth as being due in an application for execution, he is not prevented by the rule of *res judicata* from ever afterwards raising the question. [p. 524, col. 2.]

Letters Patent Appeal from the decision

(1) 27 M. 63; 13 M. L. J. 23.

SAFDAR ALI V. FAZAL.

of Mr. Justice Chamier, reported in 27 Ind. Cas. 950.

Mr. Durga Charan Banerji, for the Appellants.

Mr. Kailas Nath Katju, for the Respondent.

JUDGMENT.—This appeal arises out of an application for execution. The original decree was for Rs. 20,200, with proportionate costs and future interest at 6 per cent. per annum. It is now admitted that under the terms of the decree the decree-holder was only entitled to interest on the principal sum and not upon the costs. From time to time the decree-holder applied for execution. In the account of what he alleged to be due to him he included interest not only on the decretal amount but also on the costs. At last the situation was as follows:—If the decree-holder was not to get interest on his costs the decree was more than satisfied. If, on the other hand, he was to get interest upon his costs there would still remain something due to him. The sole question which has to be decided in the appeal is, whether or not the judgment-debtor having neglected to take exception to the inclusion in the account of interest on costs, he is now prevented from saying that the decree is satisfied. The principle which the decree-holder seeks to set up is that of *res judicata*. The law of *res judicata* appears in section 11 of the Code of the Civil Procedure. It provides that "no Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court." Explanation 4 provides that "any matter which might and ought to have been made a ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit." It seems quite clear that the provisions of the Code as to *res judicata* are not expressly made applicable to execution proceedings. It is said, however, that there are numerous authorities in which the principle of *res judicata* has been applied

to execution proceedings. No authority has been shown to us where it has been decided that if a judgment-debtor does not take exception to the amount set forth as being due in an application for execution, he is prevented by the rule of *res judicata* from ever afterwards raising the question. To hold that he was, would not only be applying the rule of *res judicata* in a way not provided for by the Code but would be also seriously extending the authorities cited. In the present case the question as to how far the decree remained unsatisfied was never raised or decided. It is only by calling to his aid Explanation 4 that the decree-holder can contend that the question has already been decided. The judgment-debtor had very little reason for taking exception to the earlier applications for execution. A large sum was then due on the decree and he knew that his property must be attached and sold in order to realise what was beyond question due. The judgment debtor could not well take exception to the application for execution without employing a Pleader and incurring expense. When the decree was practically satisfied, the question as to how much (if any) remained due for the first time became really important. If it is considered expedient (we do not say it is) to make all the provisions of section 11 of the Code applicable to execution proceedings, it should be done by the Legislature and not by the Judges. We think that the view taken by the learned Judge of this Court was correct and ought to be affirmed. We dismiss the appeal with costs.

Appeal dismissed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL NO. 1239 OF 1914.

May 12, 1915.

Present:—Sir Donald Johnstone, Kt., Chief Judge, and Mr. Justice LeRossignol.

SAFDAR ALI—PLAINTIFF—APPELLANT
versus

FAZAL AND ANOTHER—DEFENDANTS—
RESPONDENTS.

Sale—Auction sale held at time and date other than those proclaimed—Sale, if voidable.

KISHAN LAL v. SULTAN SINGH.

An auction sale held at a time or date other than those proclaimed is not a nullity but is voidable on proof of material injury. [p. 525, col. 1.]

Lala Seva Ram v. Kanshi Ram, 76 P. R. 1890, dissented from.

Tasadduk Rasul Khan v. Ahmad Husain, 21 C. 66; 20 I. A. 176, *Madho Mal v. Jawahir Singh*, 6 Ind. Cas. 713; 40 P. R. 1910; 211 P. L. R. 1910; 63 P. W. R. 1910, followed.

Second appeal from the decree of the Additional Divisional Judge, Gurjranwala, dated the 3rd March 1914, varying that of the Subordinate Judge, second Class, Gurjranwala, dated the 24th June 1913, decreeing the claim.

Bakhshi Tek Chand and *Chaudhri Nabi Bakhsh*, for the Appellant.

Mr. *Badr-ul-Din Kureshi*, for the Respondents.

JUDGMENT.—Plaintiff's suit was for possession of four houses, mortgaged to him by Fazl Ilahi deceased, by deed of 27th June 1910, but the present appeal is concerned with only the half share of one house, which originally belonged to Fazl.

The first Court found that this portion of the house was sold by auction in execution of a decree issued against Fazl, that the auction-purchaser was one Muhammad Bakhsh who conveyed his rights to Fazl Ilahi in June 1910 and that consequently Fazl Ilahi's mortgage to plaintiff was good.

The Divisional Judge adopted the defendants' argument that the auction sale was bad and was no sale at all, because the auction though proclaimed for the 5th May 1909, was in fact held on 3rd May 1909. The learned Divisional Judge relied on *Basharat-ulla v. Uma Churn Dutt* (1) and *Lala Seva Ram v. Kanshi Ram* (2), although with reluctance (for he felt that the defence was dishonest), and dismissed plaintiff's claim.

From that decree plaintiff has appealed to this Court.

Lala Seva Ram v. Kanshi Ram (2) was dissented from in the later ruling of *Madho Mal v. Jawahir Singh* (3), which is based on the Privy Council ruling reported as *Tasadduk Rasul Khan v. Ahmad Husain* (4).

Adopting the principle of those last quoted rulings, we would hold that an auction sale held at a time or date other than those proclaimed is not a nullity, but is voidable on proof of material injury.

(1) 16 C. 794 at p. 798.

(2) 76 P. R. 1890.

(3) 6 Ind. Cas. 713; 40 P. R. 1910; 211 P. L. R. 1910; 63 P. W. R. 1910.

(4) 21 C. 66; 20 I. A. 176

However, the matter is not of supreme importance in this case, for we find that the Divisional Judge has held that the auction was proclaimed for the 5th May 1909 on very inadequate evidence, that the specific objection was not maintained the first Court and that the weight of evidence is overwhelmingly in favour of the theory that the auction was held on the 3rd May 1909 and was proclaimed for that date.

The only evidence that it was to be held on the 5th May 1909 is a copy of the proclamation which was retained on the record, but the date entered therein is written in an abnormal style and is quite insufficient to rebut the evidence of the binding list and the Court's orders.

Further, it is quite clear from a petition dated 15th July 1909 on that record, that Fazl was aware of the sale and accepted the benefit of the sale, for the petition is one by his surety offering to take over the house at a higher price than that for which it had been knocked down to Muhammad Bakhsh.

We hold that the sale took place on the 3rd May 1909 and that it was proclaimed for that day, that Fazl was aware of it and accepted it and that plaintiff is entitled to possession.

We accept the appeal and restore the first Court's decree in regard to the half house in question with costs throughout.

Appeal accepted.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 974 OF 1914.

July 2, 1915.

Present:—Sir Henry Richards, Kt., Chief Justice, and Mr. Justice Piggott.

KISHAN LAL—PLAINTIFF—APPELLANT
versus

SULTAN SINGH—DEFENDANT—
RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XI, r. 21—Plaintiff keeping back documents which he ought to have produced, effect of—Evidence Act (I of 1872), s. 114, ill. (g)—Adverse inference—Dismissal of suit.

Where there is a strong ground for suspecting that a plaintiff is keeping back books and documents which he ought to have produced, the Court is entitled to draw adverse inferences against the plaintiff but it cannot dismiss his suit under Order XI, rule 21, unless an order for "discovery" or "inspection" has been made and disobeyed by him. [p. 526, col. 2.]

SAFDAR ALI v. GHULAM MOHI-UD-DIN.

Second appeal from a decree of the Additional Judge of Fatehgarh.

Dr. Surendra Nath Sen, for the Appellant.

JUDGMENT.—This appeal arises out of a suit brought to recover money alleged to be due on foot of four different mortgages. In the Court of first instance the learned Munsif was strongly of opinion that the plaintiff had in his possession or power certain documents which would throw light on the matter in dispute. With the consent of the plaintiff a visit was paid to the latter's house, a number of books were found but most of them likely to have a bearing on the case were not there.

After examining the plaintiff the Court dismissed the suit, reporting to do so under the provisions of Order XI, rule 21. The lower Appellate Court confirmed the decree of the Court of first instance. On the real merits of the case we do not feel much sympathy with the plaintiff. There is strong ground for suspecting that he was keeping back books and documents which he ought to have produced. The question, however, which we have to decide is whether the Court was entitled under the circumstances to dismiss the suit in the way it did. Order XI, rule 21, is as follows: "Where any party fails to comply with any order to answer interrogatories, or for discovery, or inspection of documents, he shall, if a plaintiff, be liable to have his suit dismissed for want of prosecution." The rule concludes "and the party interrogating, or seeking discovery, or inspection may apply to the Court for an order to that effect and an order may be made accordingly." If we look back to the earlier rules of the same Order, it is quite clear that the learned Munsif and the lower Appellate Court misapplied the rule. If a party wishes to get what is called "discovery of documents" from the other side, he makes an application under rule 12 asking the Court to order the other side to make discovery on oath of the documents which are or which have been in his possession or power relating to the matters in question. If the Court thinks fit it makes an order for discovery. The party upon whom this order of discovery is made is bound to comply with the order. The penalty for not complying with the order is that which

is specified in Order XI, rule 21. Just in the same way after a party has admitted the possession of a document, the Court can make an order for inspection, and if the Court's order is disobeyed, the party complaining of the disobedience can apply for the enforcement of the order according to the provisions of Order XI, rule 21. In the present case there was no order for "discovery" or inspection. We may point out to the Court below that if it was of opinion that the party was keeping back documents, the Court is entitled to draw adverse inferences against the party withholding or keeping back documents. In our opinion the Court was not entitled to dismiss the suit under the provisions of Order XI, rule 21. We accordingly allow the appeal, set aside the decrees of both the Courts below, and remand the case to the Court of first instance through the lower Appellate Court, with directions to restore the case under its original number in the file and to proceed to hear and to determine the same according to law. As we think that the appeals were entirely due to the conduct of the plaintiff we make no order as to costs.

Appeal allowed; Case remanded.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 1240 OF 1914.

May 20, 1915.

Present:—Sir Donald Johnstone, Kt., Chief Judge, and Mr. Justice LeRossignol.

SAFDAR ALI—PLAINTIFF—APPELLANT
versus

GHULAM MOHI-UD-DIN AND OTHERS—

DEFENDANTS—RESPONDENTS.

Mortgage—Clog on equity of redemption—Transfer of Property Act (IV of 1882), s. 60, principles of, applicability in the Punjab.

U mortgaged with *B* (a) mortgage rights of Rs. 1,000 in certain property, (b) equity of redemption of another property mortgaged to *K*, (c) certain other property free from mortgage. *U* agreed that *B* could recover Rs. 1,000, the amount due to him and pay the same to *K* the mortgagee of property (b) and that *U* was at liberty to sell the properties (b) and (c) but would be bound to pay the sale-proceeds to *K* to the extent of the mortgage-money due to *K* and the balance to himself;

SAFDAR ALI v. GHULAM MOHI-UD-DIN.

Held, that the above conditions were not a clog on the equity of redemption and could be acted upon. [p. 527, col. 2.]

Second appeal from the decree of the Additional Divisional Judge, Gujranwala, dated the 3rd March 1914, affirming that of the Subordinate Judge, second Class, Gujranwala, dated the 24th June 1913, dismissing the claim.

Bakhshi Tek Chand and Chaudhri Nabi Bakhsh, for the Appellant.

Mr. *Badr-ul-Din Kureshi*, for the Respondents.

JUDGMENT.—The facts of this case are given in the judgments of the Courts below. This appeal is concerned solely with the half of the house held by Umar Bakhsh, who mortgaged it with other property to Bute Khan in 1895. It was a condition of the mortgage that the mortgagee could recover Rs. 1,000, the value of a mortgage on two houses at Sodhra held by Umar Bakhsh, and pay that sum to Khushal Singh mortgagee of one of the houses at Wazirabad, which were included in Bute Khan's mortgage; it was further stipulated that Bute Khan, if he could find a purchaser for any of the houses at Wazirabad, would be entitled to sell but would be bound to pay the proceeds of the sale to Khushal Singh and the balance was to be devoted to the settlement of Bute Khan's mortgage.

The question is whether this enabling provision of sale by the mortgagee constituted a clog on redemption.

The first Court held it to be "peculiar and hardly enforceable," further that there was no proof that the consideration for the sale by the son of Bute Khan to plaintiff's mortgagor, Fazl Ilahi, was paid to Khushal Singh.

The Divisional Judge held that inasmuch as the provision regarding sale of the property mortgaged prevented redemption, it was void.

The mortgage by Umar Bakhsh in favour of Bute Khan comprised:

(1) A mortgage right of Rs. 1,000 on two houses in Sodhra.

(2) A house in Wazirabad held in mortgage by Khushal Singh.

(3) Two other houses, free of mortgage, in Wazirabad.

It appears from the deed that one Lada had obtained a decree against the owner of the Sodhra houses and was having the

houses sold subject to Umar Bakhsh's mortgage right, *i. e.*, Umar Bakhsh was to get his money out of the sale-price.

Bute Khan was to act as Umar Bakhsh's agent, receive the Rs. 1,000 and pay it over to Khushal Singh. As Umar Bakhsh was only mortgagee of the Sodhra houses, he had no right to redeem, but only to receive a certain sum of money.

Now the rules concerning clogging, formulated and followed by the English Courts of Law, came into existence when the usury laws were in force and every device for evading them had to be defeated.

At the present day they are an anachronism, but the Courts have adhered to technicality and an unprogressive judicial policy, instead of moulding the law to meet modified modern conditions and confirming their interference to cases where something unconscionable or oppressive in the bargain called for redress.

In the Punjab there is no Statute governing the matter, but the broad principles of the Transfer of Property Act are generally respected.

Section 60 of the Act is based upon the basic principles that once a mortgage always a mortgage, but the corollaries which encumber it in English Law find no place in the Statute Law of India.

The true meaning of the expression receives some elucidation from a study of section 69 of the same Act. The true meaning appears to be that failure to discharge the debt punctually shall not *per se* debar from redemption.

Now in the case before us, the mortgagee was not authorized to sell on behalf of the mortgagor in default of payment of the mortgage money, but he was authorized to sell at any time even before the mortgage-money fell due; the mortgage agreement in fact is two-headed, in the first place it creates the mortgage; in the second, it constitutes the mortgagee the agent of the mortgagor for certain purposes not confined to the satisfaction of the mortgagee's mortgage alone.

In the Punjab, where litigious perversity is so ripe, legal technicality is at a discount and the essential is an enforcement of contracts, where they are not bad by reason of any oppressive condition.

For these reasons we think the plaintiff-appellant should succeed. The plea that the sale-proceeds were not devoted to the

ARURA v. BALAK RAM.

extinction of Khushal Singh's mortgage was not mentioned before us and we are not pressed by it, for the plaintiff was a *bona fide* purchaser for value and was not bound to see that purchase-money reached any particular destination.

For the foregoing reasons we accept the appeal and decree to plaintiff possession of the portion of the house in Umar Bakhsh's possession with costs throughout.

Appeal accepted.

PUNJAB CHIEF COURT.
SECOND CIVIL APPEAL NO. 1217 OF 1913.
May 10, 1915.

Present:—Mr. Justice Rattigan and
Mr. Justice Leslie-Jones.

ARURA AND OTHERS, MINORS, THROUGH
Musammât PREM KAUR—DEFENDANTS—
APPELLANTS

versus

BALAK RAM AND OTHERS, REPRESENTATIVES
OF GANGA RAM, DECEASED—PLAINTIFFS
—RESPONDENTS.

Mortgage—Mortgagor, legal representative of, suit against—Decree, personal, if legal—Necessity—Assets—Liability of land mortgaged.

The plaintiff, mortgagee, sued the defendants on a mortgage executed by their father and uncle and prayed for a decree against the defendants personally and the land mortgaged. On appeal the Divisional Judge granted decree against the defendants personally as heirs of the mortgagors, but finding that the mortgage was not for necessity refused to pass a decree against the mortgaged land:

Held, that the decree should not have been passed personally against the defendants, for they were only liable to the extent of the assets of the mortgagors in their hands.

Second appeal from the decree of the Divisional Judge of Gujranwala Division at Lahore, dated the 10th March 1913, varying that of the Munsif, first Class, Hafizabad, Gujranwala District, dated the 26th June 1911, decreeing claim.

Mr. *Badr-ud-Din Kureshi*, for the Appellants.

Mr. *Dhan Raj Shah*, for the Respondents.

JUDGMENT.—Ganga Ram, the plaintiff in this case, relying on a collateral mortgage executed by the father and uncle of the defendants, sued the latter

after the death of the executants for a decree for Rs. 1,000 both against the defendants personally and the land mortgaged.

The first Court gave the plaintiff a decree for Rs. 1,000 against the land mortgaged. On appeal the Divisional Judge found that the mortgage had not been effected for necessity, and for that reason modified the decree to one "against the defendants personally as heirs of the alienors."

The defendants appeal and there is a cross-objection by the plaintiff. The only point argued in the appeal is that the defendants should not have been made personally liable. In this contention there is obvious force. They are liable only to the extent of the assets of the alienors in their hands. Indeed there is little doubt that this was all that the Divisional Judge intended to decree and the required alteration, as far as it goes is not objected to by the respondent. The latter, however, urges that the decretal amount ought to have been made a charge upon the mortgaged land. But in view of the finding of the Divisional Judge that the mortgage was effected without necessity, against which there neither is, nor can be, any appeal, we see no reason for any such alteration. The land will, no doubt, be assets in the hands of the judgment-debtors and available like other assets to provide for the satisfaction of the decree, provided that it is liable according to law. But we are not prepared to make the decretal amount an express charge upon it.

The appeal is accepted and the decree will be modified to the extent above indicated, parties bearing their own costs in appeal as the relief granted amounts to no more than the correction of an inadvertence.

The cross-objection is dismissed with costs.

Appeal dismissed.

KARRI PEDDI REDDY v. RECEIVER OF NIDADAVOLE AND MEDUR ESTATES. BUDDHA SINGH v. LALTU SINGH.

MADRAS HIGH COURT.

SECOND CIVIL APPEALS NOS. 1750 TO 1753
OF 1914.

July 27, 1915.

Present:—Mr. Justice Seshagiri Aiyar and
Mr. Justice Napier.

IN S. A. No. 1750 OF 1914

KARRI PEDDI REDDY AND ANOTHER—
DEFENDANTS—APPELLANTS

IN S. A. No. 1751 OF 1914

DORYA MAHALAKSHMI GADU AND
OTHERS—DEFENDANTS—APPELLANTS

IN S. A. No. 1752 OF 1914

KARRI SATYANARAYANA, MINOR, BY
MOTHER AND GUARDIAN, RAMANNA

—DEFENDANT—APPELLANT

IN S. A. No. 1753 OF 1914

SATIRAZU PATTABHI RAMA-

CHANDRA RAJU—DEFENDANT—APPELLANT
versus

RECEIVER OF NIDADAVOLE AND
MEDUR ESTATES—RESPONDENT.

*Madras Estates Land Act (I of 1908), ss. 3 (11), 51,
148—Rusums—"Fees paid with rent"—Rusums, if
can be included in the patta.*

*Rusums collected for payment to the karnam in a
zemindari village in lieu of salary can be included
in the patta and they are covered by the words "fees
paid with rent" in section 51 of the Estates Land
Act and are also included in the term 'rent' for the
purpose of section 148 of the Act.*

Second appeals against the decrees of the
District Court of Kistna at Masulipatam,
in Appeal Suits Nos. 248 to 250 and
252 of 1913, preferred against those of the
Court of the Sub-Collector of Narasapur
Division, in Summary Suits Nos. 612, 613,
611 and 616 of 1912.

Mr. P. Somasundaram, for the Appellants.

Mr. M. Purushotham Naidu, for the Re-
spondent.

JUDGMENT.—The decision of the District
Judge is right on the materials placed before
him. We feel very little doubt that the *karnam*
is being paid a salary in lieu of the *rusums*
which he received from the *ryots* in former
years. However, as the evidence that the
karnam is being paid a salary by Government
has not been let in and as no notifica-
tion has been proved to have been issued
under Act II of 1894 in respect of the
village, we are constrained to hold that
the *karnam* is entitled to claim the *rusum*
for the *fasli* in question. If the defendant
is able to produce the notification extending
Act II of 1894 to the village in question,

this judgment will not affect him in subse-
quent years.

On the question whether the *rusum* is
not payable because it is not a payment
for agricultural purposes, it is enough to
say that under section 51, fees paid with
rent can be included in the *patta* and
that section 3 (11) makes it clear that
such fees are included in the term "rent"
for the purpose of section 148 of the
Estates Land Act.

We dismiss the second appeals.

Appeals dismissed.

PRIVY COUNCIL.

APPEAL FROM THE ALLAHABAD HIGH COURT.

July 29, 1915.

Present:—Lord Shaw, Sir George Farwell,
Sir John Edge and Mr. Ameer Ali.

BUDDHA SINGH AND OTHERS—PLAINTIFFS—
APPELLANTS

versus

LALTU SINGH AND ANOTHER—DEFENDANTS—
RESPONDENTS.

*Hindu Law—Mitakshara—Succession—Putra, mean-
ing of—Sapinda.*

In the *Mitakshara*, as expounded in the Benares
School, the word *putra* and its synonym employed by
Vijnaneswara in connection with brothers and uncles
must be understood in a generic sense as in the case
of the deceased owner, and the descendants
in each ascending line, up to the fixed limit, should
be exhausted at any rate to the third degree before
making the ascent to the line next in order of
succession. [p. 538, col. 1.]

Under the *Mitakshara*, while the right of inheri-
tance arises from *sapinda* relationship or community
of blood, in judging of the nearness of blood
relationship or propinquity among the *gotraja*, the
test to be applied to discover the preferential heir is
the capacity to offer oblations. [p. 538, col. 1.]

The practice of introducing the opinion of another
Judge not a party to the judgment for the purpose of
enforcing the conclusion arrived at condemned. [p.
538, col. 1.]

Appeal from a judgment and decree of the
Allahabad High Court, dated July 6th, 1912,
reported in 16 Ind. Cas. 529, affirming that
of the Subordinate Judge of Moradabad,
dated June 23rd, 1910.

FACTS.—The facts of the case have been
sufficiently set forth in their Lordships'
judgment.

Mr. DeGruyther, K. C. for the Appel-
lants, contended that the whole ques-
tion was as to what the *Mitakshara* said
on the question of succession. In 1881

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the Madras High Court in *Suraya v. Lakshminarasamma* (1) decided that the paternal uncle's son came before the brother's son; in 1891 was decided *Kalian Rai v. Ram Chandar* (2) which gave precedence to the brother's grandson over the grand-parental line; in 1912 the Madras High Court in *Chinnaswami Pillai v. Kunju Pillai* (3) confirmed their former view of the law. In 1912 the matter came again before the Allahabad High Court which once more adhered to its former opinion. The Bombay decisions, *viz.*, *Rachara v. Kalingapa* (4) and *Kashibai Ganesh v. Sitabai Raghunath* (5) had nothing to do with the question. In Calcutta there was none decided on this point. The result was that the Madras rulings were in direct conflict with the Allahabad rulings. There was no authority for reading "son" as "grandson" and "great-grandson."

[Mr. AMEER ALI: As the High Court of Allahabad has decided according to *Mitakshara*, would it not be better to read the judgment and comment upon it?]

In the *Mitakshara* "son" did not include grandson, Subodhini. Apararka and Vajayanti were no authority on *Mitakshara*. The former was a commentary on Yajnavalkya.

[Mr. AMEER ALI: The whole law is from Yajnavalkya. Apararka is also a commentary on Yajnavalkya.]

Jolly dealing with Apararka said that certain matters peculiar to the Bengal School could be traced to Apararka whose view was to attach importance to oblations. This view was not accepted by the *Mitakshara*, which was based upon propinquity. The commentary by Nanda Pandita on the Institutes of Vishnu, who was the author of Dattaka Mimamsa, was directly opposed to *Mitakshara*. Smriti Chandrika said that this Chapter was included by Subodhini.

[Mr. AMEER ALI: The whole question is as to who the nearest *sapinda* is. Harrington says that that construction of *sapinda* in Subodhini is general.]

Sir Robert Finlay referred to *Kureem Chand Gurain v. Oodung Gurain* (6).

He referred to *Kureem Chand Gurain v. Oodung Gurain* (6); *Musammatt Oorhya Kooer v. Rajoo Nye Sookool* (7); *Bhyah Ram Singh v. Bhyah Ugur Singh* (8); *Suraya v. Lakshminarasamma* (1). The *Mitakshara* did not provide for the son and grandson, but on principle they were included. But the brother's great-grandson was no *sapinda* at all as he did not make the necessary offerings.

[Mr. AMEER ALI referred to *Parasara Bhattar v. Rangaraja Bhattar* (9).]

Harrington's view was clearly wrong.

Reference was made to *Mitakshara*, Chapter II, sections 4 and 5; *Lallubhai Bapubhai v. Cassibai* (10); Mayne on Hindu Law, pages 27 and 28, paragraph 504; Jolly's History of Hindu Law, page 13; Mandlik, page 380; Viramitrodaya, section 11.

Sir Robert Finlay, K. C., for the Respondents, contended that as the rule in section 5 (5) of the *Mitakshara* went to the descendants, it was absurd that three descents should not be taken from the grandfather. The Madras cases showed that they were based on the *Mitakshara* as interpreted in Madras.

Sir Robert was stopped in the middle of his argument and Mr. DeGruyther said that he had already said what he had to say on the point and could add nothing to it.

JUDGMENT.

Mr. AMEER ALI.—The question for determination involved in this appeal is one of considerable importance under the Hindu Law, and relates to the order of succession under the *Mitakshara*, as expounded in the Benares School, among the collateral kindred belonging to the same paternal stock as the deceased.

The suit out of which the appeal arises was brought by the appellant Buddha Singh alias Chaturi Singh to establish his right as the nearest reversioner to the estate of one Saheb Sahai, who died in 1873 without leaving any male issue. Saheb Sahai was a minor and unmarried at the time of his death; his mother, Rani Kishori Kunwar, who survived him, accordingly

(1) 5 M. 291.

(2) 24 A. 123; A. W. N. (1901) 189.

(3) 11 Ind. Cas. 885; 35 M. 152; 10 M. L. T. 226; 21 M. L. J. 856.

(4) 16 B. 716.

(5) 11 Ind. Cas. 560; 35 B. 389; 13 Bom. L. R. 552.

(6) 6 W. R. 158 at p. 160.

(7) 14 W. R. 208.

(8) 13 M. I. A. 373; 14 W. R. 1 (P. C.); 5 B. L. R. (P. C.) 293; 2 Sutn. P. C. J. 330; 2 Sar. P. C. J. 566; 20 E. R. 591.

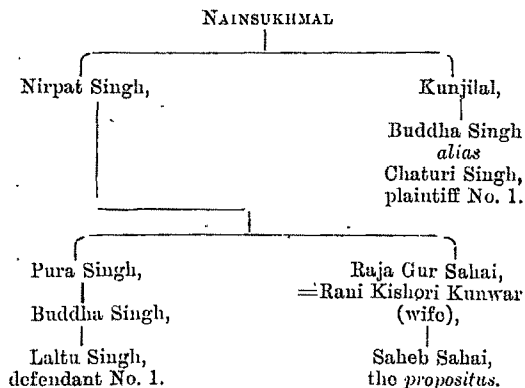
(9) 2 M. 202 at p. 205; 4 Ind. Jur. 393.

(10) 7 I. A. 212 at p. 234; 7 C. L. R. 445; 5 B. 110.

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came into the possession of his estate, which she held for nearly 34 years. She died in 1907, when the succession opened to the male collaterals of Saheb Sahai.

The following genealogical table, on which both the Courts in India have based their judgments, will explain the relative position of the parties to this action:—



The plaintiff, Buddha Singh, is thus the grandson of Nainsukhmal, the great-grandfather of Saheb Sahai, whilst the defendant, Laltu, is the great-grandson of Saheb Sahai's grandfather, Nirpat, and the grandson of his paternal uncle, Pura. The plaintiff's contention is that under the law of the *Mitakshara* he has a preferential title to the inheritance of Saheb Sahai as against the defendant, who is admittedly in possession of the deceased's estate since Rani Kishori's death. He bases his right on the following text of the *Mitakshara*:—"On failure of the father's descendants the heirs are successively the paternal grandmother, the paternal grandfather, the uncles and their sons." (Colebrooke's Translation, Chapter II, section V. v. 4.) And he contends that the expression "sons" occurring in this verse must be strictly construed, and so construed, the devolution of the inheritance in Nirpat's line ceased with his grandson, Buddha, and did not come down to his great-grandson, the defendant Laltu, and that after Buddha, by virtue of the immediately following verse he, as the grandson of the great-grandfather of the deceased, has become entitled to the estate. Their Lordships will refer presently a little more fully to this text and examine its meaning by the light of other texts.

Both the Courts in India have held against the plaintiff's claim; hence this appeal to His Majesty in Council.

The learned Judges of the Allahabad High Court in two separate and able judgments have exhaustively reviewed the authorities bearing on the subject, and as their Lordships agree in the main with their deductions and the conclusion at which they have arrived on these deductions, they find themselves relieved of the necessity of discussing the law in any detail.

The *Mitakshara* of Vijñaneswara, who flourished about the end of the eleventh and the beginning of the twelfth century of the Christian era, purports to be a Commentary on the Institutes of Yajñavalkya. Vijñaneswara analyses and discusses the text of his great predecessor, often at considerable length, explains the meaning of recondite passages, supplies omissions and reconciles discrepancies by frequent reference to other old expounders of the law. The best example of his treatment of Yajñavalkya's text is to be found in the commentary on the rule relating to the succession to the estate of a person who dies without leaving any male issue. After stating that the right of "sons, principal and secondary" to "take the heritage" had been already shown, he proceeds to quote the rule of Yajñavalkya declaring the order of succession in their default, which runs thus:—"The wife, and the daughters also, both parents, brothers likewise, and their sons, gentiles, a pupil, and a fellow-student: on failure of the first among these, the next in order is indeed heir of one who has departed for heaven leaving no male issue. This rule extends to all persons and classes." (Mr. Colebrooke's Translation of the *Mitakshara*, Chapter II, section I, paragraph 2.)

Mr. Mandlik's rendering of these two *slokas* of Yajñavalkya is more literal and is as follows:—

"The wife, daughters, both parents, brothers and likewise their sons, *gotrajas* (gentiles), *bandhus* (cognates), a pupil and a fellow-student. Of these, on failure of the preceding, the next following in order is heir to the estate of one who has departed for heaven, leaving no *putra*. This rule extends to all (males whether belonging or

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not to the four) classes." (Mandlik's Translation of the Institutes of Yajnavalkya, page 220, vv. 135, 136).

The compound word *aputra*, occurring in Yajnavalkya's text, has been rendered by Mr. Colebrooke as "leaving no male issue"; by Mr. Mandlik as "leaving no *putra*." He was evidently anxious to avoid any English synonym, as the word *putra* here, according to all the commentators, conveys a larger meaning than is usually implied by the term "son." The Viramitrodaya says clearly that the word "sonless," which is the literal equivalent of *aputra*, signifies "in default of son, grandson and great-grandson" (Chapter III, Part I, v. ii., Shastri Golap Chunder Sircar's Translation, page 154), that, in other words, it comprehends three degrees in the direct line of descent. In fact, it is not disputed at their Lordships' Bar that the word *putra* as used in relation to the last owner signifies and includes son, grandson, and great grandson. What is contended for is that the same word in connection with other relatives, such as brother, uncle or grand-uncle, must be construed in a restricted and literal sense.

The Commentary of Vijnaneswara on the above-quoted *slokas* of Yajnavalkya extends over several sections in Mr. Colebrooke's translation, and makes the work more a digest than a mere commentary. In section I of Chapter II the author deals exhaustively with the right of the widow to inherit the estate of "one who has died *aputra*." Her right of succession is dependent on his leaving no male issue to the third degree. In paragraph 3 the word *putra* is used again in the same generic sense. After treating of the rights of daughters and parents in sections II and III respectively, he deals in section IV with the succession of brothers and "their sons." Here, again, the word *putra* is used, whether in the literal or in an extended sense is a matter for consideration.

Section V relates to the right of collateral kindred of the same paternal stock or *gotra*, and, therefore, called the *gotraja*, to take the inheritance of the *aputra* in default of "brother's sons." Admittedly both the plaintiff and the defendant are

Sahab Sahai's *gotrajas*. Reference, therefore, is necessary to the rules embodied in section V.

It is to be noted here that the word *putra* or more correctly *put-tra*, which literally means "one who releases from hell" (*put*), is used by Vijnaneswara at the very beginning of his Book on Inheritance. In paragraph 3, section I, Chapter I, describing the two kinds of property (*daya*, wealth) to which rights of inheritance attach, *viz.*, the "unobstructed" and "obstructed," he speaks thus of the latter class:—

"but property devolves on parents (or uncles) and brothers and the rest, upon the demise of the owner if there be no male issue, and thus the actual existence of a son and the survival of the owner are impediments to the succession; and on their ceasing the property devolves [on the successor] in right of his being uncle or brother. This is an inheritance subject to obstruction."

And then comes the significant passage:—"The same holds good in respect of their sons and other descendants," meaning, clearly, the sons and *descendants* of uncles and brothers. And this is the construction which Balambhatta, one of the best known commentators of the *Mitakshara*, appears to have put on these words.

As pointed out in the case of *Ramchandra Martand v. Vinayak Venkatesh* (11), the right of collaterals to succeed to the inheritance of a deceased person is based on the rule of Mann, which has been translated differently by different writers, but which in substance amounts to this, that the estate of a deceased goes to his nearest *sapinda*. The right of collaterals, therefore, is dependent on the existence of the *sapinda*-relationship between the *propositus* and the claimant. It is now well settled by the decisions of this Board that under the *Mitakshara* [*Lullubhai Bapubhai v. Cassibai* (10); *Ramchandra Martand v. Vinayak Venkatesh* (11)] the *sapinda*-relationship arises "between two people through their being connected by particles of one

(11) 25 Ind. Cas. 290; 41 I. A. 290; 18 C. W. N. 1154; 27 M. L. J. 333; 1 L. W. 831; 10 N. L. R. 112; 16 M. L. T. 447; (1914) M. W. N. 835; 16 Bom. L. R. 863; 12 A. L. J. 1281; 20 C. L. J. 573; 42 C. 384.

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body," viz., that of the common ancestor, in other words, from community of blood in contradistinction to the *Dayabhaga* notion of "community in the offering of religious oblations." But as will be shown later on, the *Mitakshara*, whilst holding that the right to inherit does not spring from the right to offer oblations, does not exclude it from consideration as a test of propinquity or nearness of blood.

Mr. Colebrooke has, in his translation of section V, erroneously rendered the word *sapinda* as "relations connected by funeral oblations," and *samanodakas* as those connected by "libations of water," which has led to some confusion of ideas. Their Lordships, therefore, propose to follow the translation which was before this Board in *Lallubhai's* case (10).

The first paragraph stands thus: "If there be no brother's sons, *gotrajas* share the estate. *Gotrajas* are the paternal grandmother and *sapindas* and *samanodakas*."

Their Lordships understand that the word rendered "sons" in this paragraph is *putra* in the original. Then follows paragraph 2, in which *Vijnaneswara* develops the position of the grandmother in the following terms:—

"In the first place, the paternal grandmother takes the inheritance. The paternal grandmother's succession immediately after the mother was seemingly suggested by the text before cited. And the mother also being dead, the father's mother shall take the heritage' (Section 1, paragraph 7). No place, however, is found for her in the compact series of heirs from the father to the nephew, and that text ('the father's mother shall take the heritage') is intended only to indicate her general competency for inheritance; she must, therefore, of course, succeed immediately after the nephew; and thus there is no contradiction."

Paragraph 3 then states in general terms that after the grandmother the *sapindas* of the same paternal stock, viz., "the paternal grandfather and the rest inherit the estate, for *bhinmagotra sapindas* (i.e., *sapindas* belonging to another stock) are indicated by the term *bandhu*" (dealt with in section VI),

Paragraphs 4 and 5 deal specifically with the succession of the *samanagotra sapindas* and run as follows:—

"(4) Here on failure of the father's *descendant*, the heirs are successively the paternal grandmother, the paternal grandfather, and their sons."

"(5) On failure of the paternal grandfather's line, the paternal great-grandmother, the great-grandfather, his sons and their *issue*, inherit. In this manner must be understood the succession of the *samanagotra sapindas*."

It is clear from the observations of both Mr. Mandlik and Dr. Jolly (Mandlik's *Hindu Law*, page 379; Dr. Jolly's *Tagore Law Lectures*, page 124) that Mr. Colebrooke in his translation of paragraph 5 has omitted towards the end the important words "up to the seventh," which makes a material difference in the sense of the passage.

Mr. Mandlik translates the last sentence as follows: "In this manner up to the seventh (*sapinda*) the taking of wealth by the *samanagotra sapindas* should be known." Only instead of the expression *samanagotra*, which is in the original, he uses the abbreviated term *sagotra*.

Paragraph 6 then provides as follows:—

"6. If there be none such, the succession devolves on *samanodakas*, and they must be understood to reach the seven degrees beyond *sapindas*, or else as far as the limits of knowledge and name extend. Accordingly *Vhrat Menu* says: 'The relation of the *sapindas* ceases with the seventh person, and that of *samanodakas* extends to the fourteenth degree or as some affirm, it reaches as far as the memory of birth and name extends.' This is signified by *gotra*."

It is contended on behalf of the appellant on the strength of these several passages that the word "son" used in conjunction with brothers must be literally construed, for otherwise, it is urged, the position assigned to the grandmother in the order of succession would be displaced. The effect of this argument (which by parity of reasoning must apply also to uncles), if well-founded, is that the succession in the father's or grandfather's line must cease *ipso facto* on the failure of descendants of the second degree, and the inheritance must

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be diverted to another line ascending first to the female ancestor.

In their Lordships' opinion it begs the very question which they have to determine, *viz.*, in what sense Vijnaneswara has used the term "son" in these passages; and that question can be answered only *first* by examining his own method of employing the word and *secondly*, by inquiring in what sense other Hindu Jurists of the same school or cognate schools have understood the expression. Before proceeding with their examination of Vijnaneswara's own words, their Lordships desire to make one observation, as it strikes them, regarding the place of the grandmother in his scheme of succession.

In Yajñavalkya's rule, already quoted, to which Vijnaneswara refers as "the compact series of heirs," the paternal grandmother is not included as an heir. Vijnaneswara finds a place for her among the *gotraja*, on the authority of an enunciation of Manu, which he quotes in paragraph 7 of section I, Chapter II, and which runs thus: "Of a son dying childless the mother shall take the estate; and the mother also being dead, the father's mother shall take the heritage."

According to Manu, then, if his words are to be literally construed, the paternal grandmother would take immediately after the mother. This difficulty Vijnaneswara himself recognises; in order to reconcile the conflict between Yajñavalkya, who omits the grandmother altogether from his "compact series of heirs," and Manu, who would place her directly after the mother, he places her somewhat arbitrarily, as Messrs. West and Buhler also indicate, after the "brother's sons." The question, however, whether he intended his declaration to be imperative can be solved only by a less free translation than Mr. Colebrooke's. Anyhow, the meaning to be attached to the word "sons" is left subject to explanation.

Now in paragraph I of section V, where Vijnaneswara says, "if there be not even brother's sons", the word used is *putra*; in paragraph 2, where the grandmother's place is declared, the expression employed is brother's *suta*, a synonym of *putra*. In paragraph 4 again the word *putra* appears to be used in connection with

uncles. In paragraph 5, where the expression "his sons and their issue" occurs, the original words are said to be *tat putras*, "his sons," and *tat sunavas* (Plural of *sunu* "offspring." *Sunu* is the old Indo Aryan word which survives in the English "son"), "their sons."

The word "descendants" in Mr. Colebrooke's translation is in the original "*santana*," which means race, lineage, or posterity, and is still used among Hindus to mean male progeny without limitation. Mr. Justice Telang construes it as meaning "continuation": *Rachava v. Kalingapa* (4), other learned Sanscritists interpret it to signify "an uninterrupted series" (of progeny or heirs). Their Lordships have no doubt that Vijnaneswara has used it in the sense of lineal male descendants. *Sunavas*, translated by Mr. Colebrooke as "issue," connotes the same idea.

Having regard to the fact that this great legist, whose logical acumen judging from his work seems to have been remarkable, has used the term *putra* in previous parts of his book on inheritance in a comprehensive and generic sense, their Lordships find it difficult to conceive why he should arbitrarily and without any explanation have used the word towards the end in quite a different and restricted sense, or why, if his intention was to confine the descent in the case of the collaterals to the actual sons of brothers and uncles, he did not employ terms which would have exactly conveyed his meaning, such as *atmaja* or *auras* which, their Lordships understand, mean "son of one's loins." [See Mandlik, page 380; and Sutherlands' Translation of the Dattaka Mimamsa (Stcke's Hindu Law Books, p. 547).] Nor can their Lordships appreciate the argument that the meaning of such words as *santana* and *sunavas*, which mean lineal male progeny without limitation, should be arbitrarily cut down to two degrees.

There seems to be great force then in Sir Robert Finlay's contention that the limitation is to be found elsewhere. The rule of Manu supplies one limitation:—"To three (ancestors) water must be offered, to three funeral cake is given, the fourth (descendant is) the giver of these (oblations), the fifth has no connection

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with them." ("Sacred Books of the East," Vol. XXV, v. 186, p. 36.) The other is deduced by Mr. Harrington [see *Rutchepetty Dutt Jha v. Rajunder Narain Rae* (12)], the well-known author of the "Analysis," and one of the most erudite Judges of the old Sudder Court of Bengal, from the enunciations of Vijnaneswara himself in paragraph 6, section V, where he declares that the succession of the *samanagotra sapindas* extends 'in this manner' to 'the seventh degree.' It is not necessary in their Lordships' opinion to examine the force of the criticism that has been levelled at Mr. Harrington's construction of Vijnaneswara's dictum, for if the view based on Manu's doctrine or rule be well-founded, as the High Court has considered it to be, it would be sufficient to dispose of this appeal.

In this connection their Lordships desire to make another observation. If it be correct, as has been suggested, that the words *putra-pautra* ("son-grandson"), used by Vijnaneswara in section I, Chapter I, did not comprehend originally a great-grandson, but that it has been included by the commentators, as the Viramitrodaya shows, on the strength of analogical reasoning, then, in their Lordships' opinion, the objection to the High Court's reading of the text, based on the necessity of strict adherence to a literal interpretation, loses considerably its force, and the Courts are compelled to resort to other texts to extract the meaning of undefined expressions.

Turning now very briefly to the other authorities to which their Lordships' attention was called, they observe that Apararka, another scholiast of Yajnavalkya, who flourished about a century later than Vijnaneswara, dealing with the same text, on which the author of the *Mitakshara* has commented at such length, construes, as pointed out by the High Court, the expressions "brother's sons" and "uncle's sons" in a wider sense. That Apararka's authority is acknowledged by the expositors of the Benares School is clear from the fact, to which Mr. Mandlik refers, that Visweswara Bhatta, the author of the *Subodh ni*, a commentary on the *Mitakshara*, has used Apararka's work among others for the compilation of his *Madanaparijata*. Parts of (12) 2 M. L. A. 132 at p. 158; 2 Suth. P. C. J. 1; 1 Sar. P. C. J. 161; 18 E. R. 251,

Apararka's treatise and of the *Madanaparijata* have been translated by Dr. Sarvadhikari and are to be found in his *Tagore Lectures* for 1880.

Nanda Pandita, "an esteemed writer of the Benares School," and the author of the noted work on the Law of Adoption, called the *Dattaka Mimansa*, a standard treatise among the followers of the *Mitakshara*, has written commentaries both on the *Mitakshara* as well as on the Institutes of Vishnu, a predecessor of Yajnavalkya, who is frequently quoted by Vijnaneswara. In this latter work, called the *Vaijayanti*, in giving the order among the *sugotras*, he states that "in the father's line, on failure of the brother's son, the brother's son's son is heir." And he bases this rule on the prescriptions of Manu already quoted. It is to be noted that this writer, who must have had Vijnaneswara's words in his mind, certainly did not limit the term *putra* to two degrees. Varadaraja, whose authority is said to be great in Southern India, and whose enunciations appear to be received with respect also by the expounders of the Benares School, has given expression to the same view. Vidyabhusan Shama Charan Sarkar, a learned Hindu scholar who for many years held the post of principal Oriental Interpreter in the High Court of Calcutta, and at one time occupied the chair of Tagore Law Professor in the Calcutta University, also deals with the subject in his well-known work called the *Vyavastha Chandrika*.

This learned Hindu writer states in Principle 153 that "a brother's grandson succeeds in default of a brother's son," and refers to the decision of the Calcutta High Court in *Kureem Chand Gurain v. Oodung Gurain*(3) without taking any exception to its correctness. In the note to the Principle he states the reason why the brother's grandson succeeds on failure of a brother's son in these words: "Because the term brother's son is inclusive also of the brother's grandson, and because he is *sapinda* and the nearest of the persons understood by the term *gotraja*." The significance, however, of the statement lies in the question which Shama Charan Sarkar propounds in the footnote: "It may be asked that when in law the term 'son' (*put-tra*) is inclusive of the grandson, and great-grandson, why then the term 'brother's son' does not include also the 'brother's

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great-grandson?" The answer which he gives to his own question is both interesting and instructive. "The answer is," he says, "that in law calculation is made from the son of the common ancestor, which here is the father of both the deceased and his brother, consequently the term 'son' (of that ancestor, is inclusive of his great-grandson, who is the brother's grandson."

Dr. Raj Comar Sarvadhikari, whose authority as an expounder of the Hindu Law has been recognised by the Calcutta High Court and this Board, in his Tagore Law Lectures gives emphatic expression to the view that the word "son" includes three degrees of descendants.

Devananda Bhatta, the author of the *Smriti Chandrika*, whose doctrines, however, are not recognised in Northern India, holds the contrary opinion; and Visweswara Bhatta in the *Subodhini* certainly appears to say that the father's line ceases with the brother's son; and probably the same meaning is to be attached to his statements in the *Madanaparijata*. With regard to these two writers, their Lordships deem it necessary to observe that Devananda Bhatta, who is supposed to have been a contemporary of Apararka, admittedly differs from the author of the *Mitakshara* in several essential rules of law. It seems, to say the least, doubtful whether an enunciation in the *Smriti Chandrika* can be safely applied, except perhaps by way of analogy, to explain a dubious or indeterminate phrase or term in the *Mitakshara*. The *Subodhini* stands on a different footing; it no doubt professes to be a commentary on the *Mitakshara*, but it is equally clear that in several instances it diverges from the acknowledged interpretations of its doctrines. The views of Visweswara Bhatta and Devananda Bhatta have been propounded with much force by Mr. Mandlik and Golap Chunder Shastri, both of whom take their stand on the literal construction of the word *putra*. This thesis has been elaborately worked out by the former writer, but in substance it amounts to this, that as Vijnaneswara has used the expression "son", in conjunction with "brothers" and "uncles" it must be restricted to their direct male issue, and no extension of its meaning is permissible,

Their Lordships agree with the High Court of Allahabad that this reasoning proceeds on a very narrow basis and materially ignores the chief ground on which the opposite doctrine is based. Dr. Raj Comar Sarvadhikari's construction appears to them to rest on a logical foundation, and his views seem to be consistent and clear. In effect he says that the *Mitakshara* propounds a definite scheme of succession; lineal male descendants of the deceased owner down to and including the third degree, who constitute the first class of propinquous relations (the nearest *sapindus*) inherit in succession in the first instance. In their default the widow and daughter take by express provision of the law. The daughter's son comes in similarly. In their absence the inheritance ascends; each ascending line begins with a female, and each has to be exhausted in accordance with the rule of propinquous *sapinda*-relationship before the next in order can take; so that the parents and their three "successive descendants" take first; then the paternal grandmother and the paternal grandfather and "their three successive descendants" come next, and so on.

It may be noted here that two recent Hindu writers of repute (Dr. Jogendra Nath Bhattacharjee, M. A., D.L., in his *Commentaries on the Hindu Law*, page 444; Mr. Jogendra Chunder Ghose, *Hindu Law*, page 119) and Dr. Jolly, who was at one time Tagore Law Professor in the Calcutta University and is one of the translators of "The Sacred Books of the East," are in substantial agreement with Dr. Raj Comar Sarvadhikari.

As regards the decided cases, there seems to be a conflict of opinion between the High Courts of Allahabad and Calcutta on one side and that of Madras on the other. The latter High Court has upheld the narrow construction propounded by the *Smriti Chandrika* and the *Subodhini*, and though it purports to confine its interpretation to Southern India, the opinion it has expressed has a wider application and deserves, therefore, careful attention.

Their Lordships do not consider it necessary to refer to the earlier decisions of the Sudder Dewauny Adalat of the North-West Provinces; they think it sufficient to treat the judgment of Mr. Harrington in *Rutcheputty Dutt Jha v. Rajunder Narain Rae* (12) as a starting

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point in the current of decisions in Northern India. The question at issue in that case related to the right of *bandhus* or cognates under the *Mitakshara* to the succession to a deceased person in the presence of a *gotraja*. Mr. Harrington in dealing with the question examined exhaustively the meaning of the word *putra*, and came to the conclusion that it had been used by Vijnaneswara in a generic sense. His judgment was affirmed on appeal to this Board; and there appears to be no challenge of his interpretation of the law. It again received the approval of this Board in *Bhyah Ram Singh v. Bhyah Ugur Singh* (8). Perhaps Mr. Harrington's view with regard to the continuation of each line of heirs to the seventh degree is open to the objection that it contravenes the rule of Manu. As already observed, their Lordships do not, however, consider it necessary for the purposes of the present case to consider whether the principle suggested by him is correct or not.

In *Kureem Chanā Gurain v. Oodung Gurain* (6) also the exact point in issue was not identical with the one involved here, but Mr. Harrington's construction of the word *putra* was accepted; and it was held that in the scheme of the *Mitakshara* the term "brother's son" includes "brother's grandson".

In *Kalian Rai v. Ram Chandar* (2) the point at issue directly concerned the position of the brother's grandson in the line of descent, and the learned Judges of the Allahabad High Court (Burkitt and Chamier, JJ.) came to the conclusion that under the law of the *Mitakshara*, as accepted and expounded in the Benares School, the brother's grandson had the right of succession to the deceased before it ascended to the second line, *viz.*, the grand-parental line.

This decision has been followed in the case under appeal.

In the Bombay Presidency also the doctrines of the *Mitakshara* are recognised subject to the interpretation of the Vyavahara Mayukha of Nilkantha Bhatta, and although on many points there is considerable divergence between the Benares and the Maharashtra Schools, as regards the question involved in the present case, one decision at least of the Bombay High Court indicates an agreement with the Allahabad High Court.

Mr. Justice Telang, a Sanscritist of high order, in *Rachava v. Kalingapa* (4), explains thus the order of descent among the *gotrajas* (enunciated in Chapter II, section V, paragraphs 4-5 of the *Mitakshara*), although, as he points out, each ascending line begins with a female (*gotraja*) ancestress:—

'In the *Mitakshara*, Chapter II, section V, pl. 4-5, it is laid down that the propinquity of *gotrajas* is to be determined by lines of descent—that is to say, the inheritance is to go first in the line" (the word in the original is *santana* literally, "continuation") "of the paternal grandfather, then in default of any one in that line, of the paternal great-grandfather, then of the paternal great-great-grandfather, and so forth.'

The Madras High Court in two cases, named respectively *Suraja v. Lakshminarasamma* (1) and *Chinnwasami Pillai v. Kunju Pillai* (3), has held, as already stated, the direct opposite. The *ratio decidendi* in both judgments, which are elaborate and closely reasoned, is of a two-fold character; in the *first* place, the learned Judges say that when a word purports to bear two meanings, one primary, the other secondary, it must be understood in the primary sense unless there is anything in the context to show that it was not used in that sense. In the *second* place, they seem to consider the opinions of Devananda Bhatta and of Visveshwara Bhatta in the *Smriti Chanrika* and *Subodhini* respectively as conclusively showing that the *Mitakshara* must be taken to limit collateral descent to two degrees in each line. Their Lordships have already made their remarks on these two authorities; they do not feel disposed to attach any canonical authority to the rule of the *Subodhini*. Curiously enough there is no reference in either of the Madras judgments referred to above to a previous decision [*Parasara Bhattar v. Rangaraja Bhattar* (9)] of the same Court to which Turner, C.J., was also a party. In that case the rule of the *Smriti Chandrika* was not accepted nor was the literal construction of the *Mitakshara* followed. It is usual in such cases where a difference of opinion arises in the same Court to refer the point to a Full Bench, and the law provides for such contingencies. Had that course been followed, their Lordships would probably have had more detailed

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reasoning as to the change of opinion on the part at least of one Judge.

In *Suraya v. Lakshminarasamma* (1) the Judges say they had "consulted their learned colleague, Mr. Justice Muttusami Ayyar," and acknowledged their obligations to him for his assistance. Their Lordships cannot help remarking that it is an undesirable course, which has not been approved of by this Board, to introduce the opinion of another Judge not a party to the judgment for the purpose of enforcing the conclusion arrived at. The recorded opinion of Muttusami Ayyar, J., would have been of great value had he been associated in the decision.

However, the two Madras decisions have received the respectful consideration of their Lordships. They have already given reasons for holding that in the *Mitakshara*, as expounded in the Benares School, the word *putra* and its synonym employed by Vijnaneswara in connection with brothers and uncles must be understood in a generic sense as in the case of the deceased owner, and that the descendants in each ascending line, up to the fixed limit, should be exhausted at any rate, to the third degree, before making the ascent to the line next in order of succession.

It seems to their Lordships that there is another ground on which the plaintiff must fail. It is admitted that the defendant confers greater benefit on the deceased by the offerings he makes to the *manes* of the common ancestor. Now it is absolutely clear that under the *Mitakshara*, whilst the right of inheritance arises from *sapinda*-relationship, or community of blood, in judging of the nearness of blood-relationship or propinquity among the *gotraja*, the test to be applied to discover the preferential heir is the capacity to offer oblations. Mitra Misra, the author of the *Viramitrodaya* (Golap Chunder Shastri's translation, page 91, Chapter II, Part I, section 23A), an authoritative commentary on the *Mitakshara*, lays down this doctrine in express terms. He says, "when there are many claimants to the heritage among *gotrajas* and the like, (Dr. Raj Comar Sarvadhikari construes the word "like" as meaning "other classes of heirs.") then the fact of conferring benefits on the proprietor of the wealth by means of the offering of obla-

tions and the like only excludes those that do not confer such benefits." Dr. Raj Comar Sarvadhikari renders the last part of this passage thus: The benefit conferred on the late owner by the offering of the cake and the water determines the title to inheritance ("Tagore Law Lectures" for 1880, page 629).

In the case of *Bhyah Ram Singh v. Bhyah Ugur Singh* (8) the Board affirmed this rule in the following words: "When a question of preference arises, as preference is founded on superior efficacy of oblations, that principle must be applied to the solution of the difficulty."

For these considerations their Lordships are of opinion that the conclusion arrived at by the High Court is wellfounded, and this appeal should be dismissed with costs. And they will humbly advise His Majesty accordingly.

Appeal dismissed.

Solicitors for the Appellants: Messrs. Ranken Ford, Ford and Chester.

Solicitor for the Respondents: Messrs. Pyke, Parrott & Co.

CALCUTTA HIGH COURT.

APPEALS FROM ORIGINAL DECREES NOS. 550
AND 557 OF 1910.

May 27, 1913.

Present:—Mr. Justice Chitty and
Mr. Justice Teunon.

Srimati AKSHOY KUMARI BASU—
PETITIONER—APPELLANT

versus

Srimati PROSONNO KUMARI GHOSE
—OPPOSITE PARTY—RESPONDENT.

Will, Probate of—Creditor, locus standi of, to come in Probate proceeding.

A died on 17th January 1892, leaving a Will dated 28th December 1887. By that Will he left his property to his wife, B, for life, and after her death to his daughter-in-law C, for her life, and after her death the male children that should be born to his son, D, were, on attaining majority, to get the property in absolute right. No executor was definitely appointed by the Will, but the testator gave equal power to his wife and to his daughter-in-law and directed that, in case of death of one of them, the survivor of the two should continue to be in enjoyment and possession in the manner stated above,

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B obtained Probate of the Will on 17th May 1894, and retained possession of the property during her life. She died on 11th June 1904. The appellant had obtained a mortgage dated 29th May 1904 and a bond dated 24th November 1905 against D and applied to be made a party to the proceedings:

Held, that the appellant had no *locus standi* to come in, as it was only in the event of a Will being put forward possibly to defraud creditors that a creditor would have *locus standi* to come in in Probate proceedings.

Lakhi Narain Shaw v. Dhanada Kumar Ghose, 15 Ind. Cas. 686; 16 C. W. N. 1099; 17 C. L. J. 230, followed.

Appeals against the decrees of the District Judge of Dacca, dated the 15th of September 1910.

Babu Gobinda Chandra Dey Roy, for the Appellant.

Babu Harendra Narain Mitter, for the Respondent.

JUDGMENT.—These two appeals are presented by Akshoy Kumari Basu against two orders of the District Judge of Dacca. In Appeal No. 550, the appellant objects to the order of the District Judge who held that she had no *locus standi* in certain Probate proceedings. In the other appeal, the appellant objects to the order of the District Judge in which he said that the first Probate to Harimoni still obtained, and that there was no necessity for Prosonno Kumari to take out Probate again.

If the appellant has no *locus standi* in these Probate proceedings, it is obvious that both the appeals must fail.

Krishna Kishore Ghose died on 17th January 1892, leaving a Will dated 28th December 1887. By that Will, he left his property to his wife Harimoni for life and, after her death, to his daughter-in-law Prosonno Kumari for her life. After her death, he said, the male children that should be born to his son Ananda Kishore Bose should, on attaining majority, get the property in absolute right. "No property so left by me", said the testator, "will be liable for debt of my said son Ananda Kishore Ghose." No executor was definitely appointed by the Will, but the testator gave equal power to his wife and to his daughter-in-law and directed that, in case of death of one of them, the survivor of the two should continue to be in enjoyment and possession in the manner stated above. Harimoni obtained Probate of the Will on 17th May 1894 and retained possession of

the property during her life. She died on 11th June 1904. The present appellant's claim on Ananda Kishore originated with a mortgage dated 29th May 1904 and a bond dated 24th November 1905.

From these dates which are given to us by the learned Pleader for the appellant, it is clear that the appellant has no *locus standi*. The Probate was granted in 1894. The money was not advanced to Ananda till 10 or 11 years after that. It is obvious that there could be no question of fraud upon this creditor in 1894, when she was not a creditor at all and apparently had no prospect of being one. It would only be in the event of a Will being put forward possibly to defraud creditors that a creditor would have *locus standi* to come in in Probate proceedings. This is in accordance with our decision in the case of *Lakhi Narain Shaw v. Dhanada Kumar Ghose* (1).

We may remark that the order against which Appeal No. 557 is directed appears to us to be incorrect. The Probate granted to Harimoni was revoked by her death; and if, the estate was not fully administered and further administration was necessary, it would be open to come in and apply for Letters of Administration for that purpose.

The appeals, however, both fail, and must be dismissed with costs. We assess the hearing fee at one gold *mohur* in each appeal.

Appeals dismissed.

(1) 15 Ind. Cas. 686; 16 C. W. N. 1099; 17 C. L. J. 230.

PRIVY COUNCIL.

APPEAL FROM THE BOMBAY HIGH COURT.

June 29, 1915.

Present:—Viscount Haldane, Lord Shaw, Sir George Farwell, Sir John Edge and Mr. Ameer Ali.

MERWANJI MUNCHERJI CAMA AND
ANOTHER—PLAINTIFFS—APPELLANTS

versus

THE SECRETARY OF STATE FOR INDIA
IN COUNCIL—DEFENDANT—RESPONDENT.

Bombay City Land Revenue Act (II of 1876)—Object of the Act—Register, maps and records under Act—Statements in register and records, value of—Estoppel—Omissions, errors or mistakes of Collector, whether can affect Government's interests,

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The Bombay City Land Revenue Act must be treated as defining the extent of the rights of any one who consults the Rent Rolls, *i. e.*, maps, registers, and records kept at the office of the Collector of Bombay, and in order to ascertain these rights the Act must be read as a whole and its purpose ascertained. The Act sets up machinery only for the administration and collection of the land revenue of the Government in the city of Bombay. The object is to ascertain who is liable to pay. The Collector is a Revenue Official, and it is only in so far as the collection of revenue is concerned that he is entrusted with the duty of preparing a register and keeping records. The public are given access to these only in order to satisfy themselves that they are being properly assessed. The Act does not purport to establish a system of registration of title, which is to supersede other means of conveying or registering the title to land or to relieve purchasers or mortgagees from the ordinary obligation to see that they get what they have contracted to get. No doubt the register is of considerable use even for conveyancing purposes. But neither the language of the Statute nor the character of the Officials, who have the duty of keeping it, is such as to indicate an invitation to the public to rely on statements in the records as to title which may have to be made incidentally, but which are not expressed and do not purport to be decisive either of the rights of the Government or of those of the individual as to matters which go beyond liability to contribute to land revenue. [p. 543, col. 2.]

Where, therefore, a person, relying on certain wrong statements in certified extracts from the Rent Rolls of Quit and Ground Rent Land, kept in the office of the Collector of Bombay, and on certain notices and bills issued by the Collector, took a piece of land situate in the city of Bombay as the land of quit and ground rent and not of *sanadi* tenure which was resumable by the Government on giving six months' notice and providing compensation for buildings and other improvements, and advanced a big sum of money on mortgage of the land:

Held, that the Secretary of State for India was not estopped by the Collector's action from denying that the land was of quit rent as distinguished from *sanadi* tenure. [p. 543, col. 2.]

Appeal from a judgment and decree of the Bombay High Court, dated March 25th, 1912, affirming that of the High Court in its Ordinary Civil Jurisdiction, dated July 15th, 1911.

FACTS.—The old quit and ground rent tenures were situate in the old town of Bombay outside of and adjacent to the Fort. In or about the years 1803-1805, the Government decided to remove in large measure the occupiers of these holdings from that locality and those ejected were granted fresh tenures under *sanads* in the New Town or Camatipura. The land in question was originally so granted. A rent roll of all tenures, whether (1) pension and tax, (2) quit and ground rent, or (3) *sanadi*, were

kept in the office of the Collector, under the heading "Rent Roll of Land situated at New Town or Camatipura" and this practice continued up to the year 1876, when Bombay Act II of 1876 was passed. A new rent roll was then opened under the heading "Rent Roll of Quit and Ground Rent Land", and in it were entered tenures held on *sanads* as well as the quit and ground rent tenures. No distinction was recognised between these two classes of tenures and it was generally believed that neither class was likely to be resumed. In 1904 the Government exercised its right to resume certain *sanadi* land in New Town in Bombay and succeeded in establishing its right which was contested in the Courts. In 1905-06 Government made a special investigation into the lands held under *sanads* and in 1908 opened a new and separate Rent Roll for such lands. The Collector altered the form of the rent receipt granted to those who held lands by virtue of *sanads*, by describing them as *sanadi*. The appellants through their Solicitor addressed the Collector and objected to this being done, and demanded that their land should continue to be described as quit and ground rent land, which the Collector declined to do. On July 2nd, 1909, notice of suit was given to respondent. The High Court in its original jurisdiction held that the defendant (respondent) would be bound and estopped by representations of the Collector made in negligent breach of his statutory duty, which were made with the intention or effect of inducing the appellants to believe that the land which in fact was *sanadi* was of a quit and ground rent tenure, but on the merits decided against the appellants who appealed to the High Court. The High Court on its appellate side disagreed with the lower Court and held that respondent would not be bound or estopped by acts or omissions of the Collector amounting to negligent representation in breach of his statutory duty and relied upon the following authorities, 21 Geo. III, Ch. 70, section 1; *Gidley v. Lord Palmerston* (1); *Grant v. Secretary of State for India* (2); *Sullivan v. Spencer Earl* (3); *Viscount Cantenbury v. Attorney-General* (4); *Palmer v. Hutchinson* (5): (1) 3 Br. & B. 275; 7 Moore, 91; 24 R. R. 668; 129 E. R. 1290. (2) 2 C. P. D. 445; 46 L. J. C. P. 681; 37 L. T. 188; 25 W. R. 848. (3) 6 Com. L. Rep. 173. (4) 1 Phil. 306; 12 L. J. Ch. 281; 7 Jur. 224; 41 E. R. 648; 65 R. R. 393. (5) 6 A. C. 619; 50 L. J. P. C. 62; 45 L. T. 180.

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Collector of Masulipatam v. Cavalry Vencata Narrainpah (6); *Raleigh v. Goschen* (7); *Bainbridge v. Postmaster General* (8); *Beer Kishore Sahoy v. Government of Bengal* (9); *Dadoba v. Collector of Bombay* (10). On the merits it agreed with the lower Court and held that the Collector might be personally liable, but that did not convert the mortgagees or their transferee from finding out the nature of the security and referred to *Patman v. Harland* (11); *Butler v. Earl of Portarlington* (12); *Agra Bank Ltd. v. Barry* (13). It also held that any entry in Collector's register was not conclusive proof of title [*Varden Seth Sam v. Luckpathy Royjee Lallah* (14); *Seton v. Lafone* (15); *Porter v. Moore* (16)]. The appellants then appealed to the Judicial Committee in due course.

Mr. P. O. Lawrence, K. C., with Messrs. Raikes and Lowndes, for the Appellants:—By Bombay Act II of 1876, section 39, the Collector was under a duty to prepare and keep a separate register and rent roll of every description of land, according to the nature and terms of the tenure on which such land was held. Section 40 provided that the same would be open to inspection of the public and that certified extracts or copies thereof should be given to all persons applying for the same. Extracts were obtained which were legal evidence of the contents of the rents rolls under section 77 of the Indian Evidence Act, 1872. In these extracts the suit land was described as of quit and ground rent tenure. The representatives of the mortgagees, who were to investigate the title of the mortgagor, were misled by the these extracts and the notice which the Collector sent to the latter in respect of the rents due. The appellants deposed that

(6) 8 M. I. A. 529; 2 W. R. 61 (P. C.); 1 Suth. P. C. J. 476; 1 Sar. P. C. J. 820; 19 E. R. 631.

(7) (1898) 1 Ch. 73; 77 L. T. 429; 46 W. R. 90; 67 L. J. Ch. 59; 14 T. L. R. 36.

(8) (1906) 1 K. B. 178; 75 L. J. K. B. 366; 94 L. T. 120; 54 W. R. 221; 22 T. L. R. 70.

(9) 17 W. R. 497.

(10) 25 B. 714; 3 Bom. L. R. 603.

(11) 17 Ch. D. 353; 50 L. J. Ch. 642; 44 L. T. 728; 29 W. R. 707.

(12) (1841) 1 Dr. & War. 20; 1 Con. & L. 1; 4 Ir. Eq. R. 1.

(13) (1874) 7 H. L. 135.

(14) 9 M. I. A. 303 at pp. 322, 323; Marsh. 461; 1 Suth. P. C. J. 480; 1 Sar. P. C. J. 857; 19 E. R. 756.

(15) 19 Q. B. D. 68 at pp. 72, 73; 56 L. J. Q. B. 415; 57 L. T. 547; 35 W. R. 749.

(16) (1904) 2 Ch. 367; 73 L. J. Ch. 729; 91 L. T. 484; 52 W. R. 619.

they would not have advanced the amount if they had known that the land in question was *sanadi* and the Solicitor swore that he would not have advised his client to make the advance had he not been satisfied on inspection of the certified extracts and the receipts and notices, in all of which the land was described as of quit and ground rent tenure, and not *sanadi*. There was in the rent roll for the year 1878-79, on the page from which the said extract was taken, a note in red ink in the following terms: "*Vide, sanad* dated February 3rd, 1824" and in another of the public records of the Collectorate referring to the said land, *viz.*, the Register of Revenue Survey of 1868-69 there had been another pencil note "as per *sanad* dated 3rd February 1824." These appeared to have been interpolated after the extracts were obtained. It was not until 1908 that there was any change in the form of the receipt. The mortgagees were led to believe that the land was not *sanadi* and on the strength of that belief they advanced the amounts. The Collector acting for the Government had had in his official capacity these representations made and therefore, the Secretary of State in Council was bound by those representations and estopped from denying that the land was not of quit and ground rent tenure.

Sir E. Richards, K. C., and Mr. Dunne appeared on behalf of the Respondent, but were not called on.

JUDGMENT.

VISCOUNT HALDANE.—The facts in this case are really not in controversy. The appellants have advanced on mortgage of land in the city of Bombay Rs. 80,000. They claim against the respondent, the Secretary of State, that they advanced this sum to Abdu Hussein Ibrahimji, the mortgagor, relying on statements in certified extracts from the Rent Roll of Quit and Ground Rent Land, kept in the office of the Collector of Bombay, to the effect that the land was of quit and ground rent, and not of *sanadi* tenure. The question to be decided is whether the appellants, who were plaintiffs in the Courts below, are entitled to a declaration that the respondent is estopped from treating the land as of *sanadi* tenure. In Bombay both of these tenures exist. The land in question is in fact held under a *sanad*, which purports to enable the Government to resume possession for

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public purposes on giving six months' notice and providing compensation for buildings and other improvements. For the purposes of the question to be decided their Lordships assume, although the point is not conceded, that if the land were held on the other tenure it would be contrary to the practice of the Government, if not to the law, to resume possession, and that the land would be in consequence more valuable as a security. It is not, however, clear that such a view has always prevailed or that the difference between the two tenures was regarded as important at the time of the mortgage.

The *sanad* was granted by the Government of Bombay in 1824, a rent of 11 *reas* per square yard being reserved. Such a rent would have been the usual rent had the land been of the other tenure.

In January 1892 the mortgagor had granted a security over the land for an advance from the Chartered Mercantile Bank. A Mr. Gostling, partner in the firm of Gostling and Morris, land surveyors in Bombay, had been employed to report on the security and the title. He inspected certain entries in the Collector's Rent Rolls and in what was called Laughton's Revenue Survey Register, both of which were kept in the office of the Collector. In the entries which he inspected there were express references to the *sanad* with which the title originated. He applied to the Collector for "certified extracts" from the Rolls and Register. These extracts were, in accordance with the rules which obtained, made by his own clerk, and were formally certified by an assistant of the Collector as correct. The extracts were, however, inaccurate in certain points. In one of them the title given was "Rent Roll of Quit and Ground Rent" instead of, as it should have been in accordance with the book from which it was taken, "Rent Roll of Land situated in New Town or Camatipura". In another of the extracts, the entry in the Rent Roll from which it was taken contained a reference to the *sanad* of 1824, and this was omitted in the extract. Mr. Gostling, in addition, obtained from the mortgagor a notice in which the Collector required payment of a small sum as rent for "the quit and ground rent land situate at New Town". He also inspected the title deeds. These did not go back as far as the *sanad* of 1824, but on one

of them, dated in 1843, there was an indorsement to the effect that the registration of deeds of transfer did not imply any relinquishment of the right of ownership in, or the power to resume, the land at the pleasure of the Government, but that the sole object of the register was to enable the Collector to apply to the proper person for the payment of the rent.

Mr. Gostling does not appear to have been deterred by this indorsement, or by the references to a *sanad*, from recommending the title. Their Lordships think that in 1892, when he made the investigation, importance was not attached in the same degree as later on to the difference between the two tenures. It appears to have been thought that in neither case was there substantial likelihood of the Government resuming the land.

On the 25th October 1892, some ten months after the first advance, the mortgagor obtained advances on second mortgage from the appellants. The latter employed a Solicitor named Shroff to investigate the title and advise as to the security. His evidence shows that he inspected the title deeds at the Bank and also got hold of the certified copies of the extracts from the Collector's rent rolls and the Collector's notice, to which reference has been made. He appears to have applied to the Collector for access to certain of the records and to have obtained it. At all events he searched the records, which not only did not indicate that the tenure was quit and ground rent, but which contained a reference to the *sanad* of 1824. It is probable that he was not paying more attention to the difference between quit rent and *sanadi* tenure than had Gostling or the Collector's clerk who checked the extracts made by Gostling's clerk. In the end he advised the appellants to proceed with the mortgage.

The case made for the appellants, who were plaintiffs at the trial, was that by reason of the references and omissions in the copies of the extracts, as well as in the Collector's notice and in certain bills sent in by the Collector for the rent due, the action of the Collector has estopped the respondent, the Secretary of State, from denying that the land is of quit rent as distinguished from *sanadi* tenure, and that the appellants are entitled to a declaration of title on that

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footing. In order to determine whether this is so, it is necessary to ascertain what was the duty of the Collector and his position in relation to the Government and the public. The Collector, prior to 1876, kept in his office what were called Rent Rolls of Land, on whatever tenure held. After 1876 this practice continued, but was regulated by the Bombay Act II of that year, known as the Bombay City Land Revenue Act, 1876.

Under this Act, which extends only to the City of Bombay, the controlling authority in all matters connected with the land revenue is vested in the Collector of Bombay, subject to the Governor in Council. The duty imposed on him is to fix and levy the assessment for land revenue. The liability is to be settled with the superior holder of the lands, subject to an appeal to the Revenue Judge, who is to be the Senior Magistrate of Police. There is a further appeal to the High Court on its appellate side. The existing survey and the demarcation of lands already made and all the records of this survey are to be *prima facie* evidence. Corrections of such demarcation or of entries in the records of the survey may be made by the Collector, or by order of a competent Court.

Part VIII of the Act relates to transfer of lands. Section 30 provides that whenever the title to immoveable property subject to the payment of land revenue to the Government is transferred, the transferor and transferee are to give notice to the Collector. Any transferor who fails to give notice is, in addition to being liable for a penalty, to continue liable for the payment of land revenue until notice is given or transfer is effected in the Collector's records. In case of dispute as to the making or completion of any entry or transfer, the Collector may summon the parties and take evidence and decide summarily what entry should be made. Section 35 provides that the registration or transfer of any title in the Collector's records shall not be deemed to operate so as in any way to affect any right, title, or interest of the Government in the property in respect of which such transfer is made or registered. In the final part of the Act, which is headed "Miscellaneous," it is provided that it shall be the duty of the Collector to prepare and keep, in such form as the Government shall from time to time

sanction, a separate register and rent roll of every description of land, according to the nature and terms of the tenure on which such land is held. All maps, registers, and other records are to be kept in the office, and to be open to the inspection of the public, who are to be entitled to obtain extracts or certified copies.

Their Lordships are of opinion that the Act must be treated as defining the extent of the rights of any one who consults the maps, register, and records at the office and that in order to ascertain these rights the Act must be read as a whole and its purpose ascertained. When it is so read, their Lordships think that this purpose and the nature of the rights conferred are not doubtful. The Act is one which makes provision for the administration and collection of the land revenue of the Government in the city of Bombay. It is for this purpose only that it sets up machinery. The object is to ascertain who is liable to pay. The Collector is a Revenue Official, and it is only in so far as the collection of revenue is concerned that he is entrusted with the duty of preparing a register and keeping records. The public are given access to these only in order to satisfy themselves that they are being properly assessed. The Act does not purport to establish a system of registration of title, which is to supersede other means of conveying or registering the title to land or to relieve purchasers or mortgagees from the ordinary obligation to see that they get what they have contracted to get. No doubt the register is of considerable use even for conveyancing purposes. But neither the language of the Statute nor the character of the officials, who have the duty of keeping it, is such as to indicate an invitation to the public to rely on statements in the records as to title which may have to be made incidentally, but which are not expressed and do not purport to be decisive either of the rights of the Government or of those of the individual as to matters which go beyond liability to contribute to land revenue.

From this conclusion as to the scope of the Act it follows that what has taken place in the present case has not given the appellants any right to claim that the Government is prejudiced in any right it

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has to treat the land in question as of quit rent as distinguished from *sanadi* tenure. Nor are their Lordships satisfied that at the time of the investigation of the title in 1892 the parties themselves really attached much importance to the statements as to tenure in the extracts and other documents produced. They appear to have inspected the deeds in the usual fashion, and to have concerned themselves with the question of who was the owner of the land rather than with the question of the rights of the Government. In the view which has been taken, it is not necessary to deal separately with the question raised under section 35 of the Act as to whether any right, title, or interest of the Government could be affected by the registered entry.

Their Lordships will humbly advise his Majesty that the appeal fails and ought to be dismissed with costs.

Appeal dismissed.

Solicitors for Appellants: Messrs. E. F. Turner & Son.

Solicitor for Respondent: India Office.

Tuticorin, in Miscellaneous Petition No. 1514 of 1912, in Small Cause Suit No. 1505 of 1912

Mr. A. Swaminatha Aiyar, for the Appellants.

Mr. M. D. Devadoss, for the Respondent.

JUDGMENT.—The learned Subordinate Judge dismissed the appellants' petition to set aside the decree of the Small Cause suit, because appellants having been called on to deposit money and the time granted for doing so having been extended until 3rd December 1912, no deposit was made before the petition was taken up for orders on that date. *Dakins v. Wagner* (1), *Knox v. Simmonds* (2), *Isaacs v. Royal Insurance Company* (3) are authorities for holding that, when time is given for the performance of any act till a certain date, it includes that date. The learned Subordinate Judge, therefore, had no jurisdiction to pass his order of dismissal before 4th December 1912. We must allow the Letters Patent Appeal and set aside the Subordinate Judge's order dismissing the petition before him; costs to abide the result of the Small Cause suit.

Appeal allowed.

(1) 3 Dow. & R. 535.

(2) (1791) 4 Bro. C. C. 358; 1 Ves. 369; 29 E. R. 582.

(3) (1870) 39 L. J. Ex. 189; 5 Ex. 296; 22 L. T. 681; 18 W. R. 982.

MADRAS HIGH COURT.

LETTERS PATENT APPEAL No. 32 OF 1914.

April 15, 1915.

Present:—Mr. Justice Oldfield and
Mr. Justice Seshagiri Aiyar.

SUDALAYADUM PERUMAL NADAN
AND OTHERS—DEFENDANTS—APPELLANTS

versus

SIVANANJI NADACHI, WIFE OF MASANA
NADAN—PLAINTIFF—RESPONDENT.

Practice—Time granted to a party to do a thing till a "certain date"—That date, if included.

Where time is given by a Court to a party to a suit for the performance of an act till a certain date, it includes that date.

Dakins v. Wagner, 3 Dow. & R. 535; *Knox v. Simmonds*, (1791) 4 Bro. C. C. 358; 1 Ves. 369; 29 E. R. 582; *Isaacs v. Royal Insurance Company*, (1870) 39 L. J. Ex. 189; 5 Ex. 296; 22 L. T. 681; 18 W. R. 982, followed.

Appeal preferred under section 15 of the Letters Patent against the order of the Hon'ble Mr. Justice Ayling, dated the 6th January 1914, in Civil Revision Petition No. 302 of 1913, preferred against the order of the Court of the Subordinate Judge of

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 706 OF 1914.

July 27, 1915.

Present:—Justice Sir P. C. Banerji, Kt., and
Mr. Justice Rafique.

GANGA PRASAD RAI—DEFENDANT—
APPELLANT

versus

RAMANAND GIR—PLAINTIFF—
RESPONDENT.

Limitation—Return of plaint to be presented to proper Court—Re-presentation, whether continuance of suit.

A plaint which had been presented within time was returned to be re-presented to the proper Court. It was re-presented in accordance with the order of the Court but after the limitation for the original suit had expired:

Held, that the re-presentation was a continuance of the suit and, therefore, the suit was not barred by limitation. [p. 545, col. 1.]

Second appeal from the decision of the Subordinate Judge of Ghazipur, dated the 10th February 1914.

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FACTS of the case appear fully from the judgment.

Mr. M. L. Agarwala, for the Appellant:—The plaint was presented long after the lower Appellate Court's order. It ought to have been presented within limitation. The re-presentation of the plaint was a fresh institution of the suit and it ought to have been presented within time.

Mr. Lakshmi Narayan (with him Mr. S. P. Ghosh), for the Respondent:—The suit having been initially instituted in the Munsif's Court and the lower Appellate Court having held that the Munsif had jurisdiction, it cannot be said that there was a *fresh* institution of the suit. The appeal to the lower Appellate Court must be deemed to be a continuation of the suit as originally instituted. The suit having been instituted in the right Court, no question of limitation arises.

JUDGMENT.—The first point raised in this and the connected Appeal No. 707 of 1914 is that the suit was barred by limitation. It appears that the plaint was presented within time, but the Court of first instance ordered it to be returned and then it was re-presented in accordance with the decision of the Court, which was affirmed by the Appellate Court. In our opinion the re-presentation of the plaint was a continuance of the suit and, therefore, no question of limitation arises. Upon the merits of the case the findings of the Court below are conclusive against the appellant. The lower Appellate Court says in its judgment that "the oral evidence does not satisfactorily prove that the money borrowed was really spent on the repairs, or that the repairs were quite necessary for the preservation of the *math* building". This is a finding of fact which must be accepted in second appeal. The result is that the appeal fails and is dismissed with costs, including fees on the higher scale.

Appeal dismissed.

BOMBAY HIGH COURT.

CIVIL APPEAL AGAINST ORDER NO. 23 OF 1915.

July 14, 1915.

Present:—Mr. Justice Batchelor and
Mr. Justice Hayward.

CURSETJI DINSHAW BOLTON—

APPELLANT

versus

GANGARAM LIMBAJI GAIKWAD—

RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XL, r. 1 O. XLIII, r. 1, cl. (5)—Receiver—Refusal to appoint—Appeal—Interpretation of Statute—Old provisions re-enacted—Presumption as to decisions on old provisions.

An order refusing to appoint a Receiver is appealable. [p. 546, col. 2.]

Where the provisions of an old Code upon a certain matter are re-enacted without any substantial variation or verbal change, it must be presumed that the decisions of the High Courts on the provisions of the old Code have received the sanction and approval of the Legislature. [p. 546, col. 2.]

Appeal from an order of the first Class Subordinate Judge at Poona, in Civil Suit No. 359 of 1912.

Mr. G. S. Rao (with him Messrs. Jehangir Seervai & Co.), for the Appellant.

Mr. P. N. Samant, for Respondents Nos. 1 and 2.

Messrs. P. D. Bhide and D. A. Khare, for Respondent No. 3.

JUDGMENT.—This is an appeal from an order made by the Subordinate Judge refusing to appoint a Receiver. A preliminary objection has been taken by Mr. Bhide on behalf of the respondent that no appeal lies.

Provisions for the appointment of Receivers are contained in Order XL of the Code, rule I, of that Order providing that the Court, when it considers it just and expedient to do so, may appoint a Receiver, remove any person from the possession of property, commit the property to the possession of a Receiver and confer upon the Receiver various powers there described. Order XLIII of the Code provides for appeals from orders, and it is admitted that a right of appeal, if it exists, must be given by the Statute or by some similar authority: *Minakshi Naidu v. Subramanya Sastri* (1). Clause (s) of rule 1 of Order XLIII provides that an appeal shall lie from an order under rule 1 of Order XL. The question, therefore, is, whether an order refusing to appoint a

(1) 14 I. A. 160; 11 M. 26 (P. C.); 5 Sar. P. C. J. 54; 11 Ind. Jur. 393.

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Receiver is an order made under rule 1 of Order XL.

Mr. Bhide contends that inasmuch as it is an order not granting, but refusing, the prayer for a Receiver, it does not fall under rule 1 of Order XL. In support of his contention he calls attention to the difference of phraseology employed, on the one hand, in clause (s) of Order XLIII, rule 1, and, on the other hand, in clauses (j), (l) and (m) of that rule. The argument is that these last-mentioned clauses indicate that when the Legislature intended to give an appeal from an order merely refusing an application, that intention was expressed in plain terms, and that no such expression is to be found in clause (s). It seems to me that it would be dangerous to conjecture the expressions of the Legislature upon such a refined and subtle argument as this, seeing that, as has been more than once observed, the clauses of this Order or the corresponding provisions in the Code of 1882 have not been drawn with absolutely mathematical precision. Moreover, it is possible to retort the argument by observing that clauses (j), (l), (m) and (n) of Order XLIII, rule 1, indicate at least that in the mind of the Legislature an order refusing an application made under a certain rule is as much an order under that rule as would be an order granting the application. But I do not think that we are under the necessity of basing our decision upon these rather remote considerations. The point, which is now taken, was taken under the corresponding provision, that is, section 588 of the Code of 1882, and led at first to some difference of judicial opinion. Ultimately a Full Bench decision of the Madras High Court in the case of *Venkatasami v. Stridavamma* (2) placed upon section 588 the construction favouring the admission of an appeal in such cases. That view was adopted and followed by this Court in the case of *Sangappa v. Shivbasawa* (3) and by the Calcutta High Court in the case of *Boidya Nath Adya v. Makhan Lal Adya* (4) and *Khagendra Narain Singh v. Shashadhar Jha* (5). There was apparently no specific

decision in Allahabad, so that we may say that under the Code of 1882 the Indian High Courts were unanimous in reading the provisions of the Code as allowing an appeal from such an order as we have now before us. Now the provisions of the old Code upon this matter have been re-enacted without substantial variation in Order XLIII, rule 1, of the present Code and since the Legislature has introduced no verbal change of importance, it must, I think, be inferred that the previous decisions of the Indian Courts, which I have noticed, have since received legislative sanction or approval.

That being so, I am of opinion that we must hold that this appeal is competent under Order XLIII, rule 1, clause (s).

I may notice that the case of *Narbada-shankar v. Kevaldas* (6) was cited as being in the respondents' favour, but I am not able to understand how that decision has any bearing at all upon the point before us.

NOTE.—The rest of the judgment is immaterial for the purposes of this report.—*Ed.*

Order reversed.

(6) 29 Ind. Cas. 504; 17 Bom. L. R. 510.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 1060 OF 1914.

June 19, 1915.

Present:—Mr. Justice Piggott.

ALI JAFAR—PLAINTIFF—APPELLANT

versus

PHULMANTA KOER AND OTHERS—

DEFENDANTS—RESPONDENTS.

Agra Tenancy Act (II of 1901), ss. 4 (5), 167—Defendant sued as trespasser—Jurisdiction of Civil or Revenue Court—Alternative relief for declaration as tenant.

The plaintiff sued the defendants in the Civil Court for ejectment upon the allegation that whatever the defendants might once have been they were now in wrongful possession of the land as trespassers. The plaintiff further claimed as an alternative relief that if it be found that the defendants were holding as tenants, a declaration might be given to that effect:

Held, that the suit was maintainable in Civil Court and that the Civil Court had jurisdiction to give a declaration as to the existence or non-existence of tenancy but not as to the class of tenancy. [p. 548, col. 1.]

Second appeal from a decree of the District Judge of Azamgarh.

(2) 10 M. 179.

(3) 24 B. 38; 1 Bom. L. R. 502.

(4) 17 C. 680.

(5) 31 C. 495.

ALI JAFAR V. PHULMANTA KOER.

Mr. S. M. Sulaiman, for the Appellant.

Mr. Parmeshwor Dayal, for the Respondents.

JUDGMENT.—This appeal raises a question of jurisdiction depending mainly on the pleadings of the parties. The plaintiff alleges that he is the proprietor of certain land and that the defendants were in possession of the same as cultivators, but never had any proprietary right therein. In the course of certain Settlement proceedings the plaintiff tried to get an enhanced rent determined as payable by the defendants, and the defendants defeated his claim before the Settlement Court by pleading that they were in possession as proprietors. The plaintiff alleges that, whatever the defendants may once have been, they are now in wrongful possession of this land as trespassers. On this allegation he sues in the Civil Court for their ejectment. At the same time he claims an alternative relief; he says that, if it be found that the defendants are holding as tenants of the land in suit, the Court may make a declaration to that effect.

I think the suit is maintainable. It has been thrown out by both the Courts below, the lower Appellate Court relying on the decision of *Ram Sukh v. Gokul Chand* (1). Another case referred to in support of the decision of the Courts below is that of *Narain Singh v. Gobind Ram* (2). I think it may be conceded at once to the respondents that the mere fact that a tenant denies the existence of a tenancy and claims title in himself does not *ipso facto* terminate the tenancy. If the Court, in going into the issues of fact raised by the pleadings in this case, were to find that the defendants at one time held this land as the tenants of the plaintiff, it would probably also find that they did not cease to be tenants merely because they set up title in themselves. These considerations, however, seem to me by no means decisive as to the maintainability of the suit. *Prima facie* the plaintiff is suing to eject trespassers from his land, which he has a right to do in a Civil Court. In the alternative, he says that he is a person with a proprietary title to the land in suit upon which a cloud has been cast by the action of the defendants, and he asks the Court to make that title clear. *Prima facie* such a suit is

maintainable under section 42 of the Specific Relief Act. The question is whether this suit is barred by the provisions of section 167 of the Agra Tenancy Act (Local Act II of 1901). As was rightly laid down in the case on which the lower Appellate Court has relied, so long as the provisions of the Tenancy Act are available to give a plaintiff the relief sought by him the suit must be filed in the Revenue Court, and the jurisdiction of the Civil Court cannot be invoked to determine any dispute or matter in respect of which a suit or application under the Tenancy Act might be brought or made. With regard to the first relief sought, the suggestion for the respondents is that the plaintiff might obtain appropriate relief by moving the Revenue Court to eject the defendants as tenants and with regard to both the reliefs sought, it is suggested that the plaintiff could obtain appropriate relief by suing for a declaration under section 95, clauses (b) and (c) of the same Act. It is clear from the written statement put in by the defendants in this case that any such suit on the part of the plaintiff in the Revenue Court would be resisted by the defendants on the allegation that they were in proprietary possession of the land in suit. The question whether there is or is not tenancy in existence between the parties calls for determination in some Court or other. Strictly speaking, on the pleadings as they stand in the case now before me, the existence of a tenancy is denied by both parties. The plaintiff says that, whatever they may once have been, the defendants are now mere trespassers. The defendants say that they are in possession as rightful owners. It is conceivable that the Court, after trying out the issues of fact and examining the evidence produced by both parties, might come to the conclusion that the plaintiff's allegations as to the determination of the tenancy were based upon an error of law and that, as a matter of fact, the defendants were in possession as tenants. If so, I think, the plaintiff is entitled to a declaration. The case is not covered by section 95, clause (b), of the Tenancy Act, which refers back to section 6 of the same Act in which the different classes of tenants are specified. In any declaration which the Court may make it should certainly be careful not to trespass on the jurisdiction of the Revenue Court by declaring the class of

(1) 21 A. 143; A. W. N. (1898) 213.

(2) 9 Ind. Cas. 1022; 8 A. L. J. 431; 33 A. 523.

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tenency, but I think it is competent to give a declaration as to the existence or non-existence of a tenancy in accordance with the definition of a tenant in clause (5) of section 4 of the Tenancy Act. There is plenty of case-law on the side of the plaintiff. I may refer to the case of *Zubeda Bibi v. Sheo Charan* (3) and *Chauharja Singh v. Sarabjit* (4). See also on the question of a declaration the case of *Rayaslam v. Moti Begam* (5), decided on the 20th of June 1907.

For the reasons I set aside the decision of the Courts below dismissing the suit and remand the case through the lower Appellate Court to the Court of first instance for trial on the merits. Costs of this appeal will be costs in the cause.

Appeal decreed, Case remanded.

(3) 22 A. 83; A. W. N. (1899) 189.

(4) 15 Ind. Cas. 303; 10 A. L. J. 85.

(5) 4 A. L. J. 258 (Notes).

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 557 OF 1913.

February 25, 1915.

Present:—Mr. Justice Heaton and
Mr. Justice Shah.

CHINTAMAN GANESH OKA—

PLAINTIFF—APPELLANT

versus

THE SECRETARY OF STATE FOR INDIA—

DEPENDANT—RESPONDENT.

Inamdar—Grant—Kadim hakdars—Grant subject to kadim hakdars' dues—Hakdars' right to receive their dues direct from Government—Inamdar, whether entitled to take payment of their dues in his own hands.

The Government rights in a village vested in an *inamdar* subject to the rights of the *kadim hakdars*, who were paid their dues out of the land revenue of the village before the surplus was paid to the *inamdar*. The *inamdar* claimed to take the payment of the *kadim hakdars'* dues in his own hands:

Held, that the *inamdars'* position was untenable inasmuch as the *hakdar's* right to deal direct with the Government was a valuable right of which he could not deprive them without any support from the *sanad* of the grant or from the practice of payment in the past. [p. 549, col. 1.]

Second appeal from the decision of the District Judge of Poona, in Appeal No. 174 of 1911, confirming that of the Assistant Judge of Poona, in Civil Suit No. 20 of 1910.

Mr. J. R. Gharpure, for the Appellant.

Mr. *Strangman*, Advocate-General (with him Mr. S. S. Patkar, Government Pleader), for the Respondent.

JUDGMENT.

HEATON, J.—I think that in this case the appellant who is the plaintiff has been very erroneously instructed regarding the manner in which, if indeed he has any genuine grievance, he should present that grievance before the Court. He is the *inamdar* of a village and in virtue of the grant to his ancestor he says, and for the purposes of this case we accept it, that there have become vested in him all the rights of Government, subject to this only that the rights of the *kadim hakdars* and *inamdars* are not affected. Now it appears that these *hakdars* receive certain allowances which are paid out of the land revenue collected in the village, before the surplus is paid to the *inamdar*. By surplus I mean what is left over after paying so much as is due for Government dues for village expenses and so forth.

The plaintiff was anxious to have the payment of these dues to the *hakdars* in his own hands, and he brought this suit mainly for a declaration that he was entitled to pay these moneys direct. He maintained that in the past he always had paid them directly, and the Assistant Judge of Poona, who tried the case, states that it is not denied that up to 1897 the *inamdar* paid these allowances direct to the recipients. That is an exceedingly misleading way of stating the facts, as is brought out in the judgment in appeal of the District Judge. It appears that in fact the payments were made by the village officers. But the appellant says the payments were made by them as his servants or agents. Seeing, however, that the village officers are appointed by Government, that they act under the orders of Government and that there is absolutely nothing in the case to show that they were not making these payments by the direction of Government, it is very difficult to understand how the plaintiff can claim that the village officers acted as his servants or agents in the matter. I think, therefore, agreeing with the District Judge, that the manner of payment in the past gives no support to the plaintiff's

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contention that he is entitled to pay direct.

Then an argument was advanced that the *sanad*, the evidence of the grant by the Peshwa considerably more than a century ago, lends support to the plaintiff's claim. As a matter of fact it does not do so, for it secures, in express terms, the rights of these *hakdars*. One of those rights, no doubt, was that they were privileged, as before, to deal directly with the Government. The plaintiff now seeks to deprive them of this right, and the circumstances of the case show that it is a valuable right.

I think, therefore, that the decision of the lower Court is correct and I would dismiss this appeal with costs.

SHAH, J.—I am of the same opinion.

Appeal dismissed.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 949 OF 1914.

June 9, 1915.

Present:—Mr. Justice Tudball.

BUDHI MAL AND ANOTHER—PLAINTIFFS—

APPELLANTS

versus

BHATI AND OTHERS—DEFENDANTS—

RESPONDENTS.

Ex-proprietary tenancy—Occupancy holding—House acquired before acquisition of tenancy—Appurtenance, house if—Mortgage of house, validity of.

An appurtenance is something belonging to another thing as principal and passing as an incident to it. It is an appendage, an adjunct, an accessory or something annexed to another thing more worthy. [p. 549, col. 2.]

Where a house was in occupation of a person long before he became an ex-proprietary tenant or acquired an occupancy tenancy in the village in which the house was situate, it is not an appurtenance to either of the holdings and its mortgage is not illegal. [p. 550, col. 1.]

Second appeal from a decree of the Additional Judge of Meerut.

Mr. Iqbal Ahmad, for the Appellants.

Mr. Shamnath Mushran, for the Respondents.

JUDGMENT.—This appeal arises out of a suit for sale on the basis of a simple mortgage-deed dated the 8th of January 1902.

The mortgagor was one Ismail and the mortgaged property is a house which belonged to him. Ismail was admittedly once a *zemindar* of the village when he built this house and lived in it. He subsequently lost his proprietary rights and became ex-proprietary tenant of his *sir* lands, and his successors also admittedly acquired occupancy rights in certain other land. The Court of first instance decreed the suit. The lower Appellate Court has dismissed the suit on two grounds, the *first* was that the mortgage was illegal and contrary to law and, therefore, not binding on the mortgagor and, *secondly*, on the ground that under section 60, clauses (a) and (c) of the Code of Civil Procedure, the house cannot be sold. The second ground is clearly met by the decision of this Court in *Bhola Nath v. Kishori* (1). This is not a case of attachment and sale. It is a question of a decree for sale under a mortgage. In regard to the other ground, the learned District Judge has held that because Ismail lived in this house, this house was an appurtenance to his ex-proprietary holding and to his occupancy holding and that as under the Tenancy Act an ex-proprietary or an occupancy holding cannot be mortgaged, therefore, the mortgage of this house was contrary to law and illegal. In the first place the facts of this case seem to me to show clearly that this house cannot in any way be deemed to be an appurtenance to either of the two holdings in question. It came into existence long before either of these two occupancy holdings were acquired. The house was never allotted to Ismail by any landlord or any other person at the time at which his cultivatory holding was allotted to him, nor with the intention that he should reside therein so as to enable him to carry on his occupation as a cultivator. An "appurtenance" in common parlance and legal acceptance is something belonging to another thing as principal and passing as an incident to it. It is an appendage, an adjunct, an accessory or something annexed to another thing more worthy. I quote this from Webster's International Dic-

(1) 11 Ind. Cas. 646; 8 A.L.J. 1045 (F.B.); 34 A. 25.

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tionary. In my opinion in the circumstances of the present case it is impossible to say that Ismail's house was an appurtenance to either of his holdings and that, therefore, the mortgage of this house is contrary to law. If a mortgagor, such as the present defendants, seek to go behind his solemn word and promise and to prove that the act done was illegal or contrary to law and, therefore, not binding upon him, it is for him to prove the facts clearly and beyond doubt. To merely prove that Ismail lived in this house and that he was a cultivator is insufficient to prove that the house was an appurtenance to the holding and, therefore, could not be mortgaged by him. In my opinion the decision of the Court below is contrary to law and certainly leads to injustice. I allow the appeal, set aside the decree of the lower Appellate Court and restore that of the Court of first instance with costs in all Courts.

Appeal allowed.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 571 OF 1914.

June 22, 1915.

Present:—Sir Henry Richards, Kt., Chief Justice, and Mr. Justice Rafique.

SHIVA CHANDER SINGH AND OTHERS—
PLAINTIFFS—APPELLANTS

versus

RAM CHANDER SINGH—DEFENDANT—
RESPONDENT.

Agra Tenancy Act (II of 1901), s. 164—Suit for profits against lambardar—Burden of proof—Negligence.

In a suit for profits against a *lambardar* if the co-sharers give general evidence to show that the rents are greatly in arrear, that the tenants are solvent and that there are no special circumstances why the rents should not have been collected, the onus is shifted on to the defendant of showing that for some reason not connected with his own negligence or misconduct he was unable to collect the rents. [p. 550, col. 2; p. 551, col. 1.]

Mithan Lal v. Mizaji Lal, 17 Ind. Cas. 914; 10 A. L. J. 529, approved of.

Second appeal from a decree of the Judge of Moradabad.

Mr. Gokul Prasad, for the Appellants.

Mr. M. L. Agarwala, for the Respondent.

JUDGMENT.—This appeal arises out of a suit brought by co-sharers against the *lambardar*. The Court of first instance held that the defendant had been guilty of negligence and decreed the plaintiff's claim on the basis of the gross rental. The lower Appellate Court varied the decree of the Court below. In the course of his judgment the learned District Judge says:—

"The next point urged is that the profits should be calculated on actual collections and not on the recorded rentals as has been done by the lower Court. This plea, in my opinion, must be allowed, for in a suit under section 164 of the Tenancy Act, profits must be allowed on actual collections, unless it is proved that the rents have remained uncollected owing to the negligence or misconduct of the *lambardar*. In this case as far as I can see, there is nothing to show that the rents were not collected through the negligence or misconduct of the defendant." The Court of first instance had stated: "The *patwari* further states that the amount of arrears is recoverable and the tenants are in a position to pay it. Accordingly on the plaintiffs' application the defendant *lambardar* was examined. When he was asked to state the cause of such heavy arrears, he did not give any satisfactory cause. On the other hand he stated that he knew nothing at all, that he had no account book of collections and arrears, nor could he state what amount of money was realised from what tenant and what amount of money was in arrears. The burden of proof that the money which is due by the tenants remained in arrears owing to unavoidable circumstances, lay on the defendant. But he did not prove it. The statement of the defendant that he did not know anything at all proves that he had not made his statement in good faith." It seems to us that if a co-sharer gives general evidence to show that the rents are greatly in arrear, that the tenants are solvent and that there are no special circumstances why the rents should not have been collected, the onus is shifted on to the defendant of showing that for some reason not connected with his own negligence or

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misconduct he was unable to collect the rents. It is very difficult to see what other evidence a co-sharer under ordinary circumstances could give. This view was taken by a learned Judge of this Court in the case of *Mithan Lal v. Mizaji Lal* (1). In the present case the evidence of the *lambardar*, as pointed out by the Court of first instance, was extremely unsatisfactory. If the defendant knew nothing about the circumstances of the village he should have produced his *karindas*. There seems to be no dispute about the expenses. We think before finally disposing of the appeal, we should refer the following issue to the Court below:

"What rents for the years in suit were left unrealised and how much of these arrears were unrealised on account of the negligence or misconduct of the *lambardar*?" We direct the Court below to order the *lambardar* (within a time to be specified in the order) to file an account showing the names of the tenants, the amounts that have been realised from each of the tenants, and the amounts left unrealised. In the case of rents unrealised the *lambardar* will give in a column of the account his reasons why these rents were not realised. When this account has been filed the plaintiffs will have a right to see the same, and they will then be entitled to go into evidence to show that in respect of the moneys not realised, the *lambardar* was guilty of negligence or misconduct. The *lambardar* will, of course, have a right to rebut the evidence, if any, produced by the plaintiffs. The usual ten days will be allowed to file objections on return of the finding.

Issue remitted.

(1) 17 Ind. Cas. 914; 10 A. L. J. 529.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1214 OF 1914.

July 1, 1915.

Present:—Mr. Justice Chamier.

ABDUL QAYUM—PLAINTIFF—APPELLANT

versus

FIDA HUSAIN—DEFENDANT—

RESPONDENT.

Jurisdiction of Civil or Revenue Court—Land let for pasturage—Ejectment, suit for—Estoppel.

Where in a suit brought in a Revenue Court the defendant pleads that the suit is not cognisable by the Revenue Court, he is precluded from raising a similar plea in the Civil Court when the suit is brought in that Court. [p. 551, col. 2.]

A suit for the ejectment of a tenant from pasture land is cognizable by a Civil Court. [p. 552, col. 2.]

Mohib Ali v. Surat Singh, 15 Ind. Cas. 743, followed

Second appeal from a decree of the Additional Subordinate Judge of Bareilly.

Mr. Gokul Prasad, for the Appellant.

Mr. Gulzari Lal, for the Respondent.

JUDGMENT.—The appellant sued in a Revenue Court for the ejectment of the respondent from plots Nos. 659 and 661. The Assistant Collector decreed the claim as regards No. 661 but dismissed it as regards No. 659 on the ground that the respondent had acquired a right of occupancy therein. The appellant appealed to the Commissioner who, after holding that the land had been originally let at a light rent for pasturage, and had only recently been cultivated by the respondent, ruled that the suit did not lie in a Revenue Court for the ejectment of a tenant from such land, and that the appellant's proper course was to give the respondent notice to quit, and, if he did not comply with it, to sue him in the Civil Court. The appellant then brought in the Court of a Munsif the suit out of which this appeal has arisen. The Munsif dismissed it on a ground which I am unable to understand. His decision was confirmed by the Additional Subordinate Judge of Bareilly, who appears to have been of opinion that, whether the land was originally let for pasturage or not, it is now, and was, at the date of the institution of this suit, being cultivated by the respondent, and is therefore, a holding within the meaning of the Tenancy Act from which the respondent must be ejected, if at all, by suit in the Revenue Court. It might perhaps be sufficient to say that, as it was on the respondent's own plea that the Commissioner held that the suit could not be maintained in the Revenue Court, the respondent cannot say that the suit is not maintainable in the Civil Court. But apart

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from that I am of opinion that this appeal should be allowed.

In this plaint the appellant stated that the land was originally let for pasturage, that the respondent did not attempt to plough it up till after the settlement of issues in the previous case, when the appellant pleaded that a right of occupancy could not be acquired in pasture land and that in that suit the respondent himself admitted that he had ploughed up the land after the issues had been settled. The respondent in his written statement did not even evasively deny the appellant's allegations. All that he said was that the land was under cultivation. Under these circumstances the allegations of the appellant must be taken to have been admitted (see Order VIII, rule 5.)

The respondent does not dispute the correctness of my decision in *Mohib Ali v. Surat Singh* (1), that a suit for the ejectment of a tenant from pasture land is cognizable by a Civil Court. That decision is in accordance with several decisions of the Board of Revenue of which it is sufficient to mention that of *Chowdhury Muhammad Mahmud Khan v. Ganga Ram* (2). In the last resort, the respondent contends that as the land has been under cultivation for some years it must be taken that the appellant has consented thereto, and the land has now become a holding within the meaning of the Act, whether it was so or not before. It is sufficient to say that the appellant has for some years been trying to eject the respondent from the land, and even if it could be shown that he had accepted rent from the respondent since the land was brought under cultivation, I should hold that the appellant was still entitled to contend that it is not a holding within the meaning of the Act.

For the above reasons I allow this appeal, set aside the decrees of the Courts below and decree the appellant's claim with costs in all three Courts.

Decree reversed.

(1) 15 Ind. Cas. 743.

(2) Selected Decisions No. 6 of 1910.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL FROM ORDER NO. 47
OF 1915.

June 23, 1915.

Present:—Mr. Justice Chamier and

Mr. Justice Piggott.

KULSUM-UN-NISSA BIBI—DEFENDANT—
APPELLANT

versus

DAURU NATH AND OTHERS—PLAINTIFFS—
RESPONDENTS.

Landlord and tenant—Muafi resumed—Ex-muafidars recorded as tenants on payment of privileged rates of rent—Dispossession of such tenants—Suit to recover possession—Jurisdiction of Civil or Revenue Court—Agra Tenancy Act (II of 1901), s. 79.

Certain persons were recorded as *muafidars* in respect of certain plots of land prior to 1838. In 1838 the land was settled with the *zemindar* and the *ex-muafidars* were entered as tenants on payment of a privileged rate of rent with a right of transfer in the holding. In the Settlements of 1861 and 1868, they were again recorded as tenants with a right of transfer in the holding. The tenants were dispossessed by the landlord from a portion of the land. They sued the landlord to recover possession in the Civil Court:

Held, that the *ex-muafidars* were tenants within the meaning of section 79 of the Agra Tenancy Act and a suit to recover possession was not maintainable in the Civil Court. [p. 558, col. 1.]

Appeal against an order of the Additional Subordinate Judge of Aligarh.

The Hon'ble Mr. Motilal Nehru, for the Appellant.

Mr. Peary Lal Banerji, for the Respondent.

JUDGMENT.

PIGGOTT, J.—In this case the defendant-appellant is the sole proprietor of *Mauza Danpur* in the Bulandshahr District. The plaintiffs-respondents are residents of that village. Their suit was for recovery of possession in respect of a particular plot of land, one *bigha 15 biswas* in area, situated in this village, from which they alleged themselves to have been wrongfully ejected by the defendant. The precise date of the alleged dispossession is not given in the plaint, but the plaintiffs dated their cause of action from an adverse decision of the Revenue Court on the question of mutation. The dispossession clearly took place somewhere towards the close of the year 1809. The case as stated in the plaint may be summarised thus. The plot of land in question was originally owned by one Param Sukh, from whom it descended to his grandsons, Baldeo Das and Tula Ram. Tula Ram predeceased Baldeo Das and the

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latter died somewhere about the year 1885. The plaintiffs are distant consins of Baldeo Das and Tula Ram, claiming descent from Durga Das, own brother of the father of the said Baldeo Das and Tula Ram. The plaintiffs nevertheless asserted that they were members of a joint undivided Hindu family with Baldeo Das and Tula Ram, so that the plot of land in question passed to them by survivorship on the death of Baldeo Das. They admitted, however, that, in the village records, whatever rights had belonged to Baldeo Das were entered after his death as belonging to *Musammât* Sundar, the widow of his predeceased brother, Tula Ram. They said that this was done with their consent "for the consolation" of this lady. In the plaint as drafted they clearly intended to claim that *Musammât* Sundar was not really in possession, except in so far as she enjoyed a Hindu widow's right of maintenance out of the joint family property. *Musammât* Sundar died in the year 1909 and the defendant, as proprietor of the *mahal*, took possession of the land in suit. The defendant's claim was that the land, in *Musammât* Sundar's possession at any rate, was a mere occupancy holding and that it escheated to the proprietor of the *mahal* because *Musammât* Sundar left behind her no heir entitled to succeed under section 22 of the Tenancy Act (Local Act II of 1901). The plaintiffs said that they fought the matter in mutation before the Revenue Courts, but the decision there was against them. It is fair to note, however, that in the plaint itself the claim was put in an alternative form. In paragraph 5 of the plaint it is distinctly stated that *Musammât* Sundar had no right in the property in dispute. There is, however, an alternative plea, that if the lady was in fact in possession in her own right, then her rights were those of a Hindu widow and the property came to the plaintiffs on her death as the nearest surviving reversioners of her husband. The nature of the defence set up has already been sufficiently indicated. Before issues were fixed in the Court of first instance, the learned Munsif found it advisable to examine the plaintiff Chaube Dauru Nath, who made a statement on the 10th of February 1913 on behalf of himself and of the other plaintiffs. This statement was obviously interpreted by the learned Munsif as considerably modifying the pleas taken in the plaint. It has been read to us in detail, and I think the

learned Munsif was substantially right in so regarding it. Undoubtedly the plaintiff Dauru Nath was anxious to hedge as far as possible and to evade the attempts made by the Court while he was under examination to tie him down to definite pleadings of fact on certain points. In substance, however, he did admit that *Musammât* Sundar obtained actual possession in 1885, on the death of Baldeo Das, and that she was in possession for 24 years until her death. He went on to explain that he himself and the other plaintiffs really managed *Musammât* Sundar's affairs for her and claimed to have been in joint cultivation with her of the land in suit. He said that the Court might regard his position with respect to this cultivation as that of a servant or as that of a partner; but I have no doubt he did intend to plead that he was sharing in the cultivation of the holding at the time of *Musammât* Sundar's death, within the meaning of section 22 of the Agra Tenancy Act. The learned Munsif proceeded to fix a number of issues, of which he decided only two. The first of these was, "whether *Musammât* Sundar held the disputed plot in village Danpur as an occupancy tenant or as an absolute owner." The frame of the issue is, I think, justified by the fact that the plaintiff Dauru Nath in his statement before the Court had admitted *Musammât* Sundar's possession and had practically abandoned the plea put forward in the plaint that *Musammât* Sundar had never been in possession at all. On the issue thus framed the learned Munsif, after an elaborate discussion of the evidence and of the law which he considered applicable to the facts of the case, recorded a finding that the land held by *Musammât* Sundar was her occupancy holding and succession to the same was governed by the provisions of the Tenancy Act. This finding in itself was not conclusive against the plaintiffs, unless and until the Court had gone on to determine the question of their alleged sharing in the cultivation of the holding at the time of *Musammât* Sundar's death. This the learned Munsif did not do, but he proceeded to take up another issue stated by him in the following terms: "Whether the suit is cognizable in the Civil Court." The issue is not very happily framed. The suit as brought was based upon a claim of proprietary right, and was undoubtedly cognizable in the Civil Court. Nevertheless it is sufficiently clear what the learned Munsif meant

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by this issue and what he has actually found in respect of it. If *Musammal Sundar* was an occupancy tenant of the land in suit the plaintiffs, supposing that they proved their case so as to give them a right to succession under section 22 of the Tenancy Act, would have to prove that they were joint in cultivation with this lady at the time of her death. They were subsequently ejected by the defendant *zemindar*. They were, therefore, in the position of tenants ejected by the landholder otherwise than in accordance with the provisions of the Tenancy Act. That ejection would give them a right of suit for recovery of possession and for compensation under section 79 of the same Act, and inasmuch as they possessed that right of suit, the provisions of section 167 of the Tenancy Act (read with reference to section 79 aforesaid and serial number 30 in group (c) of the suits specified in the 4th Schedule to the same Act) would debar the plaintiffs from bringing a suit for recovery of possession in the Civil Court. This is what the learned Munsif obviously intended to find and has in substance found; and he dismissed the plaintiffs' suit accordingly. The latter appealed, and I shall have a few remarks to make presently regarding the position taken up by them in the memorandum of appeal. At present what I wish to notice is that, in the interval between the filing of the appeal and its determination, there had been a decision by this Court in Second Appeal No. 1456 of 1913, decided on the 17th of July 1914. This decision was laid before the lower Appellate Court and obviously determined the result of the appeal in that Court. It was another suit from the same village and the present defendant-appellant as proprietor of the village was a party to it. The other parties were different, and it has never been suggested that the decision had in any way the effect of *res judicata* upon the present litigation. It was, however, a decision respecting a plot of land held on substantially the same tenure as the land in dispute in the present case. The point for determination, however, was not quite the same in the suit which resulted in Second Appeal No. 1456 of 1913. The holder of the land had mortgaged it. The mortgagee brought a suit upon his mortgage, obtained a decree, brought the mortgagor's rights to sale and purchased them himself. While these proceedings were going on the

mortgagor relinquished his rights, whatever they might be in favour of the proprietor of the village. On the strength of this relinquishment the proprietor succeeded in obtaining possession. The suit was by the mortgagee auction-purchaser for recovery of possession. The point which the Court had to determine was whether the rights of the mortgagor in the property in suit, whatever those rights might be, were or were not transferable. In that case the finding of the lower Appellate Court had been that the mortgagor's rights were those of an occupancy tenant and were not transferable. In appeal this finding was treated by this Court as a mixed question of law and of fact. The learned Judges who disposed of the appeal set forth in their judgment a statement of what were represented to them as being admitted facts with regard to the previous history of the land in suit. From those facts they drew an inference, as a point of law, that the rights of the mortgagor in the land then in question were proprietary rights, that the payments which the mortgagor had admittedly been making to the proprietor of the village could not properly be described as "*rent*" within the meaning of the definition in section 4, clause (3), of the Tenancy Act, and that consequently there was no question of the existence of tenancy, but the rights of the mortgagor being proprietary rights were transferable. On these findings the plaintiff's suit was decreed. In the present case the learned Subordinate Judge has accepted this decision as a ruling laying down principles on which he was bound to act. He does not seem to have considered whether the recital of admitted facts in the decision of this Court to which he was referred as a ruling did or did not agree with the facts alleged by the parties and proved by the evidence in the present case. He did, however, give a brief recital of certain facts regarding the previous history of the land in suit, which is correct enough as far as it goes. On these facts he recorded a finding in the following terms: "That Param Sukh and Baldeo, &c., were not occupancy or non-occupancy tenants of the disputed plot but that they were owners thereof. The so-called rent which they have been paying is in reality the Government revenue and cesses." He went on to say that "even if those persons be supposed not owners of this land, they could not be said to belong to any of the classes of

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tenants specified in section 6 of the Tenancy Act." He found that they were "something more than tenants," and that their rights were transferable as well as heritable. On these findings he held that the suit was not barred by section 167 of the Tenancy Act but was maintainable in the Civil Court as brought. He was of opinion, however, that there remained other issues which ought to be tried out before the suit could either be decreed or dismissed. He accordingly treated it as having been dismissed by the Court of first instance upon a preliminary point and remanded it to that Court under Order XLI, rule 23, of the Code of Civil Procedure, for decision on the merits. The defendant comes to this Court in appeal against this order of remand.

Two comments may be made at once on the finding of the learned Subordinate Judge. The *first* is that a finding to the effect that the rights of Param Sukh and Baldeo in the land in suit were proprietary rights was scarcely open to the learned Subordinate Judge in appeal. I have carefully considered the memorandum of appeal presented to that Court by the plaintiffs and it seems clear to me that the claim of proprietary rights was abandoned and was not intended to be pressed in the Court of first appeal. In the first paragraph the plaintiffs stated their case to be that Baldeo Das had held "transferable rights of occupancy" in the land in dispute. In the second paragraph it is pleaded that *Musammāt* Sundar was not a mere tenant under Act II of 1901, "the aforesaid land has nothing to do with Act II of 1901." There is nothing else in the memorandum of appeal to modify the position here taken up. The finding, therefore, which was really open to the lower Appellate Court was the alternative finding that the plaintiffs are something more than tenants, and this finding is based upon a certain finding of fact and an inference drawn therefrom. The finding of fact is that the rights possessed by Param Sukh and Baldeo were transferable as well as heritable. The inference drawn therefrom is that persons possessing such rights cannot be tenants within the meaning of that word as used in what for the purposes of this case is the critical section, namely, section 79 of the Agra Tenancy Act. It is clearly open to us,

therefore, to re-consider this question of the existence or otherwise of a tenancy as a mixed question of law and of fact in the present appeal.

The *other* comment which may be made at once on the finding of the lower Appellate Court is that it does not warrant the further decision of the learned Subordinate Judge to the effect that the suit is not barred by section 167 of the Tenancy Act. The finding is limited to "*Param Sukh and Baldeo, &c.*" I do not quite understand what the learned Subordinate Judge meant by "*&c.*", but it is clear that he did not consider the question of the rights of *Musammāt* Sundar. The defendant no doubt contended that *Param Sukh and Baldeo* and all other holders of similar tenures in this village were nothing more than occupancy tenants, but for the purposes of this suit she raised most distinctly a further plea as to the position of *Musammāt* Sundar. She pointed out that under no apparent principle of law could *Musammāt* Sundar have succeeded by inheritance to the rights of Baldeo Das, the brother of her deceased husband. From this the defendant desired to contend that the possession of *Musammāt* Sundar at any rate was merely permissive on the part of the *zamindar* and that, although she was an occupancy tenant of this land at the time of her death, she had only become so under the ordinary law in virtue of her long possession. This point was not determined by the lower Appellate Court, although it required to be determined before there could be a definite finding on the question whether the suit was or was not barred by section 167 of the Tenancy Act.

The question, therefore, to my mind is whether we ought to set aside the order of remand as passed and substitute for that order an order fixing necessary issues for preliminary determination under the provisions of Order XLI, rule 25, of the Code of Civil Procedure, or whether, while setting aside the order of the lower Appellate Court, we are in a position to affirm, on the record as it stands, the decision of the first Court dismissing the suit. On the whole I incline to the latter alternative, and I do so because on the facts established by the evidence it seems to me to follow as an inference of law that the rights,

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not only of *Musammāt* Sundar, but of Baldeo Das before her, in the land in suit were at any rate no higher than the rights of "tenants" within the meaning of that word as used in section 79 of the Agra Tenancy Act. The land in suit formed part of some 300 *bighas* of land in this village, the previous history of which has been laid before us at considerable length. In dealing with this history we have to remember that the Revenue Records of the Bulandshahr district perished during the Mutiny, and that the information available as to events prior to 1857 is scanty. It appears, however, that in the year 1838 these 300 *bighas* were in the possession, as separate plots of land, of a number of persons who claimed to hold the same as *muafidars* under a grant anterior to the establishment of British Rule in the district in question. There was an inquiry of some sort and a decision was come to adverse to the claims of these *muafidars*. The *muafi* was resumed and the land was ordered to be assessed to revenue. So much of it as was not covered by groves was to be assessed at once and the groves were liable to assessment by degrees as they lost their character as such. In the judgment of this Court in the connected suit to which reference has already been made, it is stated as one of the admitted facts that when the *muafi* was thus resumed it was settled with the *muafidars*. This is certainly not an admitted fact in the present case: so far from its being an admitted fact, the evidence to the contrary seems to me perfectly clear. The plaintiffs-respondents rely upon an expression used in a petition presented to the Officer Settlement in 1861 which speaks of the *muafi* land as having been included in the *khalsa* and settled with the owner of the village "in the course of the Settlement now current". The inference sought to be drawn from this is that the land was so included and so settled for the first time in 1861. I am satisfied that the words will not bear that interpretation. They mean that the land had been so included and so settled during the currency of the Settlement which was being revised in the year 1861, and that the land was included in the *khalsa* and settled

with the proprietor of the village in consequence of the order of resumption passed in the year 1838. At two subsequent Settlements the question of the rights of these *ex-muafidars* came up for determination. In 1861, and again in 1883, the *ex-muafidars* claimed to be proprietors and to be settled with as such. In both years the decision was against them. They were excluded from the *khewat* of the village and ordered to be recorded as *maurusi* tenants in 1861, and as *kashtkaran dakhilkar* in 1883. Another fact stated as one of the admitted facts of the case in the judgment of this Court in Second Appeal No. 1456 of 1913 is that, in the Settlement of 1861, the transferable rights possessed by these *ex-muafidars* were expressly recognized by the Settlement Officer. This is not an admitted fact in the present case, and there is no evidence on this record to prove it. The proceedings of the year 1861 need to be carefully considered. There was first of all a proceeding with regard to the drawing up of the *khewat*, which resulted in a decision that the *ex-muafidars* were not entitled to be recorded in the *khewat*. After this decision had been arrived at, there was a question as to the preparation of the *jamabandi*. This involved a variety of questions, such as the nature of the tenancy to be recorded in respect of these former *muafi* lands and the rent to be assessed thereon. These questions were settled by agreement between the parties, and largely on the strength of a petition presented by the authorised agent of the proprietor of the village. Great stress was laid on the wording of that petition by the learned Judges who decided the connected case. It does not seem to me in any way inconsistent with the rest of the evidence in the case, or with the fact that the *ex-muafidars* were recorded as occupancy tenants of these lands at the Settlement of 1861. The petition of the proprietor of the *mahal*, after reciting the facts regarding the resumption of the *muafi* grants and the settlement of these lands with the said proprietor, goes on to say that, out of consideration for the long possession of these former *muafidars*, he has come to an agreement with them that they shall only be required to pay

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him the land revenue assessed on these lands together with a percentage which he speaks of as "a *haq malikana*." If stress is to be laid on these words on behalf of the respondents, it is only fair to the other side to notice that the petition of the land-holder's agent expressly is that the money thus payable be recorded in the Rent Roll, that is to say, in the *jamabandi*. This is in fact what was done at that Settlement. The *ex-muafidars* were recorded as occupancy tenants holding at a rent representing the land revenue payable on these plots *plus* 10 per cent. The question was raised again at the Settlement of 1888, and it is to be noted that *Musammam Sundar* herself appears as one of the persons who raised this question. In the Settlement of that year again, the petition of the *ex-muafidars* claiming proprietary rights and asking for a Settlement direct with them was disallowed. The Settlement Officer, however, seems to have felt some difficulty about these *ex-muafidars* and to have regarded them as occupying a status of a somewhat peculiar kind. He directed that they should be recorded as occupancy tenants; but he appended to that order a direction, which was in fact carried out, to the effect that in the village Record of Rights there should be a note made to the effect that these *ex-muafidars*, of whom a detailed list was given, were occupancy tenants holding at privileged rates and that they had transferable rights in their holdings. It seems to me that this is practically all the evidence in the case with which we have to deal, and the real question to my mind is simply whether the payments which these *ex-muafidars* have during all these years been making to the proprietor of the *mahal* do or do not amount to rent within the meaning of the definition in section 4, clause (3), of the Tenancy Act. The money thus payable has been directed to be recorded as rent at two consecutive Settlements. In face of the refusal of the proper authorities at both those Settlements to recognize any sort of proprietary rights in these *ex-muafidars* it seems to me impossible to hold that the payments which they were to make to the proprietor of the *mahal* represented anything more than what the Settlement Officer in 1888 had held it to be, namely, a special or privileged rate of rent. The contention before us on behalf of the

respondents was that the proceedings in 1861 and in 1888 should be treated as having been a sort of sub-settlement with the *ex-muafidars*, under the provisions of section 53, 54, 55 and 56 of the Land Revenue Act then in force, Act XIX of 1873. Special reliance is placed upon the provisions of section 56. If I thought it could reasonably be contended that the Settlement Officer in 1888 had recognized that these *ex-muafidars* possessed proprietary rights of some kind in the lands in their possession, I should have been prepared to hold that, as a matter of law, it is not impossible under these provisions of the Land Revenue Act for a Settlement Officer to recognize certain persons as holding a status substantially analogous to that of sub-proprietors in Oudh. It seems to me, however, that the Settlement Officer in 1888 followed, even though it may have been with reluctance, the precedent set by his predecessor in 1861 in refusing to recognize the existence of any kind of proprietary rights in these *ex-muafidars*.

The other principal point urged upon us on behalf of the respondents is that we ought not to have regard exclusively to the definitions of *rent*, *land-holder*, and *tenant* in section 4 of the Tenancy Act, but we ought to consider further the classification of tenants given in section 6 of the same Act. As I understand the position, the respondents wish us to record definitely, one way or the other, a finding whether the rights possessed by these *ex-muafidars* were or were not transferable, and if we find that the rights were transferable, then to hold that this fact alone makes it impossible for them to be tenants within the meaning of the Tenancy Act. When the Settlement Officer in the year 1888 was considering substantially this very question, it was urged upon him that he ought not to make any entry of a custom under which the *ex-muafidars* had transferable rights in their holdings, because such a custom would be in contravention of Statute Law. On this he remarked that it might be for the Courts hereafter to determine whether the Statute Law, beginning with the Rent Act of 1873, had or had not taken away from these particular tenants the rights of transfer which they previously enjoyed or whether it was not possible that, in spite of the Statute Law, there should be a body of

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occupancy tenants who, by reason of the manner in which their tenancy had come into existence and had been recognized by the proprietor of the *mahal*, had succeeded in acquiring and retaining transferable rights in spite of the statutory prohibition. In any case the Settlement Officer said, "I shall record the existence of custom if I find it fully established" and he proceeded to do so. In the view which I take of this case it is not necessary for us here to determine this question of the transferability of these holdings. It is possible that they are not transferable; but to my mind it is conceivable that they may be transferable and that their transferability may be established hereafter by other decisions besides the one of this Court in the connected suit to which I have already referred. I am of opinion, however, that even though it were proved that, by reason of special local custom or of the previous history of these holdings and of the manner in which they came into existence, the tenants thereof have retained transferable rights, they would nevertheless continue to be "tenants" within the meaning of that word as defined in section 4, and as used in section 79 of the Tenancy Act. For these reasons, in my opinion, the proper order for us to pass is one setting aside the order of remand passed by the lower Appellate Court and restoring the order of the first Court dismissing the suit with costs.

CHAMIER, J.—I, too, am of opinion that this appeal should be allowed and the suit dismissed. I desire to add only a few words with regard to what took place in 1838 and the contention that the holding is transferable and, therefore, the persons entitled to it are not tenants within the meaning of the Tenancy Act. The Gazetteer shows that the *pargana* in which the land now in question lies became part of British India in or about the year 1803. Between that year and 1838 there were several Settlements in the district. Regulation after Regulation had been passed for the purpose of ascertaining the nature and extent of *muafi* grants in the Province. Arrangements had been made to have all such grants entered in a register and every effort had been made to induce persons claiming to hold as *muafidars* to come forward with their claims. When the claim of the

holders of the land now in question was put forward in 1838 it was summarily rejected, both because the claimants were unable to produce any documentary evidence, and also because the alleged *muafi* grant had not been entered in the prescribed register. Most of the old records have disappeared, but it is clear to me from the extracts from records of 1861 which have been put in evidence that the Court in 1838 not only decided that the claimants were not entitled to hold the land as *muafidars* but went on to settle the land with the *zemindar* of the village, and it appears that as long ago as 1842 or 1843 the holders of the land in question were recorded as tenants. It is important, I think, to remember that in 1838 a person holding under a *muafi*-grant which the Government declined to recognise was presumed to be the proprietor of the land until some one else was able to establish title against him. It is also important to notice that Regulation VII of 1822 contained provisions for the recognition and recording of persons found to be holding heritable and transferable proprietary rights in a *mahal* in subordination to the *zemindar* and those provisions were repeated and amplified in section 53 to section 56 of Act XIX of 1873 and again in section 75 and the following sections of the present Land Revenue Act. Notwithstanding the presumption referred to above and the existence of these provisions from before 1838 up to the present time, no official has recorded the holders of these lands as being entitled to heritable and transferable proprietary rights in subordination to the *zemindar* of the village. The holders of these lands have all along been recorded as hereditary tenants holding on favourable terms. It seems to me that if we were to hold that they were proprietors of the land, we should be setting aside all that has been done regarding these lands since 1838. In my opinion it is quite clear that the holders of these lands, whatever they may have been prior to 1838, have not since that date been proprietors thereof.

I now turn to the question of the transferability of the rights of tenants. Prior to the Rent Act of 1859 there was no legislative enactment recognizing or conferring a right of occupancy upon cultivators. But the elaborate inquiries which preceded the passing of that Act showed that there was a con-

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sensus of opinion that 12 years; occupancy conferred at least a *prima facie* right of occupancy and a provision to that effect was inserted in the Act. But that Act left the question of the transferability of tenures unprovided for. There were numerous and conflicting decisions as to the transferability of the rights of occupancy tenants, and to judge from a very recent decision of a Full Bench of the Calcutta High Court in *Dayamoyi v. Ananda Mohan Roy Chowdhuri* (1), the conflict of opinion still continues in Bengal. The Full Bench concluded their judgment with the remark: "We would only add that the uncertainty as to the transferability of holdings has been one of the most fruitful sources of litigation, and it is urgently necessary that it should be set at rest by the Legislature." Many years ago it was held by a Full Bench in Calcutta that an occupancy right was *prima facie* not transferable but could be shown to be transferable by custom. That was understood to be the law in the North Western Provinces also previous to the Rent Act of 1873. In a Circular of the Board of Revenue of 1856, I find the following statement regarding the transfer of occupancy rights: "It is to be understood that the Government is not opposed to the growth in the free course of private transactions of a transferable cultivating title, and no impediment should be thrown in the way of the admission by the *zemindars* of such title, or of its tacit creation, according to the wishes and interests of the parties concerned." Between 1856 and 1873 it came to be recognized that the continual transfer of tenants' holdings was an unmixed evil, and in 1873 the Legislature by section 9 of the Rent Act of that year declared that no right of occupancy should be transferable by grant, Will, or otherwise except in certain specified cases. This prohibition was repeated in section 9 of the Rent Act of 1881 and is to be found in an amplified form in the present Tenancy Act. It seems to me quite clear that proof that the rights of the persons who held the lands now in question were transferable would by no means lead to the conclusion that they were other than tenants. It may be that it is not open

to an occupancy tenant now to plead and prove that by custom his holding is transferable, but, even if he is entitled to do so, it is quite clear that proof that his holding is transferable will not convert him into a proprietor. I am satisfied that the holders of these lands have since 1838 been nothing more than tenants and that what they have paid to the *zemindar* has been rent, although the amount of that rent has all along depended upon the amount of revenue assessed on the land. The learned Vakil for the plaintiffs in the present case has relied strongly upon some proceedings of the Board of Revenue dated February and March 1892. Those proceedings were held upon an application for revision of an order passed by the Commissioner of Meerut on appeal against an order passed by the Settlement Officer. It appears that the Settlement Officer was asked to fix the rent payable in respect of these lands, and he did so. Mr. Kaye, Junior Member of the Board, gives a short sketch of the previous history of the case and says that the applicants were in 1861 found to be tenants with a right of occupancy liable to pay only a privileged rate of rent. He says as to the first contention advanced before them, namely, that the applicants were proprietors and not tenants "however curious and unusual the applicants' status may be it is unquestionably a fact that they have been declared by judicial proceedings to be tenants and not proprietors and that question cannot now be re-opened." He then goes on to consider the rate at which the *jama assessable as rent* should be fixed. In conclusion he says "I would set aside the Commissioner's order and fix rent at 42 per cent. of the soil rents *plus* ten per cent." Mr. Reid, Senior Member, agreed with him but in his opinion the holders of the land were liable to pay local rate also. Mr. Reid refers to the proceedings of the last Settlement and says "from the proceedings of the last Settlement it would appear that the lands were resumed *muafi* upon which the landlord of the *mahal* admitted that the *muafidars* had acquired a full proprietary title with rights of inheritance and transfer. There was consequently assessed upon them the Government revenue of the land together with a ten per cent. *malikana* allowance."

(1) 27 Ind. Cas. 61; 42 C. 172; 18 C. W. N. 971; 20 C. L. J. 52.

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This is the passage upon which the learned Vakil for the plaintiffs has relied. We have been unable to find in the proceedings of the Settlement to which Mr. Reid refers any admission by the landlord of the *mahal* that the *muafidars* had acquired proprietary rights in the land. On the contrary, it seems to us that the landlord has all along maintained that the holders were tenants. Even if the reference to the Settlement proceedings by Mr. Reid is correct, and will bear the construction put upon it by the plaintiffs, his remark does not decide the question of title. He had no authority to decide that the holders of the land were proprietors, and it is quite certain that his colleague, Mr. Kaye, was satisfied that they were tenants. In my opinion there can be no doubt that the holders of these lands were tenants and paid rent as such. I, therefore, agree that the suit should have been dismissed.

By THE COURT.—The order of the Court is that this appeal is allowed, the order of the lower Appellate Court is set aside and that of the Court of first instance is restored with costs.

Appeal allowed.

BOMBAY HIGH COURT. FULL BENCH.

CIVIL REVISION APPLICATION No. 55 OF 1915.
July 5, 1915.

Present:—Sir Basil Scott, Kt., Chief Justice,
Mr. Justice Batchelor, Mr. Justice Macleod,
Mr. Justice Shah and Mr. Justice
Hayward.

NARAYAN VITHAL SAMANT—
APPLICANT

versus

JANKIBAI SITARAM SAMANT AND
OTHERS—OPPONENTS.

*Charter Act (24 & 25 Vic., c. 104), ss. 2, 9, 13, 15—Letters Patent (Bombay), cls. 11, 36—Original Side Rules, r. 62—Appellate Side Rules, r. 1—Civil Procedure Code (Act V of 1908), s. 151—Jurisdiction—Power of single Judge sitting on original side to stay suit pending in Subordinate Judge's Court in *mofussil*—Consolidation of suits—Court's inherent power to consolidate.*

It is not competent to a single Judge of the High Court, exercising the Ordinary Civil Jurisdiction of the Court, to stay the hearing of a suit pending for trial in a Subordinate Judge's Court in the *mofussil* unless authorised so to do by rule. [p. 562, col. 2.]

Per Macleod, J.—A single Judge sitting on the Original Side of the High Court is not competent to make an order for a stay of proceedings at the instance of a party to a suit in a Subordinate Judge's Court, nor is he competent at the instance of a party in a suit pending before him to issue a prohibition to a Subordinate Judge against proceeding with a suit between the same parties; but he is competent, under section 151, Civil Procedure Code, to restrain the parties in a suit before him from proceeding with a suit in a Subordinate Judge's Court in the *mofussil*, and so in effect stay proceedings. [p. 563, col. 2; p. 564, col. 1.]

Obiter.—There is no provision in the Civil Procedure Code for the consolidation of suits, but a Court has inherent jurisdiction under section 151 to consolidate two or more suits pending before it. The High Court, however, has no jurisdiction to entertain an original application for the consolidation of suits pending before a District Court, and the case is still stronger when the suits are pending in different Courts. [p. 563, col. 2.]

FACTS of the case appear from the following

ORDER OF REFERENCE.

SCOTT, C. J.—The applicants pray that a suit instituted and now partly tried on the original side of the High Court may be removed for trial to the Court of the Subordinate Judge of Ratnagiri along with certain other suits now depending between parties to the original side suit in the Court at Ratnagiri.

The reason of the application, which is of a very usual nature, rests upon the necessity to which the applicants in Ratnagiri have been reduced by an order in the original side suit passed by a single Judge staying the suits in the Ratnagiri Court.

It is contended by the applicants that the order was *ultra vires* and should be disregarded, and a decision to that effect would satisfy them as it would enable them to proceed with their suits.

It is clear beyond argument that the High Court can stay the hearing of a suit in a subordinate Court, but the question is whether any Judge sitting alone is entitled thus to exercise the functions of the High Court in its appellate jurisdiction.

The High Court is established by Royal Letters Patent under 24 & 25. Vict. c. 104. Section 2 of the Statute provides that the High Courts respectively shall consist of a Chief Justice and a limited number of Judges. Under section 9 each High Court is to have and exercise such jurisdiction as the Crown by Letters Patent

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may grant and direct and, unless otherwise directed, all jurisdiction and power and authority of the old Supreme and Sudder Courts.

The only provision for delegation by the High Court of the exercise of its Original and Appellate Jurisdictions by one or more Judges or Benches of Judges is contained in section 13.

Such delegation is to be effected by rule.

Where the rule empowers a single Judge or a Bench of two Judges to exercise any of the jurisdiction of the High Court, such Judge or Judges become the Committees of the High Court to the extent to which the rule empowers him or them to act.

In accordance with the statutory authority the High Court has since long provided for the exercise of jurisdiction by such Committees.

Rule 1, Chapter 1, of the Appellate Side Rules says: "The civil and criminal jurisdiction of the Court on the Appellate Side shall, except in cases where it is otherwise provided for by these rules or ordered by the Chief Justice, be exercised by a Division Court consisting of two Judges".

Rules 2 and 3 enumerate the Appellate Side matters which may be disposed of by a single Judge.

Rule 5 states that applications for the transfer of suits from Civil Courts in the *Mofussil* to the High Court under section 24 of the Civil Procedure Code shall be made to, and disposed of by, a Division Court of two Judges and when the application is granted, the record and proceedings shall be sent to the Original Side where the suit will be tried.

It is noteworthy that such an application was made to a Division Bench of the Appellate Side by the present opponents for the transfer of the Ratnagiri suits under section 24, but it was rejected and after such rejection a single Judge of the Original Side passed an order staying the further hearing of the suits.

It is, we think, clear that such an order appertains to the Appellate, and not to the Original Jurisdiction of the High Court; and the contention that this jurisdiction

may be exercised by a single Judge charged with the exercise of Original Jurisdiction appears to us to be exposed to doubt. The only cited authority in favour of this contention is to be found in the judgment of Phear, J., in *Queen v. Ameer Khan* (1), where that learned Judge held that a single Judge, sitting on the Original Side of the Court, had power to entertain an application for the removal of a criminal case from a *mofussil* Court to the High Court in the exercise of the latter Court's Extraordinary Original Criminal Jurisdiction. It is true that this judgment was referred to with approval by Batty, J., in a criminal case [*Emperor v. Comley* (2)] which came up to this High Court from Aden, but the reference was made in apparent ignorance of rule 6 of the Appellate Side Rules which provides that applications for the withdrawal of a criminal case to the High Court for trial shall be made to, and disposed of by, the Division Court to which criminal appellate business is allotted. And, in considering the effect of such a rule upon the present question, we have to reckon with the view taken by a Judge of the Court in *Maganlal v. Bombay Co. Ltd.* (3) where Tyabji, J., held that a single Judge's power to exercise the functions of the High Court was limited to the cases where, by the Rules of the High Court, the exercise of such functions was entrusted to the single Judge. If this view is sound, it suggests further that the true principle is that the jurisdiction of the High Court is properly exercisable by the High Court alone as a body, except in so far as the exercise of such jurisdiction has been committed by lawful delegation to some, or to one, of the Judges composing the Court.

But as the matter is of considerable practical importance and appears to be involved in much uncertainty of judicial opinion, we think it desirable that a reference should be made to a Full Bench. The question referred will be, whether it is competent to a single Judge of this Court, exercising the ordinary original

(1) 7 B. L. R. 240; 15 W. R. 69 Cr.

(2) 7 Bom. L. R. 104; 29 B. 575; 2 Cr. L. J. 75.

(3) 7 Bom. L. R. 143.

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civil jurisdiction of the Court, to stay the hearing of a suit pending for trial in a Subordinate Judge's Court in the *mofussil* unless authorised so to do by rule.

Mr. *Coyaji* (with him Messrs. A. G. *Desai* and *Hiralal & Co.*), for the Applicant.

Messrs. *Kanga* and *Mulla* (with them Messrs. *Ardeshir Hormasji, Dinshaw & Co.*), for Opponent No. 2.

Mr. P. B. *Shingne*, for Opponent No. 3.

Mr. K. N. *Koyajee*, for Opponent No. 5.

OPINION OF THE FULL BENCH.

BATCHELOR, J.—This question referred to the Full Bench should, in my opinion, be answered in the negative.

The jurisdiction of this Court, and of the Judges composing the Court, is determined by the Statute 24 & 25 Vic., c. 104, by the Letters Patent issued thereunder, and by the rules framed by the Court under the authority conferred by section 13 of the Act. By section 9 of the Act, it is provided that the Court shall have and exercise all such jurisdiction as Her Majesty may by Letters Patent grant and direct. Primarily, therefore, it is upon the Court that the jurisdiction is conferred, and section 2 of the Act provides that the Court shall consist of a Chief Justice and as many Judges, not exceeding fifteen, as Her Majesty may appoint. Section 13 empowers the Court by its own rules to "provide for the exercise, by one or more Judges, or by Division Courts constituted by two or more Judges, ... of the Original and Appellate Jurisdiction vested in such Court in such manner as may appear to such Court to be convenient for the due administration of justice." In the exercise of this power this Court has made rules for the exercise of jurisdiction by the Judges both on the Original and the Appellate Side.

The intent and effect of these provisions seem to me to be that the jurisdiction conferred is conferred on the Court as a body: it is the Court which is to "have and exercise" the jurisdiction granted; but, inasmuch as it would not be "convenient for the due administration of justice" that the entire Court should have to sit for the valid determination of every suit and appeal and application, power is given to the Court

to make rules for the exercise of the Court's jurisdiction by one or more Judges within the limits and subject to the conditions prescribed by the rules. The powers so delegated would thus fix the limit within which such Judge or Judges would be competent to exercise the Court's jurisdiction, and any order made by a Judge or Judges in excess of this authority would be void as being beyond the jurisdiction which the Judge or Judges were legally authorized to exercise.

Now the particular order with which we are here concerned is an order made by a single Judge, sitting in the exercise of the Court's Ordinary Original Civil Jurisdiction, for the stay of a suit pending in the Court of the Subordinate Judge of Ratnagiri. But, by clauses 11 and 36 of the Letters Patent and rule 62 of the Original Side Rules of this Court, the local jurisdiction of the learned Judge was confined to the town and island of Bombay. It is clear, therefore, and it was scarcely contested in argument, that the order under discussion appertains to the Appellate Side of the Court. The same result would follow if the order could properly be attributed to this Court's general powers of superintendence conferred by section 15 of the Act, for under that section, the powers granted are powers of superintendence over all Courts subject to this Court's Appellate Jurisdiction. This being so, the case falls under rule 1 of the Appellate Side Rules, which provides that, with certain exceptions not now material, the Civil Jurisdiction of the Court on the Appellate Side shall be exercised by a Division Court consisting of two Judges. It follows, therefore, that the order now in question was made by the learned Judge in excess of the jurisdiction which he was legally empowered to exercise.

If that be so, it seems to me unarguable that the Judge acquired jurisdiction by the mere circumstance that the order was passed on an application made in a suit which the Judge had jurisdiction to try. And as to the contention that substantially the same result could have been secured by an order *in personam* restraining some of the parties from proceeding with the Ratnagiri suit, and that an order of this

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nature would have been within the Judge's competence, it is enough to say that that is not the order which was made, or which arises for consideration on the question submitted to this Bench. I think, therefore, that we should refrain from expressing any opinion as the validity which might attach to any such order *in personam*, and should content ourselves with returning a negative answer to the question referred to us.

SCOTT, C. J.—I agree.

SHAH, J.—I agree.

HAYWARD, J.—I agree.

MACLEOD, J.—The applicants presented a petition to a Division Bench on the Appellate Side of the High Court praying that a suit, No. 246 of 1913, instituted and then partly tried on the Original Side of the High Court might be (1) removed for trial to the Court of the first Class Subordinate Judge of Ratnagiri, and (2) consolidated with two suits pending in that Court.

A preliminary objection to the granting of the latter prayer was constituted by the fact that an order had been made on the 21st December 1914 in Suit No 246 of 1913, whereby the proceedings in the two suits in the Ratnagiri Court had been stayed. The applicants contended that this order was *ultra vires* and could, therefore, be disregarded. If they obtained a decision to that effect they could proceed with their suits.

The question, therefore, arose whether the Judge had jurisdiction to make the order of the 21st December 1914. The Division Bench being of opinion that the authorities on the point were conflicting referred the following question to a Full Bench.

"Whether it is competent to a single Judge of this Court, exercising the ordinary civil jurisdiction of the Court, to stay the hearing of a suit pending for trial in a Subordinate Judge's Court in the *mofussil*, unless authorised so to do by rule?"

I should like to point out that the question seems to arise not on the application for a transfer of the High Court suit to the Subordinate Judge's Court, for if that application were granted the suit would be transferred and all interlocutory

orders made in the suit would go with it, but on the application for a consolidation of the suit, when transferred, with other suits pending in the same Subordinate Judge's Court, since if the Subordinate Judge could not proceed with these suits, it would be of little use consolidating another suit with them.

There is no provision in the Civil Procedure Code for the consolidation of suits, but a Court has inherent jurisdiction under section 151 to consolidate two or more suits pending before it. The High Court, however, has no jurisdiction to entertain an original application for the consolidation of suits pending before a District Court and the case is still stronger when the suits are pending in different Courts.

The applicants have really adopted this novel procedure in order to get rid of the order of the 21st December 1914, and I venture to submit that on the facts before us anything that we may say regarding the jurisdiction of the Judge to make that order will be *obiter*.

However, this point was not taken by the opponents' Counsel in his argument and I, therefore, proceed to deal with the question referred to us on its merits.

I have had the advantage of reading the judgment of my brother Batchelor and while I am in accord with the greater part of it it seems to assume that the order in question was a prohibition, nor can I agree that the question is so concise and free from ambiguity as to admit of a direct answer. For the question may refer to three possible orders which a Judge might make.

A Judge sitting on the original side might make an order for a stay of proceedings at the instance of a party to a suit in a Subordinate Judge's Court. It is beyond controversy that such an order would be without jurisdiction.

Secondly, a Judge at the instance of a party in a suit pending before him might issue a prohibition to a Subordinate Judge against proceeding with a suit between the same parties.

Such an order would clearly be without jurisdiction.

Thirdly, a Judge might restrain the parties in a suit pending before him from

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proceeding with a suit in a Subordinate Judge's Court in the *mofussil*. Such an order would, in my opinion, be with jurisdiction under section 151 of the Code.

In *Mungle Chand v. Gopal Ram* (4) under the Code of 1882, Sale, J., went so far as to restrain the parties in a suit before him from proceeding with a suit pending in the Court at Bareilly, but his attention does not seem to have been drawn to the provisions of section 56 of the Indian Specific Relief Act.

An order *in personam* to stay proceedings is, in effect, an injunction, for though it may be desirable it is not always necessary that an order, which prevents the parties from doing certain acts, should contain the word 'enjoin' or 'restrain.' For instance, an order appointing a Receiver of certain property is also an injunction restraining the parties from dealing with that property. Nor is an order *in personam* limited to the acts of the parties within the local limits of the Ordinary Original Civil Jurisdiction of the High Court except by express enactment.

In my opinion, therefore, a single Judge sitting on the Original Side of the High Court is competent to restrain the parties in a suit before him from proceeding with a suit in a Subordinate Judge's Court in the *mofussil*, and so in effect stay the proceedings.

Reference answered in the negative.

(4) 34 C. 101.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1241 OF 1914.

June 25, 1915.

Present:—Mr. Justice Chamier.

GHASI RAM AND ANOTHER—PLAINTIFFS —
APPELLANTS

versus

Musammat KISHNA AND OTHERS—

DEFENDANTS—RESPONDENTS.

*Limitation Act (IX of 1908), Sch. I, Art. 134—
Auction-purchaser of mortgagee right, purchaser from—
Bona fide—Absolute title.*

A person who purchases by private treaty from an auction-purchaser of the rights of the original mortgagee is entitled to rely upon Article 134 of the

Limitation Act, 1908, if he purchases in the *bona fide* belief that he is purchasing an absolute title. [p. 565, col. 1.]

Second appeal from a decree of the Additional Subordinate Judge of Bareilly.

Mr. Haribans Sahai (with him Mr. Gokul Prasad), for the Appellants.

Mr. Jang Bahadur Lal, for the Respondent.

JUDGMENT.—This appeal arises out of a suit brought by the plaintiffs for possession of property which was mortgaged as long ago as September 6th, 1856, by Shambhu, under whom the plaintiffs claim, to a man named Hulasi. The plaintiffs claimed to be entitled to redeem the mortgage. They said that defendants Nos. 1—7 were owners of the mortgagee rights. Those defendants resisted the suit on the ground that they had become proprietors of the property. In April 1877, the rights and interests of the mortgagee were put up to sale and purchased by one Ghasi. In January 1884, Ghasi sold to defendants Nos. 1—3 half the rights which he had acquired at the auction-sale, and in December 1888, he sold to the predecessor-in-title of defendants Nos. 4—7 not only the mortgagee rights which he had acquired at the auction-sale, but what he represented to be an absolute proprietary interest in the property, for a sum of Rs. 100. The suit has been decreed as against defendants Nos. 1—3 on the ground that they are not entitled to the protection of Article 134 of Schedule I to the Limitation Act; but it has been dismissed against defendants Nos. 4—7 on the ground that what Ghasi purported to sell to them and what they purchased from him was an absolute proprietary interest in the property which they held. Here I may note that they have been in possession of the property since December 1888. This appeal is brought only against defendants Nos. 4—7.

It is contended that Article 134 does not apply to the case, because defendants Nos. 4—7 did not purchase from the original mortgagee of the property. It is conceded that a purchaser from the son or other heir of the original mortgagee of the property would be entitled to rely upon Article 134, but it is contended that a person, who purchases from the auction-purchaser of the rights of the original mortgagee, is not entitled to rely upon that Article. Several cases, supposed to bear upon this question, have been cited to me; but on examination

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they are all found to be totally irrelevant, and it is useless to discuss them. I have no hesitation in holding that a person who purchases by private treaty from an auction-purchaser of the rights of the original mortgagee is entitled to rely upon Article 134. The auction-purchaser of the rights of the mortgagee steps into the shoes of the mortgagee. Next it is contended that Article 134 affords protection only to a person who purchases property from a mortgagee in the *bona fide* belief that he is purchasing an absolute proprietary title. The words in *good faith* which appeared in Article 134 of the Limitation Act of 1871 were struck out of that Article when Act XV of 1877 was passed and do not appear in the present Limitation Act of 1908. My view is that the words were advisedly struck out in order to put a stop to the instituting of inquiry into the knowledge or state of mind of a purchaser of the property. That was the view expressed by Mr. Justice Tudball in *Dal Singh v. Gur Prasad* (1), and it is said to have been repeated by him in an unreported decision by him in Second Appeal No. 547 of 1914. The case is referred to in a judgment of Mr. Justice Piggott but a wrong reference is given, the case actually referred to being a suit for restitution of conjugal rights. But it seems that this Court has in several cases either held or assumed that notwithstanding the alteration in the language of Article 134 the purchaser must show that he purchased in good faith. There seems to have been some difference of opinion on the subject in the Bombay High Court. See *Yesu Ramji Kalnath v. Balakrishna Lakshman* (2) and *Pandu v. Vithu* (3). Sitting as a single Judge I must follow the decisions of this Court and I therefore, direct that the record of this case be returned to the lower Appellate Court for a finding on the question whether the predecessors-in-title of defendants Nos. 4—7 purchased the property now in their possession from Ghasi in the *bona fide* belief that they were acquiring an absolute interest in the property. Further evidence may be admitted. Ten days will be allowed for objections on return of the finding.

Case remanded.

(1) 2 Ind. Cas. 250; 12 O. C. 84.

(2) 15 B. 583.

(3) 19 B. 140.

DAYA KISHEN v. MOHAMMAD WAZIR AHMAD.

MADRAS HIGH COURT.

FULL BENCH.

REFERRED CASE NO. 2 OF 1915.

August 3, 1915.

Present:—Sir John Wallis, Kt., Chief Justice,
Mr. Justice Sadasiva Aiyar and Mr. Justice
Srinivasa Aiyangar.

EDWARD CHARLES DAWSON—

PLAINTIFF—PETITIONER

versus

MATTY DAWSON—DEFENDANT—

RESPONDENT.

Divorce Act (IV of 1869), s. 19 (1)—Impotence—Proof.

In order to support a suit for nullity of marriage under section 19 (1) of the Indian Divorce Act impotence must be proved or there must be facts from which impotence, that is, physical unfitness for consummation, may be inferred.

Case stated, under section 20, Act IV of 1869, by the District Judge of Bellary, in Original Suit No. 42 of 1914, for the confirmation of the decree *nisi* passed by him in the said suit by the High Court.

Mr. A. D. Zachaus, for the Plaintiff.

JUDGMENT.—In order to support a suit for nullity of marriage in this country on the ground of impotence on the part of one of the parties, such impotence must of course be proved, or there must be facts from which impotence, that is, physical unfitness for consummation may be inferred both at the date of the marriage and at the date of the institution of the suit. The only evidence here is that the respondent never attained puberty and that the petitioner never had intercourse with her. Nor are the allegations in the plaint any more satisfactory. In the circumstances, we think it best not to confirm the decree and to dismiss the suit, but with liberty to bring a fresh suit as the whole nature of the proceedings appears to have been misconceived.

Suit dismissed.

ALLAHABAD HIGH COURT.

LETTERS PATENT APPEAL NO. 42 OF 1915.

July 2, 1915.

Present:—Sir Henry Richards, Kt., Chief
Justice, and Mr. Justice Piggott.

DAYA KISHEN—DEFENDANT—APPELLANT

versus

MOHAMMAD WAZIR AHMAD—

PLAINTIFF—RESPONDENT.

Landlord and tenant—Occupancy holding—Planting of grove with permission of landlord—Nature of holding if changed—Power of tenant to transfer trees.

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Where an occupancy tenant plants a grove on his holding with the permission of the *zemindar*, the character of the holding is not changed. The tenant has no right to transfer the trees nor can they be sold in execution of a decree against him. [p. 567, col. 2.]

Letters Patent Appeal from Mr. Justice Rafique's following

JUDGMENT.—This appeal arises out of a suit brought by a *zemindar* for a perpetual injunction restraining the defendant from cutting down trees of a grove or otherwise interfering with his (*zemindar's*) possession over it. It was alleged in the plaint that Moulvi Wazir Ahmad, the plaintiff, was the *zemindar* of the village of Shitabnagar, and that Bhopal and others were his tenants in respect of plots, among others, numbered 74, 81 and 89. There was a mango grove on the said plots, which was in the possession of Bhopal and others merely as his tenants whose sole right in the grove was that of taking fruit. They had no right of transfer in respect of the trees of the grove nor could the said trees be sold in execution of a decree against them. One Daya Kishen in execution of his decree against them had some of the trees of the said grove put up to auction and purchased them himself on the 28th of June 1911. The said sale was void at law and put an end to the rights of the tenants in the grove and the plaintiff became entitled to its possession. He entered on possession but Daya Kishen, the purchaser, with the help of two others attempted to cut down the trees purchased by him and was prevented by the plaintiff. The plaintiff, therefore, sued for perpetual injunction restraining Daya Kishen and his friends from cutting down any trees of the grove in question or otherwise interfering with the plaintiff's possession over the said grove. The claim was resisted on various grounds. The pleas with which we are concerned in this appeal were that the plots Nos. 74, 81 and 89 were granted to Debi Singh, ancestor of Bhopal and others, by the *zemindar* of the village for planting a grove and Debi Singh accordingly planted a grove, and his descendants had a proprietary right in the grove which they could transfer either privately or which could be sold in execution of a decree against them. Moreover, under a custom obtaining in the village and also under the terms of the *wajib-ul-arz* tenants have a transferable

right in the trees in their possession. The learned Munsif held that the land of the grove in suit had not been granted to Debi Singh for planting a grove, but was his occupancy holding over which he had planted a grove. He further held that the custom set up by the defence was not proved and that the terms of the *wajib-ul-arz* were not applicable to the present case. The claim was accordingly decreed. Daya Kishen, the auction-purchaser of the trees, preferred an appeal. The only point urged on his behalf before the learned Subordinate Judge was that under the terms of the *wajib-ul-arz* of the village of Shitabnagar tenants had a transferable right in the trees planted by them. In order to dispose of the question raised in the appeal the learned Subordinate Judge framed a fresh issue and remitted it for trial to the first Court. The finding of the first Court on the fresh issue did not support the contention of the appellant that under the terms of the *wajib-ul-arz* a tenant had a right of transfer in the trees planted by him on his holding. The learned Subordinate Judge accepted the finding of the first Court, but for other reasons held that the tenants of the grove in suit had a right of transfer in the trees. He accordingly accepted the appeal and dismissed the claim of the plaintiff. The latter has come up in second appeal to this Court. He contends that an occupancy or non-occupancy tenant who plants trees on his holding has no right of transfer in the trees in the absence of a custom or contract to the contrary. The following cases are relied upon in support of this contention: *Kasim Mian v. Banda Husain* (1), *Imdad Khatun v. Bhagirath* (2), *Kausalia v. Gulab Kuar* (3), *Janki v. Sheodhar* (4), *Wahida Khatun v. Bulagi Das* (5). For the respondent the reply is that the finding of the lower Appellate Court is that the land of the grove in suit was given to Debi Singh on a fixed rent for the purpose of planting a grove and, therefore, the principle laid down in the cases relied upon by the appellant does not apply. It is said that when a *zemindar* grants land on rent to a persons to plant a grove, that

(1) 5 A. 616; A. W. N. (1883) 169.

(2) 10 A. 159; A. W. N. (1883) 32.

(3) 21 A. 297; A. W. N. (1899) 72.

(4) 23 A. 211; A. W. N. (1901) 52.

(5) 3 A. L. J. 385; A. W. N. (1906) 140.

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person has a right of transfer in the trees. In support of his argument, the respondent refers to the following cases: *Muhammad Ismail Khan v. Mithu Lal* (6), *Habibullah v. Kalyan Das* (7). The case-law, no doubt, makes a distinction between the rights of a tenant, occupancy or non-occupancy, who plants trees on his holding and of a person who is given land at a specified rent solely for the purpose of planting a grove. The contention of the respondent must prevail if it has been found that the land of the grove in suit was granted to Debi Singh for the purpose of planting a grove. It is true that the learned Subordinate Judge does say that he thinks that the land of the grove in suit was let to Debi Singh on a fixed rent for the purpose of planting a grove. But there does not seem to be any evidence in support of this finding. The defendant-respondent produced evidence to prove that the plaintiff-appellant had granted the land of the grove in suit to Bhopal and others who had planted the grove. The first Court disbelieved that evidence. The learned Subordinate Judge did not accept it also, for he holds that the land was granted to Debi Singh. He means presumably that the land was granted by the former *zemindars*, as the plaintiff-appellant was not the *zemindar* in the life-time of Debi Singh. In fact the learned Subordinate Judge in an earlier part of his judgment accepts the finding of the first Court that the grove in question was planted with the permission of the former *zemindars*. The revenue papers show that the land of the grove was the occupancy holding of Debi Singh for a long time before any trees were planted by him on it. The reason for the finding seems to be that the learned Subordinate Judge thought that the permission of the former *zemindars*, which was assumed in the absence of any protest by them, to Debi Singh to plant a grove, amounted to the grant of a fresh lease to him of the land for the purpose of planting a grove. If that were a valid reason the cases referred to above by the appellant were erroneously decided. But I do not think that it can be said that the permission by a *zemindar* to his occupancy or non-occupancy tenant to plant

(6) 17 Ind. Cas. 656; 11 A. L. J. 649.

(7) 25 Ind. Cas. 169; 12 A. L. J. 1080,

trees on his holding cancels the original lease and is a fresh lease for the purpose of planting trees. The finding under discussion being unsupported by any evidence cannot be accepted. The character of the grove in question then is that it was planted by an occupancy tenant on his holding. He or his successors have, therefore, no right of transfer in the trees. They cannot be sold privately or in execution of a decree against Bhopal and others.

But it is further contended for the respondent that as soon as the grove was planted by Debi Singh, the land lost its character as an occupancy holding and the *zemindar* could have ejected him. The *zemindar* having failed to do so, Debi Singh became a trespasser and his possession became adverse to the *zemindar*. Debi Singh and his successors have been in adverse possession for more than twelve years prior to the sale of the trees, and hence the plaintiff-appellant cannot question the sale to Daya Kishen. No such plea was taken by the latter in his defence. But apart from that the case of Daya Kishen was and the finding of the lower Court is that the trees were planted with the permission of the former *zemindars*. No question of adverse possession can, therefore, arise. The appeal prevails, the decree of the lower Appellate Court is set aside and that of the first Court is restored. Costs are allowed to the appellant throughout.

Mr. Uma Shankar Bajpai, for the Appellant.

Mr. Abdul Raof, for the Respondent.

JUDGMENT.—We think the decision of the Judge of this Court is correct. We dismiss the appeal.

Appeal dismissed.

CALCUTTA HIGH COURT.

REVIEW OF JUDGMENT IN SECOND CIVIL APPEAL
No. 223 OF 1872.

March 28, 1874.

Present:—Mr. Justice Jackson and
Mr. Justice Glover.

Srimati BIMOLA AND ANOTHER—

PLAINTIFFS—APPELLANTS

versus

DANGOO KANSARI AND ANOTHER—
DEFENDANTS—RESPONDENTS.

Hindu Law—Succession—Childless widow, whether entitled to inherit—Bengal School.

RAJ BAHADUR v. SHYAM LAL.

Under no circumstances can childless widows inherit the property in Bengal.

Sreemuty Bimola v. Dangoo Kansaver, 19 W. R. 189, reversed.

Petition to review the following judgment of the High Court, dated the 24th February 1873, reported in 19 W. R. 189:—

JACKSON, J.—It seems to me there was really no valid defence to the plaintiffs' suit.

The plaintiffs did not sue to recover, as the Subordinate Judge supposes, a particular part of the premises in which Juggurnath, the father of Amrita and grandfather of the husband of Bimola, resided. They simply sought to establish their right to that portion of the joint family premises which descended by right to Juggurnath. They put their claim a little too high in asking for a half share of those premises when it seems they were really entitled to a fourth share, and no more. The Subordinate Judge taking a mistaken view of what, as I have just stated, the plaintiffs asked for, went on to say that they had not been in possession of the particular premises of Juggurnath, and consequently their suit was barred by limitation. It is clear that they had been residing as members of a joint family on joint premises, and on the occurrence of disputes between them and their co-sharers, they were certainly entitled to come into Court and ask to have their proper share assigned.

As to the exclusion of Amrita under the Hindu Law, there seems to be no ground for that, because although a widow at the time of her father's death, still she could certainly, as the law now stands, re-marry and have issue. I think the decision of the lower Appellate Court should be set aside, and the Munsif's decree for a fourth share restored with costs.

GLOVER, J.—I concur.

ORDER.—We think the passage in our judgment, "as to the exclusion of Amrita under the Hindu Law, there seems to be no ground for that, because although a widow at the time of her father's death still she could certainly, as the law now stands, re-marry and have issue", should be struck out but we do not think it neces ary to alter the decree.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1441 OF 1914.

July 30, 1915.

Present:—Mr. Justice Chamier.

RAJ BAHADUR—DEFENDANT—

APPELLANT

versus

SHYAM LAL—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. IX, r. 9—Cause of action—Suit for profits dismissed in default—Second suit for profits of other years including previous profits, maintainability of—Agra Tenancy Act (II of 1901), s. 164

A co-sharer brought a suit for profits of the years 1313, 1314, 1315 *fastis* against the *lambardar*. The suit was dismissed for default of appearance. Subsequently another suit was brought by the same co-sharer for the profits of the years 1316, 1317, 1318 *Fastis*. In this suit the plaintiff included also sums recovered during the years in suit in respect of the years 1313, 1314, 1315:

Held, that the suit was not barred by Order IX, rule 9, of the Civil Procedure Code, inasmuch as the causes of actions of the two suits were different [p. 569, col. 1.]

Second appeal from the decision of the District Judge of Farrukhabad, dated the 10th August 1914.

FACTS.—The plaintiff brought a suit for profits for the years 1313-1315. That suit was dismissed for default. He then brought the present suit for profits collected in the years 1316—1318 and claimed the profits relating to the years 1313—1315 *fastis* which the *lambardar* had realised in the years now in suit. The first Court dismissed the suit as barred by Order IX, rule 9, Civil Procedure Code. The lower Appellate Court decreed the suit.

Mr. *Vishnu Nath*, for the Appellant:—The previous suit for profits relating to the years 1313—1315 *fastis* having been dismissed for default of appearance, the present suit for profits so far as it relates to rents realised for the years 1313—1315 *fastis* is barred by Order IX, rule 9, Civil Procedure Code. The cause of action in the previous suit was the refusal of the *lambardar* to pay the profits and the present suit is also based on the same cause of action.

Mr. *Lakshmi Narayan*, for the Respondents:—The cause of action for the present suit arose when the arrears of rent were realised. If the previous suit had not been dismissed for default one of two things would have happened—either the plaintiff's suit would have been decreed on the basis of actual collections or on gross rental. In the former case, no cause of action for

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rents not collected could have then arisen and in the latter case the present suit, so far as it related to the profits of those years could, not have been brought. Moreover, in every suit for profits the plaintiff would not be able to sue for profits if he happened to sue for the same on the basis of gross rental in any previous year.

JUDGMENT.—The plaintiff in this case is a co-sharer in a *patti* of which the defendant is *lambardar*. The plaintiff brought a suit against the defendant for the profits of the years 1313, 1314 and 1315 *fastis*. That suit was dismissed for default of appearance on the part of the plaintiff under Order IX, rule 8, Civil Procedure Code. Some years later the plaintiff brought the present suit against the same person for profits of his share for the years 1316, 1317 and 1318 *fastis* and he has obtained a decree. Included in those profits are sums recovered during the years in suit in respect of the years 1313, 1314 and 1315 *fastis*. It is contended that the present suit is barred by Order IX, rule 9, Civil Procedure Code, so far as the plaintiff seeks to recover any portion of the rents recovered on account of the years 1313, 1314 and 1315 *fastis*. In the Court below and here the defendant relied strongly on the fact that in the previous case the plaintiff claimed profits on the basis of the gross rental on the ground apparently that a large amount of profits had remained uncollected owing to the negligence or misconduct of the defendant. This fact does not appear to me to affect the question which I have to decide. Order IX, rule 9, Civil Procedure Code, provides that where a suit is dismissed under Order IX, rule 8, the plaintiff shall be precluded from bringing a fresh suit in respect of the same cause of action. The cause of action for the previous suit was made up of the plaintiff's title to the share and the profits thereof and the failure of the defendant to give him those profits at the end of each of the years 1313, 1314 and 1315 *fastis*. The plaintiff's cause of action for the present suit is made up of his title to the share and the profits thereof and failure of the defendant to give the plaintiff those profits at the end of each of the years 1316, 1317 and 1318 *Fastis*. The causes of action for the two suits appear to me to be totally

different. The contention of the defendant in the present case seems to confuse two questions, namely, the question whether the two suits are based upon the same cause of action and the question whether the plaintiff is entitled in the present suit to sue for and recover any moneys which, if his suit had not been dismissed for default, he might have recovered in the previous suit if the Court had applied to the case the provisions of section 164, sub-section 2 of the Tenancy Act. If as I hold, no portion of the present suit is barred by Order IX, rule 9, Civil Procedure Code, the plaintiff is entitled to the decree which he has obtained from the lower Appellate Court. I, therefore, dismiss this appeal with costs.

Appeal dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 2828 OF 1913.

August 10, 1915.

Present:—Mr. Justice Spencer and

Mr. Justice Kumaraswami Sastri.

Hakeem PATTE MUHAMAD—PLAINTIFF—

APPELLANT

*versus**Sheikh* DAVOOD—DEFENDANT No. 3—

RESPONDENT.

Mortgage—Suit for redemption—Swadina tanaka meddatu sharatu pattiram—Stipulation by mortgagor to pay within fixed period and to relinquish land in default—Anomalous mortgage—Clog on redemption—Parties, liability of—Applicability of English principles of equity—Transfer of Property Act (IV of 1882), ss. 50, 58, 60, 88, 98.

Where the material portion of a document, dated 20th March 1894, described as *swadina tanaka meddatu sharatu pattiram* (possessory mortgage-deed containing a condition for a period fixed) ran as follows:—"Within these limits a house site together with a thatched house thereon we have mortgaged, that is, we have kept it as possessory mortgage and have received Rs. 10 from you. So having paid the interest pertaining to these ten rupees within the end of a year from the said date we shall take possession of our house and site. If we do not act according to the said condition we shall quit the land and house as if this is a sale."

Held, in a suit for redemption brought 17 years after the term had expired, that the document was an anomalous mortgage falling within the provisions of section 58 of the Transfer of Property Act and, therefore, the parties must be strictly bound by the

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terms of their contract and neither the conditions of section 60 as to survival of the rights of redemption nor the English principles of equity could be applied. [p. 571, col. 1; p. 573, cols. 1 & 2.]

Usuman Khan v. Nagalla Dasanna, 16 Ind. Cas. 694; 37 M. 545; 12 M. L. T. 330; 23 M. L. J. 360; (1912) M. W. N. 995; *Thumbusawmy Moodelly v. Hossain Rowthen*, 1 M. 1; 2 I. A. 241; 3 Suth. P. C. J. 198; 3 Sar. P. C. J. 531; *Ramasami Sastrigal v. Samiyappanayakan*, 4 M. 179; 6 Ind. Jur. 81; *Kola Venkatanarayana v. Vuppala Ratnam*, 29 M. 531, distinguished.

Kanhayalal v. Narhar, 27 B. 297; 5 Bom. L. R. 140; *Visvalingha Pillai v. Palaniappa Chetti*, 21 M. 1; *Samuel v. Jarrah Timber and Wood Paving Corporation*, (1904) A. C. 326; 90 L. T. 731; 52 W. R. 673; 11 Manson, 276; 20 T. L. R. 536; 73 L. J. Ch. 526; *Perrayya v. Venkata*, 11 M. 403; *Srinivasa Aiyangar v. Radhakrishna Pillai*, 22 Ind. Cas. 54; 14 M. L. T. 547; (1914) M. W. N. 81; 26 M. L. J. 47; 38 M. 667; *Neelakandhan v. Tirunilai Ananthakrishna Ayyar*, 30 M. 61 at p. 66; 16 M. L. J. 462; 1 M. L. T. 426; *Bapuji Appaji v. Senavaraji Marwadi*, 2 B. 231 at p. 234, referred to.

Pattabhiramier v. Vencatarow Naicken, 13 M. 1. A. 560; 15 W. R. (P. C.) 55; 7 B. L. R. 136; 2 Suth. P. C. J. 410; 2 Sar. P. C. J. 623; 20 F. R. 660, *Ramayya v. Gurawa*, 14 M. 232, applied.

Second appeal against the decree of the District Court of Kistna at Masulipatam, in Appeal Suit No. 109 of 1913, preferred against that of the Court of the District Munsif of Bezwada, in Original Suit No. 210 of 1912.

Mr. P. Nagabhushanam, for the Appellant.

Mr. V. Ramadoss, for the Respondent.

JUDGMENT.

SPENCER, J.—A vendee from the original mortgagors brought this suit for redemption. The suit document is termed '*swadina tanaka meddatu sharatu pattiram*,' which may be translated as a possessory mortgage-deed containing a condition for a period fixed. It recites that the mortgagors have received Rs. 10 and have mortgaged their house site with a thatched house standing thereon, that they undertake to pay the principal and interest of these Rs. 10 within a year and take back possession of their house and site, and that, if they do not act according to these conditions, they will surrender the house and land treating the transaction as a sale.

This suit for redemption was brought seventeen years after the term expired.

The District Munsif dismissed the suit on the ground that the 3rd defendant had had adverse possession for over 12 years, following

Usuman Khan v. Nagalla Dasanna (1). The facts of that case were somewhat different. The parties agreed to treat the possession of the mortgagee as the possession of a full owner after possession had been enjoyed for eight years under the mortgage, and nine years after the execution of the deed they showed by their actions that they wished to act upon that agreement. It is, of course, always open to a mortgagor and a mortgagee to enter upon a fresh transaction independent of the mortgage extinguishing the mortgage and passing the property to the mortgagee as a purchaser. See *Kanhayalal v. Narhar* (2). But here we are concerned only with the terms of the document. The District Judge has treated it as an anomalous mortgage, in which case under section 98 of the Transfer of Property Act the rights and liabilities of the parties have to be determined strictly by their contract. The appellant's Vakil maintains that it is a usufructuary mortgage or a combination of a usufructuary and a simple mortgage with a clog on the equity of redemption, and he quotes *Srinivasa Aiyangar v. Radhakrishna Pillai* (3) in support of his argument.

I am of opinion that the District Judge was right. Simple mortgages, mortgages by conditional sale and usufructuary mortgages are defined in section 58 of the Transfer of Property Act. This cannot be treated as a simple mortgage as there is delivery of the property to the mortgagee, as there is no personal covenant of the mortgagor to pay, and as there is no provision that the mortgagee may sell the property and apply the proceeds in payment of the mortgage-money. Nor is it a mortgage by conditional sale as there is no ostensible sale; nor is it a usufructuary mortgage as there is no condition that the mortgagee should receive the rents and profits and appropriate them in lieu of interest. In fact, the document does not provide any rate of interest. Moreover, the possession of the mortgagee is not to continue until payment of the mortgage-money, but for a fixed period of one year after which the transaction is to become a sale. In *Visvalingha Pillai v. Palaniappa Chetti* (4) a mortgage for a fixed

(1) 16 Ind. Cas. 694; 37 M. 545; 12 M. L. T. 330; 23 M. L. J. 360; (1912) M. W. N. 995.

(2) 27 B. 297; 5 Bom. L. R. 140.

(3) 22 Ind. Cas. 54; 26 M. L. J. 47; 14 M. L. T. 547; (1914) M. W. N. 81; 38 M. 667.

(4) 21 M. 1.

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period was treated as an anomalous mortgage.

It is argued that, if the document be treated as a combination of two forms of mortgage, such, for instance, as a simple mortgage and a usufructuary mortgage combined, all the distinguishing features, such as possession by the mortgagee, necessarily cannot be retained; but at least, we may expect to find such features present as are not contradictory to the features of the other kind of mortgage with which it is combined. But that is not the case here. Taking the document to be an anomalous mortgage the parties must, by the provisions of section 98, be strictly bound by the terms of their contract, and neither the conditions of section 60 as to the survival of the rights of redemption nor the English principles of equity can be applied. [Vide *Gopalan Nair v. Kunhan Menon* (5).]

A number of other decisions have been cited, in which by applying the principles of English equity the right of redemption has been held to subsist even after the document declares it to have ceased. Such are the decisions in *Thumbusamy Moodelly v. Hossain Rowthen* (6), *Ramasami Sastrigal v. Samiyappanayakan* (7) and *Kola Venkatanarayana v. Vuppala Ratnam* (8), in which the document was described as '*meddatu krayam*' and contained terms similar to those in the documents before us. These decisions relate to documents executed before the year 1882, when the Transfer of Property Act was introduced and settled the law on the subject of mortgages. Between 1858 and 1882 the Courts of this Presidency and of Bombay applied doctrines which the English Courts of Equity applied to mortgages in England; but in dealing with documents executed since 1882 the Courts are bound to apply the provisions of the Transfer of Property Act. [See *Neelakandhan v. Tirunilai Ananthakrishna Ayyar* (9) and *Ramayya v. Gururua* (10).]

(5) 30 M. 300 at p. 305; 17 M. L. J. 189; 2 M. L. T. 161.

(6) 1 M. 1; 2 I. A. 241; 3 Suth. P. C. J. 198; 3 Sar P. C. J. 531.

(7) 4 M. 179; 6 Ind. Jur. 81.

(8) 29 M. 531.

(9) 30 M. 61 at p. 66; 16 M. L. J. 462; 1 M. L. T. 426.

(10) 14 M. 232.

The second appeal must be dismissed with costs.

KUMARASWAMI SASTRI, J.—The plaintiff is the appellant. He sued to redeem a mortgage dated 20th March 1894. The material portion of the document runs as follows: "Within these limits a house site together with a thatched house thereon we have mortgaged, that is, we have kept it as a possessory mortgage and have received Rs. 10 (ten rupees) from you. So having paid the principal and interest pertaining to these ten rupees within the end of a year from the said date we shall take possession of our house and site. If we do not act according to the said condition we shall quit the land and house as if this is a sale." The deed purports to be a *meddatu sharatu tanaka*.

Both the lower Courts dismissed the suit on the ground that the suit was barred, as the mortgagee became the owner and was in possession as owner of the property from 1895 and that there was consequently no mortgage to redeem. It is argued by Mr. Nagabhushanam that the rule of law, "Once a mortgage always a mortgage", applied to the present case and that it was not competent to the parties to contract themselves out of the rule by a stipulation which is invalid as a clog on the equity of redemption.

Reference has been made to section 60 of the Transfer of Property Act and to *Samuel v. Jarrah Timber and Wood-Paving Corporation* (11), *Perayya v. Venkata* (12), *Ramasami Sastrigal v. Samiyappanayakan* (7), *Kola Venkatanarayana v. Vuppala Ratnam* (8), *Srinivasa Aiyangar v. Radhakrishna Pillai* (3), *Neelakandhan v. Tirunilai Ananthakrishna Ayyar* (9), *Bapuji Appaji v. Senavaraji Ma wadi* (13).

Whatever doubts may exist, when the position of mortgagee was converted into that of a purchaser by a distinct subsequent contract between the parties, the decisions referred to above show that a clause covenanting for an absolute title in default of redemption within the stipulated period in a deed of mortgage falling within any of the kinds of mortgages defined in section 58 of the Transfer of Pro-

(11) (1904) A. C. 323; 90 L. T. 731; 52 W. R. 673; 11 Manson, 276; 20 T. L. R. 536; 73 L. J. Ch. 526.

(12) 11 M. 403.

(13) 2 B. 231 at p. 234.

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erty Act, a combination thereof referred to in section 98 is governed by section 60 of the Transfer of Property Act, is invalid and does not prevent the mortgagee from redeeming. The following observations of Justices Muttusami Iyer and Shephard in *Perayya v. Venkata* (12) are clear and in point: "According to this argument the stipulation in the mortgage instrument, that if the money is not paid within the date fixed, the instrument shall itself be considered as an absolute sale-deed, coupled with the fact of failure to pay within the time fixed, must be deemed to be an act of the parties extinguishing the right of redemption. In our judgment this is not a tenable position, and the act of parties, a phrase used here and elsewhere in the Act in contradiction to 'operation of law', must denote a release or other such transaction standing apart from the mortgage transaction under which the right of redemption comes into existence. There is no extinguishment of the right by act of parties when, by virtue of a stipulation contained in the very contract under which the right is created, that right ceases to exist."

Reference has been made by Mr. Ramadoss for the respondent to *Usuman Khan v. Nagalla Dasanna* (1) first reported in (1912) M. W. N. 995 and referred to by the lower Appellate Court and it is argued that possession by the mortgagee for 12 years after the date referred to in the deed of mortgage confers on him title as purchaser. It appears from the facts reported that there was a separate release-deed for a fresh consideration. Their Lordships Sundara Aiyar and Sadasiva Aiyar were of opinion that though the release-deed owing to want of registration would not confer immediate ownership, yet it operates to change the character of possession of mortgagee into possession as owner. There is nothing in the judgment to indicate that their Lordships were overruling the decision of *Perayya v. Venkata* (12) or laying down the rule that a recital in the mortgage-deed itself would alter the nature of the possession.

I am of opinion that if the mortgage in question can be brought under any of the clauses defined in section 58 of the Transfer of Property Act or can be said to be a combination referred to in section 98 of the Transfer of Property Act, the clause in the deed of mortgage to the effect that it shall operate as

a sale, is invalid as being a clog on the equity of redemption and that the plaintiff's right to redeem is not affected.

The next question is whether the mortgage in question can fall under any of the above clauses.

It has been argued by Mr. Nagabushanam for the appellant that the mortgage is one by conditional sale or at least a combination of a simple and a usufructuary mortgage and reference has been made to *Kola Venkatanarayana v. Vuppala Ratnam* (8) and to *Srinivasa Aiyangar v. Radhakrishna Pillai* (3). *Meddatu krayam* has been defined by Wilson in his Glossary as "land mortgaged with the option to the lender to consider it as his property if the mortgage is not redeemed within a stipulated period," and the words "*meddatu sharatu tanaka*" in the suit document mean the same thing. In *Kola Venkatanarayana v. Vuppala Ratnam* (8) above referred to, the terms of the document were similar to those of the suit bond. Their Lordships the Chief Justice and Mr. Justice Benson held that there was a mortgage by conditional sale. Though the document was executed before the Transfer of Property Act came into force, their Lordships were inclined to the view that the instrument in question, which provided for the payment of the sum due within a fixed date and in default constituted the mortgagee owner, fell within the definition of a mortgage by conditional sale in section 58 of the Transfer of Property Act. If the definition given in section 58 is strictly applied, it is doubtful whether a transaction which at its inception is a deed of mortgage with possession and which is to ripen into a sale on the happening of a certain contingency, can be said to be a mortgage where the mortgagor ostensibly sells the property with a covenant for redemption or reconveyance if the mortgage-money is paid. In *Srinivasa Aiyangar v. Radhakrishna Pillai* (3), Sadasiva Aiyar, J., was of opinion that such a mortgage was not a mortgage by conditional sale but "a mortgage with a clause for providing for future conditional sale". Though the 29 Madras case was referred to during the course of the argument, it has not been referred to and distinguished. Spencer, J., was not disposed to place a strict interpretation on section 58, clause (c), and

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refers to cases where mortgages like those in question are described as mortgages by conditional sale.

All the cases where mortgages like the present were treated as mortgages by conditional sale were cases of mortgages created before the passing of the Transfer of Property Act. I agree with Sadasiva Aiyar, J., in thinking that a mortgage like the present one is not a mortgage by conditional sale. It also does not fall within the definition of either a simple or a usufructuary mortgage. It is not a simple mortgage as possession has been given and there is no covenant to pay or a right given to the mortgagee to bring the property to sale; nor is it a usufructuary mortgagor as there is no provision for the appropriation of the rents and profits towards the principal or interest due and possession as mortgagee is to be only for a year. I do not think that the mortgage can be said to be a combination when the *essential* ingredient of each of the classes is wanting, at least when such elements do not contradict each other and so can find place in the document.

I am of opinion that the mortgage in question is an anomalous mortgage falling within the provisions of section 98 of the Transfer of Property Act. It has been argued that the principles of equity, which form the basis of a series of decisions between 1858 and the date of the passing of the Transfer of Property Act whereby any agreement entered into at the time of the mortgage having the effect of clogging the right of redemption was declared inoperative, should be applied to anomalous mortgages, even though section 98 of the Act enacts that in cases of anomalous mortgages the rights and liabilities of the parties shall be determined by their contract as evidenced by the mortgage-deed. It is contended that the Court ought not to enforce illegal or invalid stipulations.

I do not see any sound reason for departing from the language of section 98 and importing an exception not mentioned therein. As pointed out by their Lordships of the Privy Council in *Pattabhiramier v. Venkatarow Naicken* (14), mortgages like the (14) 13 M. L. A. 560; 15 W. R. P. C. 35; 7 B. L. R. 136; 2 Suth. P. C. J. 410; 2 Sar. P. C. J. 623; 20 E. R. 660.

mortgage in question were long common in India and were recognized and enforced according to their letter both by Hindu and Muhammadan Jurists and that what is known in English Law as the equity of redemption was unknown to the ancient law of India. In *Thunbuswamy Moodelly v. Hossain Rowthen* (6) their Lordships of the Privy Council observe that the decision in *Pattabhiramier v. Venkatarow Naicken* (14) was based on sound principles and that the course of decisions which imported into the consideration of Hindu mortgages principles founded on the maxim, once a mortgage always a mortgage, of the English Court of Equity, were radically unsound, and involved very mischievous consequences.

It is thus clear that there is nothing opposed to the Hindu Law or to the general principles of equity or good conscience in giving effect to the terms of the contract, and it seems to me that the Legislature in enacting section 98 intended to take such mortgages as did not fall within the classes specified therein out of the rule which prevents clogs on the equity of redemption, a rule which their Lordships of the Privy Council thought was erroneously imported into Hindu mortgages. *Neelakandhan v. Tirumilai Ananthakrishna Ayyar* (9), *Ramayya v. Guruva* (10) support the view that the terms of the contract ought to be strictly enforced in cases of anomalous mortgages.

I would dismiss the appeal with costs.

Appeal dismissed.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL FROM ORDER NO. 72
OF 1915.

June 23, 1915.

Present:—Mr. Justice Chamier and
Mr. Justice Piggott.

JIA BIBI—APPLICANT—APPELLANT

versus

ILAHI BAKSH AND OTHERS—OPPOSITE

PARTY—RESPONDENTS.

Limitation Act (IX of 908), Sec. I, Art. 164—Decree before the Act—Execution—Application to set aside ex parte decree—Law of limitation applicable.

Where an *ex parte* decree was passed when the Limitation Act of 1877 was in force but an application

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to execute it was made after Act IX of 1908 came into force:

Held, that an application to set aside the decree by the judgment-debtor would be governed by Act IX of 1908.

First appeal from an order of the Subordinate Judge of Azamgarh.

Mr. Peary Lal Banerji, for the Appellant.

Dr. S. M. Sulaiman, for the Respondent.

JUDGMENT.—This is an appeal against an order of the Subordinate Judge of Azamgarh, rejecting an application for setting aside a decree passed *ex parte* against the appellant in 1904. Her case was and is that she did not come to know of the decree in question until a proclamation of sale was brought to the village in December 1912, that is less than 30 days before she presented her application. The evidence shows that the plaintiffs in the suit made repeated efforts to serve her personally with notice of the suit and of subsequent proceedings. Substituted service was effected and declared to be sufficient by the Court. She has herself sworn that she did not come to know of the decree against her until a few days before she made her application. Evidence has been produced on behalf of the respondents, which has been accepted by the Court below, that she was aware of the suit at the time when it was pending and was anxious to enter into a compromise. It is almost inconceivable that she should have remained ignorant of this suit, as she says, for eight or nine years. She says that she has been quarrelling with her son-in-law for the last twenty years. She must have other relatives who must have come to know of the suit, and we think there can be little doubt that she knew of the suit while it was pending. We accept the evidence which has been produced by the respondents to prove that she was aware of the suit. It is contended that the application should be governed in the matter of limitation, not by Article 164 of the Limitation Act which was in force at the time when the appellant made her application but by Article 164 of the Limitation Act of 1877, which provided that an application, to set aside a judgment *ex parte* might be made within 30 days

from the date of executing any process for enforcing the judgment. It is conceded that no such process was executed before the passing of the new Limitation Act. It has been repeatedly held that in a case of this kind the law of limitation to be applied is the law existing at the time when the application is made. It is sufficient to refer to the decision of the Bombay High Court in *Hope Mills Ltd. v. Vithaldas Pranjivandas* (1). There can be no doubt that the application is governed by the present Limitation Act and is barred thereby and was rightly dismissed both on the merits and also on the ground of limitation. This appeal fails and is dismissed with costs.

Appeal dismissed.

(1) 7 Ind. Cas. 982; 12 Bom. L. R. 730.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 879 OF 1913.

August 3, 1915.

Present:—Mr. Justice Seshagiri Aiyar and Mr. Justice Napier.

PADMA KRISHNA CHETTIAR *alias*

KRISTNA IYER—DEFENDANT—

PETITIONER

versus

NAGAMANI AMMAL—PLAINTIFF—

RESPONDENT.

Promissory note executed and signed by guardian in his individual capacity—Money spent for purposes binding on minor—Minor's estate, if liable—Negotiable Instruments Act (XXVI of 1881), ss. 28, 30 Bills of Exchange Act, 1882, (45 & 46 Vict. c. 61), s. 26.

Where the mother of the defendant borrowed from the plaintiff certain moneys for purposes binding on the defendant and executed a promissory note therefor but did not sign the same as guardian and the defendant was sued on the note:

Held, that the estate of the defendant was liable for the debt. [p. 575, col. 1.]

The Negotiable Instruments Act contains no provision as to promissory notes signed by guardians. Sections 28 and 30 of the Act do not cover all cases of representatives and cannot, therefore, be applied to guardians. [p. 575, col. 1.]

The case of one person signing for another who is *sui juris* is not in *pari passu* with that of a person executing a document on behalf of another who is incapable of contracting. [p. 575, col. 2.]

Where the validity of a transaction has to be looked at from two standpoints, each of them should be regarded as supplementing the other. The doctrine of Hindu Law is not to be ignored because a

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contract coming under its purview, is also regulated by another provision of law. [p. 575, col. 2.]

Hunoomanpersaud Panday v. Musammat Babooee Munraj Koonwecree, 6 M. L. A. 393; 18 W. R. 81_n; Sevestre 253_n; 2 Suth. P. C. J. 29; 1 Sar. P. C. J. 552; 19 E. R. 147; *Subba Narayana Vathiyar v. Ramaswami Iyer*, 30 M. 88; 1 M. L. T. 377 (F. B.); 16 M. L. J. 508; *Krishna Ayyar v. Krishnasami Ayyar*, 23 M. 597; *Subramania Iyer v. Arumuga Chetty*, 26 M. 330; *Sobhanadri Appa Rau v. Sriramulu*, 17 M. 221, referred to.

Petition, under section 25 of Act IX of 1887, praying the High Court to revise the order of the Court of the Subordinate Judge of Kumbakonam in Small Cause Suit No. 692 of 1913.

Mr. K. Bhashyan Aiyangar, for the Petitioner.

Mr. T. R. Venkatrama Sastri, V. S. Govindachariar and V. S. Kallabhiran Aiyangar, for the Respondent.

JUDGMENT.—The finding in this case is that the mother of the defendant as his guardian borrowed from the plaintiff the amount sued on, and that it was spent for purposes binding on him. The question of law argued very strenuously by Mr. Bhashyam Iyengar is that as the promissory note executed by the mother was not signed by her as guardian, she alone is liable on the note and that the decree against the defendant is wrong. He relies on the language of section 28 of the Negotiable Instruments Act and contends that the principle which renders the agent personally liable on a contract entered into on behalf of the principal applies to the case of guardians also. The short answer to this contention is that, as the Act contains no provision relating to notes signed by guardians whereas it specifically legislates for the case of agents in section 28 and of legal representatives in section 30, Courts should not by analogy extend these provisions to a deliberately unprovided case. The learned Vakil drew our attention to section 26 of the Bills of Exchange Act as enunciating the principle applicable by law merchant to all cases of representation. Apart from the question whether section 26 was intended to apply to documents executed by guardians, it is evident from the omission of the general section and the inclusion of specific provisions like those to which we have already referred, that the Indian Legislature has not thought fit to lay down

any general rules applicable to all cases of representation. The case of one person signing for another who is *sui juris* is not in *pari passu* with that of a person executing a document on behalf of another who is incapable of contracting.

The decisions in *Koneti Naicker v. Jutu Gopala Aiyar* (1), *Govindan Nair v. Nannu Menon* (2) and *Yinugantti China Venkatarayanim v. Katagiri Venkata Narasimharayanim* (3) construe the provisions relating to agents. They can afford no assistance to us in deciding the present case. *Ramaswami Mudaliar v. Muthuswami Ayyar* (4) is not a pronouncement on a question of law. The learned Judges were not prepared to accept the finding of the Subordinate Judge that the debt was contracted by the mother in her capacity as guardian.

As we are not hampered by any legislative provision regarding documents executed on behalf of a minor, we must be guided by the principles of Hindu Law in deciding such case. The true test regarding the binding nature of a guardian's contract was laid down in the well-known case of *Hunoomanpersaud Panday v. Musammat Babooee Munraj Koonwecree* (5). Even where the relationship of principal and agent was found to exist in transactions entered into by managers of Hindu families, it was decided by a Full Bench of this Court that section 28 of the Negotiable Instruments Act did not affect the liability of the junior members. The true principle is that where the validity of a transaction has to be looked at from two standpoints, each of them should be regarded as supplementing the other. The doctrine of Hindu Law is not to be ignored because a contract coming under its purview is also regulated by another provision of law. The decision of *Subba Narayana Vathiyar v. Ramaswami Iyer* (6) does not differ from the ruling in *Krishna Ayyar v. Krishnasami Ayyar* (7). On the other hand the decision of *Subramania Iyer v. Arumuga Chetty* (8) is directly in point.

(1) 21 Ind. Cas. 417; 14 M. L. T. 414; 25 M. L. J. 425; 38 M. 482.

(2) 26 Ind. Cas. 750; 27 M. L. J. 595; (1914) M. W. N. 782.

(3) 21 Ind. Cas. 650; 14 M. L. T. 502; (1913) M. W. N. 1005.

(4) 30 Ind. Cas. 481.

(5) 6 M. L. A. 393; 78 W. R. 81_n; Sevestre 253_n; 2 Suth. P. C. J. 29; 1 Sar. P. C. J. 552; 19 E. R. 147.

(6) 30 M. 88; 1 M. L. T. 377; F. B.; 16 M. L. J. 508.

(7) 23 M. 597.

(8) 26 M. 330.

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Mr. Bhashyam Iyengar sought to distinguish this case on the ground that the claim in it was for the debt evidenced by the note and not on the note itself. We do not think this distinction has any substance. Moreover paragraph 4 of the plaint in this case refers to the binding character of the debt; Vide *Sobhanadri Appa Rau v. Sriramulu* (9). We must, therefore, hold that the estate of the minor is liable for the debt.

We think the decree of the Court below must be modified, as there can be no personal decree against the defendant. *Sanka Krishnamurthi v. Bank of Burma Ltd.* (10).

Subject to this modification the civil revision petition will be dismissed with costs.

Petition dismissed.

(9) 17 M. 221.

(10) 11 Ind. Cas. 79; 35 M. 692; (1911) 1 M. W. N. 355.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 888 OF 1914.

July 1, 1915.

Present:—Sir Henry Richards, Kt., Chief Justice, and Mr. Justice Piggott.

RAJMANGAL MISIR AND OTHERS—

PLAINTIFFS—APPELLANTS

versus

MATHURA DUBAIN AND ANOTHER—

DEFENDANTS—RESPONDENTS.

Evidence Act (I of 1872), ss. 33, 70—Statement made by witness in ex parte proceedings, whether admissible in evidence in subsequent proceeding of the case—Admission made before Registering Officer, if proves execution.

A witness was examined in a suit on a bond to prove its execution. The suit was decreed *ex parte*. At the instance of the defendant the decree was set aside and the case was restored to its original number. In the meantime the witness died. His statement was sought to be relied on to prove execution:

Held, that the fact of the service of process before the passing of the *ex parte* decree, not having been proved, the statement of the witness as to the execution of the document was not admissible in evidence under section 33 of the Evidence Act. [p. 577, col. 1.]

The "admission" referred to in section 70 of the Evidence Act is an admission in the course of the very proceedings, for example, made in the pleadings or by a party himself in his examination. The admission of the execution of a document by the executant before the Sub-Registrar contained

in the certificate endorsed on the document is not sufficient proof of its execution when a suit is brought on it. [p. 577, col. 2.]

Second appeal from a decree of the Additional Judge of Gorakhpur.

Mr. Kailas Nath Katju (for Mr. Iswar Saran), for the Respondents.

JUDGMENT.—This appeal arises out of a suit on foot of a mortgage, dated the 3rd of February 1888. The original amount secured was Rs. 251. The amount claimed for principal and interest is Rs. 1,384. There is no allegation of any payment upon foot of principal or interest from the time of the execution of the deed, and the suit was not instituted until the 10th of August 1909, that is to say, in or about twenty-one years after the alleged execution of the mortgage. Defendant No. 1 is the widow of the alleged original mortgagor, one Bandhu Dube. Defendant No. 2 is alleged to be a subsequent transferee at an auction-sale held on foot of another mortgage alleged to be pious to the mortgage in suit. An *ex parte* decree was obtained on the 30th of November 1909. This *ex parte* decree was set aside on the 21st of January 1913 on the applications of *Musammil Mathura*, the plaintiff No. 1, who satisfied the Court that she had not been served with the process. When the Court was granting the decree *ex parte*, a witness of the name of Baldeo was produced who stated that he was the sole surviving attesting witness to the mortgage and that he had seen the bond executed by Bandhu. He identified the signature of Bandhu and his own. The *ex parte* decree having been set aside, as already stated, the plaintiff was called upon to prove his case as in a contested suit. Meanwhile Baldeo had died. A witness was produced who attempted to prove that the signature of Baldeo was in the hand-writing of the latter. He was unable to say that he had ever seen Baldeo write or that he had ever received documents purporting to have been written by Baldeo in answer to documents written by him or that documents written by Baldeo had in the ordinary course of business been habitually submitted to him. In other words, he was unable to say that he was "acquainted" with the hand-writing of Baldeo. Under these circumstances the Court of first instance held that the plaintiffs

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had failed to prove the mortgage sued upon and dismissed the suit. The lower Appellate Court confirmed the decree of the Court of first instance.

In second appeal to this Court it has been contended that the evidence of Baldeo given at the time the *ex parte* decree was granted should have been admitted as evidence of the due execution of the document. Section 33 of the Evidence Act provides, amongst other things, that the evidence given by a witness in a judicial proceeding is relevant for the purpose of proving in a subsequent judicial proceeding, or at a later stage of the same judicial proceeding, the truth of the facts which it states when the witness is dead. It is under this section that the appellants contend that the evidence of Baldeo should have been admitted by the Courts below. There is, however, a proviso to the section that before the evidence of a deceased witness can be admitted, it must be shown that the adverse party in the first proceedings had the opportunity of cross-examination. So far as *Musammatt Mathura* is concerned it is clear that she had no such opportunity, it having been found by the Court that she was never served with the process prior to the granting of the *ex parte* decree. It is contended that as defendant No. 2 did not apply to have the *ex parte* decree set aside, it must be taken that he had an opportunity of cross-examining the witness. The affidavit of the process-server, made in the absence of defendant No. 2 when the suit was first instituted, is relied on. In our opinion this is not sufficient. If it was intended to use the statement of Baldeo as evidence against defendant No. 2, it would at least have been necessary to prove by the oral evidence of the witness who had served him with the process, or the fact of service. It was not sufficient to refer to the ordinary affidavit of service made by the process-server. It is unnecessary to decide whether if the process-server had been produced, his evidence would have been sufficient to entitle the plaintiffs to put the evidence of Baldeo, but it seems to us clear that without the evidence of the process-server the evidence of Baldeo was not admissible against either of the defendants. There

was no evidence of the execution or due attestation of the document sued upon.

It was next contended that the certificate of the Registrar endorsed upon the bond proves an admission by Bandhu that he executed the document, and reliance is placed upon section 70 of the Evidence Act. This section provides that the admission of a party to an attested document of its execution by himself shall be sufficient proof of its execution as against him, though it be a document required by law to be attested. It seems to us that the admission referred to in this section is an admission in the course of the very proceedings, for example, made in the pleadings or by a party himself in his examination. The contention is that the certificate contains an admission by Bandhu and that under the provisions of section 60, clause (2), the certificate of the Registrar is sufficient proof that Bandhu made the admission. In our opinion this contention goes much too far. The certificate endorsed by the Registering Officer upon a document which requires registration is evidence that all the provisions of the Registration Act have been duly performed.

It may be said that the plaintiffs have been somewhat unfortunate. They have themselves to blame in the first place, because they waited so long before instituting their present suit. But for the period of grace allowed by the recent Limitation Act the suit would have been barred by time. If the finding of the Court below was correct that the defendants or at least one of them was not duly served, this also was the fault of the plaintiffs.

The appeal fails and is dismissed with costs.

Appeal dismissed.

SARABJIT PRATAP BAHADUR SAHU v. BHAGWAT KOERI.

CALCUTTA HIGH COURT.

FIRST CIVIL APPEAL NO. 273 OF 1912.

July 20, 1915.

Present:—Mr. Justice Chitty and

Mr. Justice Walmsley.

Koer SARABJIT PRATAP BAHADUR

SAHI—PLAINTIFF—APPELLANT

versus

Musammam BHAGWAT KOERI AND OTHERS

—DEFENDANTS—RESPONDENTS.

Hindu Law—Woman, estate of—Possession, suit for recovery of, by reversioner—Alienation, effect of—Reversioner, relinquishment in favour of—Limitation Act (IX of 1908), Sch. I, Art. 120—Declaration of right—Period from which right to sue accrues—Waste, what constitutes—Reversioner, when.

The estate of a Hindu widow or daughter may be determined in various ways but an alienation in favour of a third party clearly does not have the effect of accelerating the estate and entitling the next reversioner to immediate possession. [p. 580, col. 1.]

Where there has been no relinquishment in favour of a reversioner, nor is any such relinquishment alleged which would accelerate the estate in his favour he cannot successfully maintain a suit for immediate possession of the estates. [p. 580, col. 1.]

A claim to a declaration of right is governed by Article 120 of the first Schedule to the Limitation Act and the time begins to run from when the right to sue accrues. [p. 580, col. 2.]

A relinquishment by daughters of their right of inheritance to their father's estate does not amount to waste of the original estate to justify the Court in considering whether the estate should be taken out of their hands. A Hindu lady, in such a position has an absolute right and full power to alienate the estate for the period of her enjoyment, to an outsider. That will not give a reversioner the right to come in and plead waste and insist on the estate being brought into possession by the Court. [p. 581, col. 1.]

Appeal against the decree of the Subordinate Judge of Saran, dated the 24th of July 1912.

Babu Umakali Mookerjee, Dr. Sarat Chandra Basak, Babus Chandra Sekhar Prosad Singh and Rishendra Nath Sircar, for the Appellant.

Sir Rash Behari Ghose, Babu Mahendra Nath Roy, M. Muhammad Mustafa Khan, Babus Rajendra Prasad, Harnarayan Prasad and Sib Chandra Palit, for the Respondents.

JUDGMENT.—This is an appeal by the plaintiff, Sarabjit Pratap Bahadur Sahi, from a decree of the Subordinate Judge of Saran

dismissing his suit. The plaintiff sued to recover possession of certain properties as heir of his maternal grandfather, Sri Kishun Singh. The genealogical table attached to the plaint shows the relationship between the parties. Sri Kishun Singh died on 29th July 1872 leaving a widow, Kamalbas Koeri, and two daughters, Ram Kawal Koeri, defendant No. 3, and Raj Kishori Koeri, defendant No. 4. The plaintiff is one of the sons of Ram Kawal Koeri. His elder brother, Raja Shatrugit Protap Bahadur Sahi, died on 8th October 1898. Kamalbas Koeri, the grandmother of the plaintiff, died on 9th September 1899. Raj Kishori Koeri had one son, Ram Narayan Singh, who died on 12th December 1910. The plaintiff's suit was filed on 2nd September 1911. During the pendency of the suit, namely, on 25th January 1913, the plaintiff's mother, defendant No. 3, died. The parties defendant are No. 1 Bhagwat Koeri, the widow of Mahabir Prosad Singh, No. 2 Babu Ragheswar Inder Sahi, minor son of Babu Harihar Inder Sahi, and defendants Nos. 3 and 4 mother and aunt of the plaintiff.

The case was argued and decided in the Court of first instance on what may be called a "demurrer," that is to say, the learned Subordinate Judge, assuming all the facts alleged by the plaintiff to be correct, decided that the plaintiff's present suit could not succeed. The defendants had put in written statements traversing many of the allegations of fact made in the plaint. It will be unnecessary to go into these questions of fact if the learned Subordinate Judge's decision is correct. The case has been argued in this Court on the same footing.

The claim of the plaintiff as shown by the prayer of his plaint was as follows: (a) That it be declared that Babu Sri Kishun Singh died while separate from his brothers, Bachu Singh and Jugal Kishore Singh, and that the plaintiff is the heir of the said Babu Sri Kishun Singh. (b) That it be declared that, after the death of Kamalbas Koeri, plaintiff as heir of Babu Sri Kishun Singh is entitled to possession of the disputed properties which appertain to his estate on the ground stated in the plaint, and the possession of the defendants as derived from Babu Bachu Singh and Babu

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Mahabir Prosad Singh who had no title thereto be declared wrongful and without title. (c) That it be declared that the alienations mentioned in paragraphs 38, 39 and 40 of this plaint are invalid in so far as they relate to the estate of Babu Sri Kishun Singh and are of no binding effect on the plaintiff. (d) That a decree for recovery of possession of the disputed properties mentioned in schedule IVA by ousting the defendants be passed in favour of the plaintiff and the plaintiff be put in possession thereof. (e) That in case the Court be pleased to hold that the plaintiff is not entitled to immediate possession of the properties in suit as absolute owner thereof, the same may be reduced into proper possession and the plaintiff be placed in charge of the same as manager during the life-times of the defendants Nos. 3 and 4 and a declaration of plaintiff's right to possession as an absolute owner from such date as under the circumstances of the case the Court thinks proper be made in favour of the plaintiff. (f) That leave may be granted to the plaintiff to join the claim for Rs. 45,000 with the claim for the rest of the estate of Babu Sri Kishun Singh and a decree for the said Rs. 45,000, representing the price of *kothis* Bunwar and Basoila mentioned in paragraph 26 of the plaint appertaining to the estate of Babu Sri Kishun Singh and appropriated by the husband of the defendant No. 1, together with interest as detailed in schedule VI be passed against the defendant No. 1 to be realised from the estate of the defendant No. 1's husband. (g) That a decree for Rs. 1,05,494-5-3, being the mesne profits of the disputed properties for three years prior to the institution of the suit as detailed in schedule VII, and also for the future mesne profits from the date of suit till delivery of possession be passed in favour of the plaintiff against defendants Nos. 1 and 2. (h) That the costs of the suit with interest be awarded to the plaintiff. (i) That such other appropriate reliefs be granted to the plaintiff to which he, under the circumstances of the case, is entitled to obtain in law and equity.

That is in effect a suit for possession on declaration of the plaintiff's title with an additional prayer that, if the plaintiff be

not entitled to immediate possession of the property in suit as the absolute owner thereof, he (the plaintiff) should be given possession as manager during the life-time of defendants Nos. 3 and 4. The case of the plaintiff resolves itself into three claims, *first*, a claim for immediate possession; *secondly*, if he cannot get that, a claim for declaratory relief; and *thirdly*, a claim to be put in possession as manager during the life-time of defendants Nos. 3 and 4.

Now, it is not disputed by the appellant that, under ordinary circumstances, his maternal grandfather's estate would not fall into his possession until the deaths, *first*, of his grandmother, Kamalbas Koeri, and *secondly*, of the daughters of Sri Kishun, namely, defendants Nos. 3 and 4. The plaintiff's suit was brought on 2nd September 1911, about a week before the twelve years from the death of Kamalbas Koeri expired. He was thus, so far as that lady is concerned, just within time in his suit for possession. But he could not hope or expect to get possession during the life-time of his mother and aunt who would take the estate before him as the daughters of Sri Kishun Singh. It would be, therefore, necessary for him to show that the estates of these ladies had expired by their deaths or in some other way. They were both alive at the date of the institution of the suit.

The plaintiff, however, alleges that by certain *ekrarnamas*, dated 9th July 1873, these ladies relinquished their estates in favour of Bachu Singh a brother of Sri Kishun Singh and father-in-law of defendant No. 1. In point of fact the plaintiff alleges, and this is not disputed, that there were three *ekrarnamas* executed on 9th July 1873, one in respect of the estate of Kamalbas Koeri, one in respect of the estate of Ram Kawal Koeri and the third in respect of the estate of Raj Kishori Koeri. The plaintiff glosses over the fact that, if the *ekrarnamas* of defendants Nos. 3 and 4 operated as a relinquishment of their estates, the *ekrarnama* of his grandmother, Kamalbas Koeri, would have the same effect. However that may be, the allegation is that the execution of those *ekrarnamas* was procured by Babu Bachu Singh with a view to create evidence of his jointness with his brother, Sri Kishun

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Singh, and to prevent these defendants from asserting a claim as heirs of their father, Sri Kishun Singh. The question whether, Sri Kishun Singh was joint with his brothers, Bachu Singh and Jugal Kishore Singh, at the time of his death is a question of fact which would arise in the suit. We may, however, assume for the purposes of the present argument that Sri Kishun was separate from his brothers. Those *ekrarnamas* were executed about a year after the death of Sri Kishun Singh. The plaintiff alleges that by those *ekrarnamas*, defendants Nos. 3 and 4 relinquished their heritable right and in consequence, accelerated the succession of the plaintiff to the estate of his maternal grandfather. Now, in point of law, this is wholly incorrect. The estate of a Hindu widow or, as in this case, of a daughter might be determined in various ways; but as these *ekrarnamas* are set out in the plaint, they clearly do not amount to more than an alienation in favour of Bachu Singh. Now an alienation in favour of a third party clearly does not have the effect of accelerating the estate and entitling the next reversioner to immediate possession. The learned Pleader for the appellant in his reply referred us to certain remarks made by the learned Judges in the case of *Debi Prosad Chowdhury v. Golap Bhagat* (1). He argued that there had been a disclaimer at the death of Sri Kishun which would put an end to the estates of these ladies. The plaintiff, however, does not allege any such disclaimer in his plaint; on the contrary, he says that these ladies, well knowing that they had the right of inheritance to their father's estate, gave it up by these *ekrarnamas* a year after their father's death in consideration of certain villages granted to them by Bachu Singh in lieu of maintenance. There has been no relinquishment in favour of the reversioner in this case; nor is any such relinquishment alleged which would accelerate the estate in favour of the plaintiff as such reversioner. It follows, therefore, that during the life-time of his mother and aunt, the plaintiff could not successfully maintain a suit for immediate possession of the properties left by his grandfather Sri, Kishun Singh. His mother died pending the

present appeal; but his aunt, the defendant No. 4, is still alive and her estate stands in the way of his immediate inheritance.

In the Court below, the learned Pleader for the plaintiff saw the difficulty in which he was placed and endeavoured on the principle, as Sir Rash Behari has put it; that "half a loaf is better than no bread," to obtain from the Court a declaration of the plaintiff's right as such reversioner in anticipation of the deaths of his mother and aunt, the defendants Nos. 3 and 4. As above stated, the suit is not, strictly speaking, brought for such a declaratory relief. Assuming, however, that it might be granted on the plaintiff's present prayer and that it would be proper to grant it, the question arises whether the claim in that respect can be said to be in time. In our opinion, it is clearly barred by limitation. The claim to such a declaration would be governed by Article 120 of the first Schedule to the Limitation Act. The time from which the period of limitation begins to run is from when the right to sue accrues. Now, these alienations or acts of the ladies which gave the plaintiff a cause of action took place as long ago as 1873. The plaintiff was then a minor; but, assuming that a certificated guardian was appointed and his minority would extend until he was 21 years of age, as the learned Subordinate Judge points out, he would have attained majority some time in 1889. Allowing three years from that date, the suit would have had to be brought by 1892. It is thus hopelessly out of time. Even if the time were to run from Kamalbas Koeri's death, the suit would be long out of time as she died in 1899 and the suit was not brought until 1911. That disposes of the second point.

As in the Court below the plaintiff fell back upon the right to a declaratory relief on failure of his claim for immediate possession, so here an attempt was made to save the plaintiff's suit by arguing that the question of his appointment as manager should be gone into. Nothing appears to have been said in the Court below with regard to this paragraph of the plaintiff's claim. It seems to have been raised here for the first time. On the allegations of the plaintiff

(1) 19 Ind. Cas. 273; 40 C. 721; 17 C. W. N. 701; 17 C. L. J. 490.

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iff as contained in paragraph 34 of his plaint, it is clear that the relinquishment by defendants Nos. 3 and 4 of their right of inheritance to their father's estate would not amount to waste of the estate of Sri Kishun Singh, which would justify the Court in considering whether the estate should be taken out of their hands. A Hindu lady in that position has an absolute right and full power to alienate the estate for the period of her enjoyment to an outsider. That will not give the reversioner the right to come in and plead waste, and insist on the estate being brought into possession by the Court. There are no allegations in the plaint which point to anything like spoliation of the estate or indicate that the estate has, in any way, suffered or will, in any way, suffer from its being held by defendant No. 1, who is said to be in possession claiming under defendants Nos. 3 and 4. There is, therefore, no possible advantage to be gained by prolonging this litigation and opening up an inquiry which, on the allegations contained in the plaint, must necessarily prove infructuous. This is not one of that class of cases referred to by the learned Pleader for the appellant in his reply in which the denial of her own and the reversioner's title by a Hindu widow may give the reversioner an immediate cause of action, because it is necessary that he should, at the earliest stage, be allowed to support that title by adducing evidence and getting an adjudication of the Court upon it. We are of opinion that the learned Subordinate Judge was right in the course that he took and in the conclusion to which he came.

It was suggested here that the case ought not to have been argued on the preliminary issue without all the issues, both of fact and of law, in the suit having been properly framed. It appears, however, that the course which was adopted was adopted by consent of both the parties and that Pleaders on both sides were taken from Calcutta before the Subordinate Judge to argue the case on these lines. There would have been no possible advantage in framing a number of issues which, in the view that the Subordinate Judge took of the case, would not have to be considered.

Agreeing, therefore, with the Court below, we dismiss the appeal with costs, two sets, to defendant No. 1 and defendant No. 4.

Appeal dismissed.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1283 OF 1914.

July 8, 1915.

Present:—Justice Sir George Knox, Kt.

PARTAP SINGH AND ANOTHER—PLAINTIFFS

—APPELLANTS

versus

DHUM SINGH AND ANOTHER—DEFENDANTS—

RESPONDENTS.

License coupled with transfer of interest—Irrevocable—Easements Act V of 1882, s 60.

A grant of a license coupled with a transfer of interest cannot be revoked. [p. 183, col. i.]

Second appeal from a decree of the District Judge of Saharanpur.

Mr. *Nihal Chand*, for the Appellants.

Mr. *S. A. Haidar*, for the Respondents.

JUDGMENT.—The plaintiffs are the appellants in this Court. They come to Court as *zemindars* of a village in Dehra Dun. They say that the defendant, Dhum Singh, is a tenant of a certain plot of land in that village that the defendant, Dhum Singh, and his son, Balbir Singh, members of a joint Hindu family, have cut down a number of *kokat* trees which stood on the land belonging to the appellants. They prayed for a decree for Rs. 50 on account of the price of trees cut down, Rs. 25 as actual and deterrent damages and for perpetual injunction restraining the defendants from interfering in any way in future with the jungle. The respondents plead that there is a custom whereby the tenants are authorized in this village to use the jungle of the *zemindars*. They say that they have all along cut wood from the said jungle for their own use and stored it. This cutting is confined to *kokat* trees which I understand to mean trees mainly used for firewood. Both the Courts have found the custom set up by the respondents not proved. Behind that finding in second appeal I cannot go. At the same time the question raised is a

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very big question and it may be doubted whether the decision about custom has been rightly arrived at, but as I said before I cannot go behind it in second appeal and I am bound by it so far as this case is concerned. Both the Courts have found it proved that the tenants in this village have been allowed by the predecessor-in-interest of the appellants to cut firewood free of charge in land belonging to the appellants, and out of this they have construed a license granted by the appellant's predecessors to the respondents to go upon the land in possession of the then *zemindars* and to cut firewood free of charge. The lower Appellate Court then went on to consider whether that license has been specifically revoked. It came to the conclusion that it had been specifically revoked when the present suit was brought. It accordingly decreed the claim for injunction but dismissed the claim for damages.

The appellants come into this Court and take the plea that after the transfer from the predecessor of the present appellants, the action of the defendants in cutting firewood was unauthorized and they are liable to pay damages found due by the first Court. I do not quite understand why they took the first plea in their memorandum of appeal, *viz.*, that under section 62 of the Easements Act the license granted by the former *zemindar* may be deemed to have been revoked when he sold his rights in the village to the plaintiffs. This plea has, however, been taken and I go on to consider it. It has been contended on the opposite side that the license in the present case is not a mere license, such as would be the case if the respondents had been granted permission merely to go upon the land of the *zemindar*. There was, the contention runs, a license coupled with a grant, license to go upon the land coupled with the grant to cut and take firewood from the land. In support of this contention I was referred to a passage in the Tagore Law Lectures of Mr. Peacock on the Law relating to Easements in British India. Reference is there made to the case of *Thomas v. Sorrell* (1). Apparently the

Court's library does not possess a copy of Vaughan, but the passage in question will also be found in the case of *Wood v. Leadbitter* (2) in which Lord Chief Justice Vaughan is reported as saying in the course of his judgment:—"A dispensation or license properly passeth no interest, nor alters or transfers property in anything, but only makes an action lawful, which without it had been unlawful. As a license to go beyond the seas, to hunt in a man's park, to come into his house, are only actions which, without license, had been unlawful. But a license to hunt in a man's park, and carry away the deer killed to his own use, to cut down a tree in a man's ground, and to carry it away the next day after to his own use, are licenses as to the acts of hunting and cutting down the tree, but as to the carrying away of the deer killed and tree cut down, they are grants." This case has been applied in *Prosonna Oommar Singha v. Ram Oommar Ghose* (3). Chief Justice Petheram in that case held that the law in this matter (this was anterior to the passing of the Indian Easements Act) "is the same in this country as it is in England, there being so far as we can see no common law in this country on the subject and no statutory law either. The law in England is clearly laid down in the case of *Wood v. Leadbitter* (2). The Courts have acted upon the law as there laid down ever since, and it has always been held to be good law and binding upon them. That case decided that the license to go upon another man's land, unless coupled with a grant, was revocable at the will of the grantor, subject to the right of the other to damages if the license were revoked contrary to the terms of any express or implied grant." I notice that in that case the very point taken in this case was also taken for the first time before the High Court.

Holding as I do that this is the law on the subject even after the passing of Act V of 1882, the case appears to me to come within section 60 of Act V of 1882. When the transfer was made, the

(2) (1845) 13 M. & W. 838; 14 L. J. Ex. 161; 9 Jur. 187; 67 R. R. 831.

(3) 16 C. 640.

(1) Vaughan, 330 at p. 351; 124 E. R. 1098.

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transferee had no higher right than his transferor. The transferor was not in a position to revoke the grant or the license, because the latter was coupled with a transfer of property and such transfer is in force. I am all the better able to hold this, because as I said in the beginning of my judgment the contrary holding would be a matter of great importance in the Dun.

The result is that the appeal is dismissed. The decree of the lower Appellate Court is set aside and the plaintiff's suit dismissed with costs in all Courts. Under the circumstances I do not think it necessary to take up the memorandum of objections. They fall and disappear with the result of the case.

Appeal dismissed.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 1544 OF 1913.

July 7, 1915.

Present:—Mr. Justice Mullick.

GOPI SUNDARI DASI—PLAINTIFF—

APPELLANT

versus

HALADHAR MAZUMDAR AND OTHERS—

DEFENDANTS—RESPONDENTS.

Bengal Tenancy Act (VIII of 1885), s. 87—Tenancy, splitting up of—Abandonment.

Where a tenancy in favour of several tenants has not been split up and even one of the original tenants still remains on the land though the others drop away, there is no abandonment within the meaning of section 87 of the Bengal Tenancy Act. [p. 584, col. 2.]

Gobind Chandra Pal v. Hamidulla Bhuiyan, 7 C. W. N. 670, distinguished.

Appeal against the decree of the Subordinate Judge, Pabna, dated the 13th of February 1913, modifying that of the Munsif, second Court, at Pabna, dated the 23rd of June 1911.

Babus Jogesh Chandra Roy and Nanda Lal Banerjee, for the Appellant.

Babus Tarakeswar Pal Chowdhury and Sasadhar Roy, for the Respondents.

JUDGMENT.—It is admitted that the *bara taraf* and *cho'ta taraf* were two co-sharer land-

lords in possession of an occupancy holding measuring 14 *bighas* 5 *cottas* through certain tenants, Torap, Dinn, Juman and Jarip. Torap transferred his half share in the holding to Ananda and Dinu's share was inherited by his son, Enait. We next find that Juman and Jarip had somehow dropped out of the holding and that there was some kind of division of the lands of the holding, and that Ananda paid rent separately of his share to the *bara taraf* and Enait for his share to *cho'a taraf*. We are concerned in the present suit with Ananda's portion of the holding. It is admitted that Ananda by a Will bequeathed his land to Bipin, the son of his mistress, Dhonomoni, and that defendant No. 3, Bonalata, the widow of Bipin, made a *dar-jote* settlement in favour of defendant No. 2. The plaintiff, who is the *bara taraf* landlord, sued defendants in this case for ejectment on the allegation that Ananda had no right to bequeath to defendant No. 3 the occupancy holding which is not transferable by custom, and that consequently the other defendants who claim as under-tenants have also no right. The basis of the plaintiff's case is that there was a division of the holding as between the landlords on the one hand and the tenants, Ananda and Enait, on the other, by which a separate non-occupancy-holding was created in favour of Ananda for an area of 7 *bighas* 2½ *cottas* with a rental of Rs. 4-12-0. Defendant No. 2 in his written statement said that he was a *bona fide* tenant and could not be ejected without notice. Defendant No. 1 said that he had no concern with the case and had been wrongly impleaded. Defendant No. 3 said that the tenancy had not been split up and that as the original tenant was still in possession of a part of the holding, she could not be ejected.

The learned Munsif found that there had been a splitting up of the tenancy but that upon the plaint, as framed, no decree for ejectment could be given. It appears that in the plaint the land from which it is sought to eject defendant No. 1 is not described by metes and bounds. It is merely stated that plot No. 1 consists of a certain area out of the total area of 2 *bighas* 8 *cottas*. After the evidences of both sides had been recorded, an application was made for amendment of the plaint by describing by metes and bounds the parcels from which an ejectment was

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sought. The learned Munsif found that the statements in the application for amendment were inconsistent with the evidence given in the case. For instance, in respect of plots in which according to the application Ananda and Enait were said to be joint, the evidence showed the exclusive possession of one party alone. It was clear, therefore, that even if he allowed the amendment of the plaint, he could not grant ejectment according to the terms, and so he dismissed the plaintiff's suit for that part of the land which is in schedule *ka*. We are not concerned with the lands in schedule *kha* and *ga* in this case. We need not, therefore, refer to them.

In appeal the learned Subordinate Judge found that there had been no splitting up of the tenancy at all. He, therefore, refused to eject the defendants.

The plaintiff prefers this second appeal and the only ground of law taken is that upon the facts found the Court of appeal below was bound to draw the inference that there had been a splitting up of the tenancy. Now what the learned Subordinate Judge found is this. He says that there was a division of the land, but he does not say whether each plot was divided into two equal shares or whether some plots were given to one party and some to another party. Again, he says that for the sake of convenience Ananda paid half share of the rent on account of the *jote* to the plaintiff. But he goes on to say that during certain *punia* ceremonies Enait paid some rent to the *bara taraf*, that is, to the plaintiff. Again he goes on to say that in a certain road-cess return the plaintiff has described Torap, the predecessor of Ananda, and Dinu, the predecessor of Enait, as his tenants; and again that, in a rent suit brought by the *chhoti taraf* for their share of rents, Miru, the son of Torap, and Enait, the son of Dinu, were both impleaded as tenants. It also appears even in the present case that Enait has been impleaded as a tenant. Upon all these facts, the learned Subordinate Judge has declined to come to the finding that there was a splitting up of the tenancy and I cannot interfere in second appeal. Reliance has been placed on behalf of the appellants on the following cases:—*Gobind Chandra Pal v. Hamidulla Bhuian* (1); *Panchanan Banerji*

v. Raj Kumar Guha (2); *Bhabatarini Dasi v. Ekabbar Malita* (3) and *Sailendra Nath Mitter v. Karali Charan Singh* (4). These cases do not really touch the point. They merely show that it is open to a tenant, notwithstanding the terms of the section 188 of the Bengal Tenancy Act, to hold separate tenancies under co-sharer landlords in respect of their shares in the holding. If then the tenancy has not been split and the original tenant still remains on the land, there can be no abandonment within the meaning of the section 87 of the Bengal Tenancy Act. Therefore, the plaintiff cannot eject the defendants. The appeal is dismissed with costs, only one set of costs is allowed to the different defendants.

Appeal dismissed.

- (2) 19 C. 610.
(3) 5 C. L. J. 235; 2 M. L. T. 155 (F. B.).
(4) 2 C. L. J. 534.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 506 OF 1915.

August 2, 1915.

Present:—Sir Justice P. C. Banerji, Kt., and
Mr. Justice Rafique.

THE ALLAHABAD IMPROVEMENT
TRUST, REPRESENTED BY THE MUNICIPAL
BOARD, ALLAHABAD—PLAINTIFF—

APPELLANT

versus

Rana TIKANDRA JANG BAHADUR—

DEFENDANT—RESPONDENT.

Contract Act (IX of 1872), s. 74—Contract of sale—Breach of conditions—Penalty imposed by contract to be enforced—Damages not agreed in contract, if allowable.

The defendant purchased a site from the plaintiff at an auction under the following conditions:—

"Purchaser shall immediately after the sale pay into the Municipal Office...a deposit of 10 per cent. of the purchase-money and shall sign an agreement...and shall pay the residue of the purchase money to the vendors within a period of nine months from the date of the sale and on payment of the said amount the purchase shall be completed. If the purchaser fail to comply with any of these conditions his deposit shall be forfeited and the vendors shall be at liberty to re-sell the lot either by public auction or by private contract." The defendant made a deposit of Re. 1 only at the time of the auction-sale and failed to comply with the rest of the conditions:

Held, that the plaintiff was entitled to recover only 10 per cent. of the purchase-money which the purchaser was bound to deposit and not the loss which might accrue to the plaintiff on re-sale of the site. [p. 585, col. 1.]

(1) 7 C. W. N. 670.

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Second appeal against the decision of the District Judge of Allahabad, dated the 22nd January 1915.

FACTS appear fully from the judgment.

Mr. B. B. O'Connor, for the Appellant:—The defendant having refused to pay the balance, the plaintiff was entitled to a decree for damages to the extent of the loss sustained. The right to sue for such damages was not limited to the conditions in the notice. The conditions of the sale clearly show that the defendant is liable. The clause as to forfeiture is not a penalty and section 74 of the Contract Act does not apply. He relied on *Howe v. Smith* (1); *Noble v. Edwards* (2); *Soper v. Arnold* (3); *Icely v. Grew* (4); *Manian Pattar v. Madras Railway Company* (5); Gour on Law of Transfer, 4th Edition, page 619.

Dr. Tej Bahadur Sapru, for the Respondent, distinguished the rulings cited by the appellant's Counsel and submitted that where a contract is silent as to the right to recover the balance of the deficit money on a re-sale, the law does not give the plaintiff any legal right independent of the contract. Section 74 is clearly applicable to the facts of this case. He also referred to and discussed *In re Pettit's Estate* (6); *Nothard v. Proctor* (7); *Cornwall v. Henson* (8); Leake on Contract, 6th Edition, page 771; Dart on Vendors and Purchasers, Volume I, Edition 7th, page 179; Williams on Vendor and Purchaser, Volume I, pages 42-45; Pollock and Mulla's Contract Act, page 332.

Mr. O'Connor replied.

JUDGMENT.—The suit out of which this appeal has arisen was brought by the Allahabad Improvement Trust represented by the Municipal Board of Allahabad under the following circumstances. For the improvement of the town of Allahabad a road called

the Hewett Road was opened out and land was acquired under the Land Acquisition Act. Portions of the land so acquired not used for the road were sold by auction under certain conditions set forth in a document, which was signed by the Chairman of the Municipal Board and the person bidding at the auction-sale. The defendant purchased a plot of land for Rs. 3,900. He made a deposit of Re. 1 only and did not pay the balance of the price. The Municipal Board after issuing notice to the defendant re-sold the land. The amount realized at the re-sale was Rs. 875. The present suit was accordingly brought to recover the difference, namely Rs. 3,024, from the defendant. The Court of first instance decreed the suit. Upon appeal the learned District Judge modified the decree of that Court and passed a decree in the plaintiff's favour for the amount of the deposit which the defendant was bound to make under the terms of the contract. In our opinion the whole case turns upon the true construction of the provisions of the instrument called "the conditions of sale", which was the contract between the parties to which we have referred above. Clause 4 of this document provides that each purchaser shall immediately after the sale pay into the Municipal Office, Allahabad, to the credit of the Allahabad Improvement Trust, a deposit of 10 per cent. of his purchase-money and shall sign an agreement in the form sub-joined, and shall pay the residue of the purchase-money to the vendors within a period of nine months from the date of the sale and on payment of the said amount the purchase shall be completed." Clause 8 provides that "if any purchaser fail to comply with any of these conditions, his deposit shall be forfeited and the vendors shall be at liberty to re-sell the lot or lots sold to him either by public auction or by contract". As we have stated above, the deposit required by rule 4 was not made nor was the residue of the purchase-money paid within the term fixed. There was thus a failure to comply with the conditions laid down in the document, and the provisions of clause 8 could be enforced. As we understand that clause it gives the vendor the right to re-sell the lot, but the penalty which it provides is the forfeiture of the deposit which the purchaser was bound to make. The Municipal Board, upon the purchase by

(1) (1884) 27 Ch. D. 89 at p. 101; 53 L. J. Ch. 1055; 50 L. T. 573; 32 W. R. 202; 48 J. P. 773.

(2) (1877) 5 Ch. D. 378; 37 L. T. 7.

(3) (1889) 59 L. J. Ch. 214; 14 App. Cas. 429; 61 L. T. 702; 98 W. R. 449.

(4) 1836) 6 N. & M. 467; 43 R. R. 553.

(5) 29 M. 118; 16 M. L. J. 37.

(6) (1875) 1 Ch. D. 478; 45 L. J. Bk. 63; 34 L. T. 51; 24 W. R. 359.

(7) (1876) 1 Ch. D. 4 at p. 5; 45 L. J. Ch. 302; 33 L. T. 709.

(8) (1900) 2 Ch. D. 298; 69 L. J. Ch. 581; 82 L. T. 735; 49 W. R. 42; 16 T. L. R. 422.

HIDAYAT ALI KHAN SAHIB v. KHADAR KHAN SAHEB.

ing made by the defendant, was entitled to obtain from the defendant the deposit of 10 per cent. of the purchase-money. This amount they were entitled to recover under clause 8 as soon as a breach of the conditions of the document was committed. They also acquired the right to re-sell the property, but under clause 8 the right of re-sale did not carry with it a right to recover damages sustained by reason of any deficiency arising in the amount of purchase-money realized by the re-sale. The parties must be bound by the contract which they entered into, and we have to consider what their intention was when clause 8 was inserted in the document. If it had been intended that upon failure to perform any of the conditions of sale, the vendee would be liable to pay damages arising upon re-sale, one would have expected that such a condition would find place in the document. The absence of such a condition leads to the inference that the only penalty incurred by the vendee is the forfeiture of the 10 per cent. of the purchase-money which he was bound to deposit. In this view the English cases and other authorities cited before us have no bearing on this case and need not be considered. In our opinion the decision of the lower Appellate Court is right and this appeal must fail. We accordingly dismiss it with costs, including fees on the higher scale.

Appeal dismissed.

MADRAS HIGH COURT.

FIRST CIVIL APPEAL NO. 46 OF 1913.

August 2, 1915.

Present:—Sir John Wallis, Kt., Chief Justice, and Mr. Justice Srinivasa Aiyangar.

HIDAYAT ALI KHAN SAHIB AND OTHERS

—PLAINTIFFS NOS. 1 TO 11—APPELLANTS

versus

KHADAR KHAN SAHEB AND OTHERS—

—DEFENDANTS AND PLAINTIFF NO. 12—

RESPONDENTS.

Adverse possession—Possession by one member on behalf of all, if can be made adverse.

Where one member of a family gets into possession of certain lands on behalf of the whole family, his possession enures for the benefit of all the members

of the family and he cannot make it adverse to them. [p. 587, col. 2.]

Corea v. Appuhamy, (1912) A. C. 230; 81 L. J. P. C. 151; 105 L. T. 836, followed.

Appeal against the decree of the Court of the Temporary Subordinate Judge of Ganjam at Berhampore, in Original Suit No. 35 of 1911.

Mr. C. S. Venkatachariar, for the Appellants.

Mr. T. Prakasam, for the Respondents.

JUDGMENT.—This is a suit for a declaration that certain properties which were in the plaintiffs' possession were their property. The properties, it is found, had been in the possession of their relation one Roshan Ali, through whom the defendants claim, until his death when they were taken possession of by the plaintiffs. The plaint alleged that they were originally the property of one Mirja Mahommed Beg and that on the death of his widow they were inherited by the children of Imam Ali Khan, from whom the plaintiffs, Roshan Ali and the 5th defendant are descended and alleged that defendants Nos. 1 to 4, who are the descendants of Roshan Ali, were disentitled to share in the inheritance by reason of their illegitimacy, but their legitimacy is not now questioned. The defendants denied that the plaintiffs ever had any right to the suit properties and alleged that they had dispossessed the defendants after Roshan Ali's death in 1909. They alleged that part of the suit properties had belonged to Mahommed Beg who had bequeathed them to Roshan Ali, but it is not necessary to go into this question, because it appears that Mahommed Beg was only related to the wife of Imam Ali by virtue of an alleged adoption not recognized by Muhammadan Law and that, therefore, the plaintiffs are not in his line of heirs and have no claim to succeed to his property. This claim is not now pressed. The written statement, however, alleged that Imam Ali Khan owned 71.25 acres in the same village which are also part of the suit lands and set up in effect that the 1st plaintiff and the father of the other plaintiffs, who as well as the defendants are heirs of Imam Ali, had abandoned these lands and left them to Roshan Ali, the father of defendants Nos. 1 to 4, in 1875. Thus whereas the plaintiffs mistakenly set up that the suit lands had

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all been the property of Mirja Mahommed Beg, the defendants claimed some of them on the ground that they were the property of Imam Ali and that the 1st plaintiff and the father of the other plaintiffs had abandoned their share in them. The parties joined issue (issues 5 and 6) on these allegations and went to trial on them, and in these circumstances we think it is too late for the defendants to object that the plaintiffs did not in their plaint claim any of the suit properties by inheritance from Imam Ali.

It would, no doubt, have been more correct if the plaint had been amended, but it is clear that the parties went to trial on the question whether the 1st plaintiff and his brother had relinquished their claim to share in the suit lands which had belonged to their father, Imam Ali, and abandoned them to Roshan Ali, the father of defendants Nos. 1 to 4.

Exhibit M shows that in 1842 the suit village had been partitioned between Imam Ali and the widow of Mahommed Beg. Imam Ali would appear to have died about 1861 and Exhibit B of that year is an *inam* statement, which would appear to have been drawn up as if to be presented by Imam Ali himself but is signed by his son Roshan Ali. It shows Roshan Ali in actual enjoyment and gives the other members of his family. Exhibit C is a power-of-attorney taken by him from his sisters in respect of their shares. Exhibit 3 is the plaint in a pauper suit of 1882 in which the 1st plaintiff and the father of the other plaintiffs sued their brother, Roshan Ali, alleging that Imam Ali had died about 20 years ago and that Roshan Ali and they lived together until 1873 when Roshan Ali took possession of all the lands and had been enjoying the shares of the plaintiffs therein. In his counter-petition, Exhibit 12, which was in lieu of a written statement, Roshan Ali admitted the right of the plaintiffs in that suit to share in the property of their father, but alleged that he had been in management and incurred debts to the extent of Rs. 3,000 for the purposes of the family and that the plaintiffs were not entitled to recover their shares until this debt was paid off. Exhibit K is his deposition in which he stated that the village had been partitioned between Moosa Bi,

widow of Mohammed Beg, and Imam Ali, that at the time of Imam Ali's death it was in the sole possession of Moosa Bi, that at the time of the *Inam* Commission in 1861 he obtained a separation of their share, that from 1863 they had divided profits and that he was willing to give the plaintiffs their share in the 71 acres if they paid their share of the debt. Exhibit 4 shows that the suit of 1882 was dismissed at settlement of issues, on the ground that the plaintiffs had no right to sue without joining the other heirs of their father, Imam Ali. The Subordinate Judge has found, and the evidence shows, that from 1882 and earlier Roshan Ali was in exclusive possession and enjoyment of 71.25 acres of the suit lands which had belonged to Imam Ali, but his own admissions above set out show that he got into possession of these lands on behalf of the whole family, and this being so, his possession enured for their benefit and he could not make it adverse to them. See *Corea v. Appuhamy* (1). We are, therefore, unable to agree with the Subordinate Judge that the suit is barred by limitation and as regards the 71.25 acres, we reverse the decree of the lower Court and remand the case for disposal according to law. There will be no order as to the costs of this appeal.

Appeal allowed; Suit remanded.

(1) (1912) A. C. 230; 81 L. J. P. C. 151; 105 L. T. 836.

CALCUTTA HIGH COURT.

APPEAL FROM ORDER NO. 475 OF 1913.

July 21, 1915.

Present:—Mr. Justice Chitty and

Mr. Justice Walmsley.

KIRANSHASHI DEBI AND OTHERS—

JUDGMENT-DEBTORS—APPELLANTS

versus

CHANDRIKA PROSAD SINGH AND

ANOTHER—OPPOSITE PARTY—

RESPONDENTS.

Execution—Attachment of decree—Stay of execution—Exclusion of time—Limitation—Civil Procedure Code (Act V of 1908); O. XXI, r. 53—Limitation Act (IX of 1908), s. 15.

MA SEIN TON v. MA SON.

A judgment-debtor had previously obtained a money-decree against his decree-holder in another Court. In the execution of his decree he got the decree against himself attached under Order XXI, rule 53, of the Civil Procedure Code. The execution petition was eventually dismissed for default but on that date the decree against him which had been attached by him was barred by time. The decree holder applied for the execution of his decree:

Held, that the attachment of the decree operated as stay of the execution by order of Court and the period during which the decree remained attached should be excluded in commutation of the limitation for execution of that decree.

Appeal against the order of the Subordinate Judge, Mozafferpore, dated the 17th of July 1913.

Babu Atul Krishna Roy, for the Appellants.

Babu Ganesh Dutt Singh, for the Respondents.

JUDGMENT.

CHITTY, J.—This is an appeal by the judgment-debtors against an order of the Subordinate Judge ordering execution of a decree against them. It appears that this decree was passed in the Court of the Subordinate Judge on 16th February 1910. Before that, the judgment-debtors had obtained a decree also for money in the Munsif's Court for presumably a lesser amount. In execution of that decree, the judgment-debtors, instead of applying as they should have done for a set-off, attached the present decree under Order XXI, rule 53, Code of Civil Procedure. The decree being passed by a different Court from that in which the judgment-debtors had obtained their decree, the attachment must have been made under clause (1) (b) of that rule, that is to say, by a notice by the Court which passed the decree sought to be executed requesting the other Court to stay the execution of the decree unless and until the Court which passed the decree sought to be executed cancelled the notice or the decree-holder or the judgment-debtor applied to the Court receiving such notice to execute its own decree. The effect of that attachment would be to stay the execution of this decree unless and until these events happened. Now, in this case those events never did happen and the execution case lasted until 26th July 1910, when it was dismissed for default. The learned Subordinate Judge has held that this period

must be excluded under section 15 of the Limitation Act; and, if the period be excluded, admittedly the present application for execution of this decree which was made on 18th April 1913 would be in time.

We are of opinion that the Subordinate Judge was right in the conclusion to which he came. The effect of the attachment was to stay the execution. Is that a stay of the execution by an order of Court as stated in section 15 of the Act? It is argued for the appellants that that order must be made by the Court which passed the decree. In such a case of attachment there is really no necessity for the Court to make any separate order. The stay operates automatically on the receipt of the notice from the Court which attaches the decree. We think that it must be regarded as a stay by order of Court.

So far as the merits of the case are concerned, there are no merits whatever in favour of the appellants. What, of course, should have been done in this case was to set off the decrees of these two parties—the one against the other.

We dismiss the appeal with costs. Hearing fee three gold mohurs.

WALMSLEY, J.—I agree.

Appeal dismissed.

LOWER BURMA CHIEF COURT.
FULL BENCH.

CIVIL REFERENCE NO. 1 OF 1915.

August 10, 1915.

Present:—Sir Charles Fox, Kt., Chief

Judge, Mr. Justice Parlett and

Mr. Justice Twomey.

MA SEIN TON AND OTHERS—PLAINTIFFS—
APPELLANTS

versus

MA SON—DEFENDANT—RESPONDENT.

Burmese Buddhist Law—Widow's right of disposal of joint property of herself and her husband.

Subject to any claim by the eldest son to a certain specified property, such as his father's elephant, pony, betel box, etc., and to a quarter share of the joint property as *orasa son*, a Burmese Buddhist widow has an absolute right of disposal over the whole of the joint property of herself and her late husband as against the children of their marriage. [p. 592, col. 2; p. 593, col. 2.]

Ma On v. Ko Shwe Tha Dun, L. B. R. (1872-92) 378, dissented from.

MA SEIN TON v. MA SON.

FACTS appear from the following order of reference, dated the 24th February 1915, made by

TWOMEY, J.—In 1908 Ma Dun, the widow of U E, mortgaged a certain house and a piece of garden land measuring 6.60 acres to one J. D'Cruz, *alias* Po Maung. Both house and land were the joint property of Ma Dun and U E having been acquired during their married life. The mortgagee brought a suit on the mortgage and obtained a decree for sale against Ma Dun.

The four children of Ma Dun and U E then brought this suit against D'Cruz's widow, Ma Son (who has Letters of Administration to his estate) praying for a declaration that one half of the mortgaged property is the ancestral property of the four children. They pleaded that as the property was mortgaged without their consent and without "necessity" their interest in the property is not affected by the mortgage. The widow, Ma Dun, was joined as co-defendant.

The Township Court decided that the property was the joint property of Ma Dun and her husband, that on her husband's death Ma Dun had absolute power of disposal over only one half of the property except in case of necessity, that the mortgage in this case was not for necessary subsistence, that the oldest daughter, Ma Hmwe On, was aware of and assented to the mortgage and was, therefore, bound by the transaction, but that the remaining three children (a son and two daughters) did not assent and were not bound. A decree was given declaring the rights of these three children in the property. Ma Shwe On did not appeal and so far as she is concerned, there is an end of the matter. But the mortgagee's representative, Ma Son, appealed to the District Court, which decided in his favour that the three children were also privy to the mortgage and that they were bound by it as much as their elder sister, Ma Hmwe On. These three younger children have now appealed to this Court.

On the facts, I think, the District Judge has come to a wrong conclusion. It is beyond dispute that the three appellants were not parties to the mortgage and even if they took no steps immediately when they heard of the transaction, that would not deprive them of any rights they may have had in

the property. One of them was a minor at the time of the mortgage and as regards her the District Judge says: "her mother's acts, if not contrary to her interest, might be taken as binding her". But Ma Dun did not purport to mortgage the property on her own behalf and her children. She mortgaged it as sole owner. Moreover the respondent did not plead that Ma Dun's children assented to the mortgage. Her plea was that the property was mortgaged to raise money for the necessary subsistence of the family. The District Court did not deal with the question of necessity at all, but there is no reason to question the finding of the Township Court on this issue. According to Ma Dun herself the mortgage-money was required for her step-brother, Mg. Gyi, while Ma Son, the respondent, says that it was for Ma Dun's son-in-law, Mg. Nyein. Ma Son failed to prove that it was spent for necessary subsistence. Her case was that she believed Ma Dun to be sole owner. It is clear, therefore, that if Ma Dun's absolute right of disposal was restricted to one half of the property, it would be necessary to set aside the decree of the District Court.

But the correctness of the rule laid down 30 years ago in *Ma On v. Ko Shwe Tha Dun* (1) has lately been questioned in the Upper Burma case *Mi Saw Myin v. Mi Shwe Thin* (2), in which the learned Officiating Judicial Commissioner (Mr. McColl) held that under the Buddhist Law on the death of a husband his widow succeeds to the estate, with the exception of certain specified property and one-fourth of the estate which goes to the eldest daughter, that with the exception of this portion the widow is at liberty to spend the whole of the estate, if she chooses to, and not merely for necessities, and that the texts of the Dhammathats on which the doctrine that the widow can only spend the estate for necessities is based, refer to the spending of the specified property set apart for the eldest daughter and not to the spending of the bulk of the estate. The Lower Burma rule, as stated in *Ma On's* case (1), is that:—

"A Burmese Buddhist widow has an absolute interest in the whole of the family property on the death of her husband, but

(1) L. B. R. (1872-1892) 378.

(2) 15 Ind. Cas. 919; U. B. R. (1912) I, 125.

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she has an absolute right in respect of her own share (*i.e.*, one-half) and a life-interest in the remainder and she has not the right of absolute disposal of the remainder but only a power of sale in case of necessity." That rule was to a great extent based on the authority of an earlier case *Nga Shwe Yo v. Mi San Byu* (3), in which the Judicial Commissioner, Mr. Jardine, held that on the death of the father the children take an interest in the family property and that the widow cannot dispose of the interests of the children except in case of necessity. But as Mr. McColl points out, the learned Judges who decided *Ma On's* case (1) seemed to have overlooked the fact that Mr. Jardine in the later judgment of *Maung Po Lat v. Mi Po Le* (4) expressed considerable doubt as to the correctness of the doctrine he had laid down in *Nga Shwe Yo's* case (3). It appears indeed that the doctrine was evolved from Richardson's incorrect translation of section 5, Book X, of the Manukye. In the passage "if the mother uses the property for necessary subsistence" are an interpolation. The Burmese text is * * * * *

Similarly the words "from necessity" are interpolated in the translation of section 3 of Book X, which is referred to by the Judges in *Ma On's* case (1). The Burmese words are * * * * *

Section 5 deals with partition between a widow and the eldest son; section 3 with partition between a widower and the eldest daughter. It is only in section 4, dealing with partition between a widow and the eldest daughter, that the words reading necessity * * occur. There is nothing to show how the interpolations in the English translation of sections 3 and 5 came out. But the opinion may be hazarded that the words relating to necessity were introduced by the translator merely to affect a specious symmetry in the three sections 3, 4 and 5. I think Mr. McColl has given very good reasons for his opinion that in section 4, book X, of the Manukye and the Dhamma and Amwebon extracts given in section 31 of the *ex-Kinwun Mingyi's* Digest, the restriction as to spending only in case of necessity applies merely to the specified property, female slaves, cattle, etc. which is mentioned in these texts as the share of the eldest daughter, and does

(3) L. R. (1872-92), 108; S. J. 108.

(4) L. R. (1872-92), 212; S. J. 212.

not apply at all to the residue of the property which goes to the widow. This appears to me to be a reasonable interpretation of the texts and I am in favour of adopting the rule as propounded in Upper Burma. Apart from these texts there is nothing in the Dhammathats to warrant the inference that the surviving parent is restricted to a life-interest as regards any portion of the family property. On the contrary Mr. Burgess in *Ma Min Tha v. Ma Naw* (5) quoted the following passage from the Manu Wannana as indicating clearly that children cannot stop their parents from doing as they choose with their property:—

"And if during the life-time of heirs, sale and purchase be effected by parents against the will of heirs, and if after the land shall have come to the possession of the others, and after the death of the parents, the heirs are desirous of redeeming the land, they shall have the right to do so."

It was held in that case that the heir of the deceased husband under Buddhist Law is his widow and not any of his children (except the eldest son in respect of a fourth of the estate) until the death of the widow and that the children have no such interest in the estate as is contemplated in the section 91, Transfer of Property Act. Mr. Burgess clearly considered, moreover, that this view was in accordance with the spirit of the Dhammathats which give great prominence to the parental authority.

The question arises, therefore, whether the ruling in *Ma On v. Ko Shwe Tha Dun* (1) restricting the widow's right of disposal of the family estate should not be reconsidered and whether the conclusion arrived at in *Mi Saw Myin v. Mi Shwe Thin* (2) should not be accepted as regards Lower Burma also.

The matter is one of great importance to Burmese Buddhists and I, therefore, refer the following question to a Bench of the Court:—

"What right of disposal has a Burmese Buddhist widow in the joint property of herself and her late husband?"

Mr. D. N. Palit, for the Applicants.

Mr. N. C. Sen, for the Respondents.

Mr. May Aung, Amicus Curiae.

(5) U. B. R. (1892-56,) II, 581.

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OPINION OF THE FULL BENCH.

TWOMEY, J.—Mr. May Aung appeared as *amicus curiæ* at the hearing of this reference and gave the Court advantage of his wide knowledge of Buddhist Law. He pointed out that the terms of the reference are wider than the facts of the case warrant, and it has been agreed that the question for decision should be narrowed down as follows:—

What right of disposal has a Burmese Buddhist widow in the joint property of herself and her late husband as against the children born of their marriage?

The matter was decided in 1885 by the Special Court's ruling in *Ma On v. Ko Shwe Tha Dun* (1) which has been followed ever since in Lower Burma, but the correctness of that ruling has been seriously questioned and further consideration of the Buddhist Law on the subject has become necessary.

According to the Special Court's ruling, the widow's absolute right of disposal would be restricted to "her own share" and as regards the remainder, she would have a "life-interest" with a power of sale in case of necessity.

At the outset, it may be noted that the use of the term "life-interest" to describe the widow's interest in the remainder is open to criticism. The following passages from Mr. Mayne's *Hindu Law* (8th Edition, pages 846 and 870) have been quoted with approval by their Lordships of the Privy Council in *Thakur Vasonji Morarji v. Chanda Bibi* (6) in dealing with the subject of a Hindu widow's interest in property inherited from her husband:

"Hindu Law knows nothing of the estates for life or in tail or in fee. It measures estates not by duration but by use. The restrictions upon the use of an estate inherited by a woman are similar in kind to those which limit the powers of a male holder but different in degree. The distinctive feature of the estate is that, at her death, it reverts to the heirs of the last male owner.

"It is not a life-estate because under certain circumstances she can give an absolute and complete title. Nor is it in any sense an estate held in trust for the rever-

sioners. Within the limits imposed upon her, the female holder has the most absolute powers of enjoyment." Much the same arguments might be used with regard to a Burmese Buddhist widow's interest in the moiety of the joint property inherited by her from her husband. This has already been pointed out in Mr. Burgess's judgment in *Ma Min Tha v. Ma Naw* (5).

The grounds of the Special Court ruling may be briefly examined. A great part of the judgment is devoted to disposing of the extreme proposition that the surviving parent takes nothing but a life-interest in any part of the children's interest. The learned Judges thought that none of the authorities went to this length and they decided that after giving the eldest son or daughter his or her share of the property, the remainder vests in the surviving parent for himself or herself and the younger children, under Manukye, sections 4 and 5 of Book 10. They held that the surviving parent has an "ascertainable interest" in this remainder and apparently thought on the authority of Manu Wannana, section 26, that this interest was one-half. This half is at the absolute disposal of the surviving parent, but he or she could not dispose of the other half of the remainder without necessity. They accepted Mr. Jardine's ruling in *Nga Shwe Yo v. Mi San Byn* (3) as showing that without necessity, the surviving parent cannot dispose of the interests of the children, i. e., the interests of the younger children in the remainder.

To sum up, the younger children are referred to as receiving the remainder of the joint property with the widow in only two of the texts in section 30 of the Digest and in section 31; many of the texts say that the widow may exhaust the property in her life-time; only three of the texts in section 31 restrict the widow's power of disposal to necessitous circumstances and it is at least highly probable that the restriction in these texts applies only to the specified property assigned to the eldest daughter; the Dhammathats expressly debar the younger children from sharing in the inheritance till their mother's death and the Manu Wannana, a Dhammathat of the highest

(6) 29 Ind. Cas. 781; 19 C. W. N. 873; 17 Bom. L. R. 556; 18 M. L. T. 31; (1915) M. W. N. 449; 2 L. W. 676; 22 C. L. J. 180; 37 A. 369; 29 M. L. J. 130.

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authority, lays down that the widow has not to share with the younger children, but has only to provide for them in a suitable manner; it is nowhere laid down that the younger children have "an ascertainable interest" in the joint property while their mother lives.

Although the Manukye and two other Dammathats associate the younger children with the widow in taking three shares out of four when the eldest son claims partition, this provision must, I think, be interpreted as merely emphasizing the widow's natural duty of bringing up the younger children in a becoming manner, not as conferring on them any vested right in the joint property or as constituting the widow a trustee of some unascertained part thereof for their benefit.

Mr. May Aung draws attention to the extracts from Kungya in section 30 of the Digest as explaining why the widow gets three shares out of four. It runs as follows:—

"Husband and wife own property equally, that is to say, the husband is entitled to half the property and so is the wife. On the death of either husband or wife, the survivor is entitled to half of the share of the deceased. The other half is inherited by the children. In view of the above principle it is said that when the mother gets three shares out of four the children shall get one share."

This statement of principles is, however, at variance with the general rule by which the one-fourth share is assigned to the eldest son and not to the children generally.

The real principle appears to be that the widow, who owned the one half of the joint property in her husband's life-time, inherits his half when he dies, and having thus become possessed of the whole can do as she likes with it, subject to the claims of the eldest son and the eldest daughter.

As regards the eldest son, the Dammathats allot to him certain specified property (his father's elephant, pony, betel box, etc.), property appertaining to the head of the family, in addition to a quarter share of the bulk of the joint property. There appears to be no reported case of an eldest son claiming anything more than his quarter share and it may be doubted whether the rule as to the

specified property is not now obsolete. The question has not yet judicially been considered. It must also be noted that the eldest son can claim a quarter share from his mother only if he has attained the full status of *orasa* at the time of his father's death. Also, even if there is a son who is a competent *orasa* the widow has to give him the quarter share only, if he claims it from her in time and does not elect to wait till her death and then share with the younger children.

As regards the eldest daughter's specified property also, there is no reported case of any such claim and the extent to which such a claim could be judicially recognised has yet to be decided. The provisions of the Manukye and other Dammathats in section 31 of the Digest are definitely in favour of such a claim; but there is reason to doubt whether the specified property was intended to be given in all cases. The nature of the property (slaves, cattle, seed grain and according to some texts, a piece of land) seems to indicate that the daughter would get it only on marrying and setting up house apart from her mother and not so long as they lived together and I have referred to certain texts which support this view (including the Manu Wannana). As noted above, it seems that the mother is allowed to exhaust the specified property for necessary subsistence and from this it would follow that the mother can retain it in her possession in case the necessity for consuming it should arise. The daughter's claim is, therefore, at best a precarious one, and there are some texts in sections 26 and 38 of the Digest which go so far as to say that the daughter is entitled only to what has been actually given to her by her parents.

I would answer the reference in this case as follows:—

Subject to any claim by the eldest son to certain specified property and to a quarter share of the joint property, a Burmese Buddhist widow has an absolute right of disposal over the whole of the joint property of herself and her late husband as against the children of their marriage.

PARLETT, J.—Having had the advantage of reading Mr. Justice Twomey's judgment I can find but little to add to

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his exhaustive analysis of the texts of the Dhammathats dealing with the question referred. Those which have the most important bearing upon it are collected in sections 30 to 33 of the Kin Wun Mingyi's Digest. Those in sections 30 to 31 are directly in point, dealing as they do with partition between mother and son and mother and daughter respectively on the death of the father. The texts not only prescribe the manner in which the partition should be effected but also indicate the conditions under which the right to claim it arises, and show, I think, clearly that the death of one parent is not the only condition necessary. Several of those in section 30 commence with some such proviso as "if the son is an *orasi*" or "if the son is one who is competent to assume the duties and responsibilities of his father". The nature of the property to be given to him also shows that the rule presupposes that the son succeeds to his father's position as head of the family and to his office, if he holds one. Thus he is allotted the household furniture and according to Mann Wannana, the family house and house-site; he also gets land, held as an emolument of office. In this connection I may note that most of the texts specify no other classes of lands than these, though some of them give the son in addition the lands worked by his father and some refer merely to lands in general. On the other hand I find only two texts Dhammathat Kyaw and Kyannet, which mention any land at all going to the mother. I think this points to a condition of affairs, not, I believe, very remote in some parts of Upper Burma, when all land was held either in return for service to the State or on a village communal system, in either of which cases it would naturally pass to a son succeeding to his father's position.

Similarly in several of the texts in sections 31, 32 and 33 in more of them than the English version indicates, the son or daughter entitled to partition is given as the eldest. Section 32 explains that the reason for allowing the son a share is to give him a fitting start in life. Nothing I think could be plainer than that these texts give no right to claim a partition to any but a grown up son or daughter, and that the eldest. Several of them refer distinctly to the existence of other children than the one whose right to a share is declared. In some,

the English translation does not accurately reproduce the plural number which is used in the Burmese version. This, I think, is made even clearer by the provisions of section 34 and 35 which lay down that the children other than the eldest son or daughter are entitled to a partition only when both parents are dead; an exception to this, however, is made when one parent having died, the survivor re-marries: sections 44 to 46.

Sections 36 to 43 profess to deal with partition between a surviving parent and children living together or separately, but it can hardly be said that they really confer any such right. In the case of children living with the parent they can get nothing whilst he or she lives, nor can they protest if the estate is exhausted and nothing is left for them to inherit on the second parent's death. A son or daughter living separately is merely allowed to retain property already given by both parents; the surviving parent obtains all the joint property and any residue there may be on that parent's death goes to the children living with him or her.

I think, therefore, that the following rules may be deduced. On the death of one parent the surviving parent inherits all their joint property; if, however, the eldest son or daughter is grown up he or she is entitled to certain specified property of the deceased parent and in the case of the eldest son to a 1/4th share of the bulk of the estate. Unless the surviving parent re-marries none of the other children are entitled to claim anything until that parent's death, nor do the texts indicate that such children have an interest in the property, though their right to partition is postponed till the death of the surviving parent. Such a principle would, I think, be foreign to Burmese Buddhist Law and on the contrary many of the texts make it clear that the children cannot protest if the property is exhausted before the right to claim a partition accrues.

I concur in Mr. Justice Twomey's answer to the reference.

Fox, C. J.—I also concur in the answer proposed by Mr. Justice Twomey to the modified question under reference.

My learned colleagues are in a more advantageous position by reason of their knowledge of the Burmese language than Sir John Jardine, Mr. Mells and Mr. MacEwen were in, when they had to consider

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the meaning of the texts bearing on the question. The Kinwun Mingyi's collection of texts from various Dhammathats was not available when the hitherto leading case of *Ma On v. Ko Shwe Tho Dun* (1) was decided. Errors in Richardson's translation of the Manukye have been discovered. Under the circumstances I do not think we are offending against any principle or rule of law in re-considering the question decided in that case.

The exhaustive examination of the texts in the judgments of my learned colleagues justifies departure from a ruling which, although given nearly thirty years ago and followed in Lower Burma ever since, is now shown not to be accurate in all respects.

Reference answered.

LOWER BURMA CHIEF COURT.
CIVIL MISCELLANEOUS APPEAL No. 165
OF 1913.

March 23, 1915.

Present:—Mr. Justice Ormond and

Mr. Justice Twomey.

MA EIN—APPELLANT

versus

TIN NGA AND OTHERS—RESPONDENTS.

Buddhist Law—Inheritance—Husband and wife dying without issue simultaneously or within short interval of one another—Joint property—Parents, right of—Manu Kye Book X, ss. 32, 56—Kin Wun Mingyi's Digest, ss. 208, 347—Analogous case of married couple dying leaving brothers and sisters.

Where a husband and wife die childless simultaneously or within a short interval of one another, their property is to be regarded as retaining its joint character and is to be divided accordingly, *i.e.*, the respective party's parents would take the separate or ancestral property of husband or wife and would share equally the jointly acquired property of the husband and wife. [p. 596, col. 1.]

Obiter dictum:—If there are no parents surviving but the husband and wife leave brothers and sisters it would seem reasonable to deal with the estate by analogy as a joint estate. [p. 596, col. 2.]

Appeal against the judgment and decree of the District Judge of Pyapon, dated the 17th September 1913, in Civil Miscellaneous No. 44 of 1913, dismissing the application for Letters of Administration.

Mr. Ohari, for the Appellant.

Mr. Maung Kyn, for the Respondents.

JUDGMENT.

TWOMEY, J.—The appellant Ma Ein applied to the District Court of Pyapon for Letters of

Administration to the estate of her daughter Ma Shwe Myit and son-in-law Maung Tun Tha who died without issue, the former on the 22nd January 1913 and the latter on the next day. Ma Ein alleged in her application that the deceased couple lived with her from the time of their marriage and had property in common with her, and that the property valued at over Rs. 22,000 was in her possession as joint owner.

The only other relatives left by the deceased are Maung Tun Tha's brother and sister, and they assigned their interest in the property to a stranger named Maung Meik. This assignee opposed the grant of Letters of Administration to Ma Ein, claiming that as Tun Tha survived his wife he inherited as her sole heir and that Ma Ein is not entitled to any part of his estate. The respondent, Maung Meik, has died and his legal representatives have been substituted on the record.

The District Judge in a very brief order accepted the caveator's plea and dismissed Ma Ein's application. The Judge entirely failed to consider the rules of Buddhist Law regulating the devolution of the inheritance in cases of this kind.

The appellant relies on section 56 of the 10th Book of Manu Kye, which is headed "The Law of Inheritance as regards the six relations of the husband and the six of the wife." The cognate texts in other Dhammathats are collated in section 308 of the *ex-Kin Wun Mingyi's Digest*. Section 55 of the Manu Kye provides for the case of a husband and wife dying without issue and leaving no children, grandchildren, great-grandchildren or parents surviving. In such cases certain specified distant collaterals (maternal and paternal uncles and aunts of the deceased husband and wife) are to divide the joint estate between them, but only if the two deceased have died simultaneously or within a short interval of one another. If on the other hand one shall die "before the other," the inheritance goes to the relatives of the spouse who died last in accordance with the ordinary rule. Having regard to the context, it is plain that "before the other" means "a considerable time before the other." With reference to this text Mr. Burgess remarked as follows in *Ma Gun Bon v. Maung Po Kywe* (1):—

(1) U. B. R. (1897-1901), II, 66.

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"The apparent reason of this distinction seems to be that when husband and wife die within a short interval of each other, their joint interest in the estate is regarded as predominant, whereas when one lives long after the other, the presumption arises that the joint interest has completely merged in the sole interest of the survivor, and there is no doubt a certain amount of plausibility about such a distinction."

And Mr. Justice Irwin thought that the balance of authority is plainly in favour of such a construction, which he stated in the following words *Ma Kadu v. Ma Jon* (2):—

"While the husband and wife are both alive and childless the relations of both have reasonable expectations of inheriting. When they die within a short interval, the succession would seem to be governed by accident, or by the caprice of fate, rather than by a rule of law, if the relatives of the survivor exclude those of the spouse who died shortly before. After the lapse of some time, the interests of the latter naturally pass out of sight."

This construction appears reasonable and the same construction would apply to section 32 of the *Manu Kye*, which deals with another case of a husband and wife dying within a short interval of one another and without issue. Section 32 expressly provides for the case where parents are surviving.

[Richardson's version is as follows:—

£ "32nd. Parents having given their children in marriage, and in a separate residence, they both shall die, the law for the partition of their property between the parents of both."

When the parents on both sides have given their son and daughter in marriage, and they, dwelling apart from their parents, shall both die, the law by which the partition of their property is made between the parents of both is this: if any husband and wife, living in a separate dwelling, shall both die without issue, let the parents of the wife have what she brought with her at marriage; let the parents of the husband have what he brought with him originally, and let the property acquired during the marriage be divided equally between both. If they had no property originally, let the parents divide equally what they have acquired. If the wife had no original property, and the husband had,

(2) U. B. R. (1905), *Bud. Law, Inheritance*, p. 7.

let it be divided into three shares, and let his parents have two, and the wife's parents one. If the husband had no original property, and the wife had, let it be divided into three shares, and let the parents of the wife have two, and of the husband one. If the wife dies first, and the husband after her, let the parents of the one who died first have one and those of the person who died last two shares, and pay the debts in the same proportion."

The special provision in the last sentence for the case where "the wife dies first and the husband after her" would indicate that the earlier part of the section relates to cases where the two persons die simultaneously or within a short interval of one another, while the last sentence refers to cases where a considerable interval elapsed between the two deaths.

The cognate texts are abstracted in section 347 of the *Digest*. They do not differ substantially from the *Manu Kye*.

It will be noticed that these texts do not mention co-heirs, *i. e.*, brothers and sisters of the deceased couple, at all. The explanation may be (1) that in the case contemplated there are no surviving brothers or sisters or (2) that though surviving, they are postponed to the surviving parents of the deceased couple. We are precluded from accepting the latter explanation as a general rule, in view of the recent decision of the Privy Council in *Ma Nhin Bwin v. U Shwe Gon* (3) that the right of succession of brothers and sisters in preference to parents is established beyond doubt. But their Lordships were careful to distinguish the special case of parents living with the deceased. They said that *Ma Nhin Bwin's* case (3) "should not be held as dealing with or affecting parental rights in cases where the family continues to live together." Accordingly, though the rule given in section 32 of the *Manu Kye* may not now be applied to cases where the parents and children lived apart from one another, it is still applicable where they lived together, as in the present case. The correctness of this view appears to be confirmed by the provisions of various texts in the *Dhammathats* which prescribe schemes for partition between the parents of a person who has died childless on

(3) 23 Ind. Cas. 433; 16 Bom. L. R. 377; 27 M. L. J. 41; 18 C. W. N. 1121; 16 M. L. T. 142; 20 C. L. J. 264; 41 C. 887; 1 L. W. 914; 8 L. B. R. 1; 7 Bur. L. T. 105.

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the one hand and the surviving husband or wife on the other. (See sections 28, 29, 30 and 31, Manu Kye, and the cognate texts of which abstracts are given in Chapter XIX of the Digest.)

The ordinary rule of inheritance under the Buddhist Law is that the husband is sole heir to the wife and the wife sole heir to the husband, whether there be issue of the marriage or not. The texts cited above show that in certain cases the surviving parent of a childless son or daughter is allowed to share with the surviving wife or husband, while brothers and sisters do not come in at all. It would seem *a fortiori* that when both husband and wife die within a short interval of one another and the estate is treated as the joint estate of both, a surviving parent must be recognized as having a substantial interest in the estate, if indeed he does not altogether oust all other relatives including brothers and sisters of the deceased persons, at any rate in cases where the deceased couple lived with the parent. The present case belongs to the latter class, and I would hold that Ma Ein clearly has rights of inheritance under section 32 of the Manu Kye. If Tun Tha as well as Ma Myit had left a parent surviving, then under section 22 the parent of Tun Tha would take Tun Tha's ancestral property the parent of Ma Myit would take Ma Myit's ancestral property, and the jointly acquired property of the husband and wife would be divided equally between the two parents. But as the parent of only one of the deceased is left surviving, the question will arise whether that parent entirely or only partially excludes the brothers and sisters of the other deceased. We are, however, not called upon to decide this question. It is sufficient to find for the purposes of section 23 of the Probate and Administration Act, 1881, that Ma Ein is entitled to the whole or at any rate to some part of the estate of the two deceased.

It is curious that the Dhammathats should lay down definite rules for the two special cases (1) where the childless couple leave parents and (2) where they leave the six distant collaterals. In both these cases we find provisions which can only mean that, if the husband and wife die one shortly after the other, the estate is to be regarded as retaining its joint character and is to be divided accordingly. But the principle deduced by Mr. Burgess and Mr. Justice Irwin might fairly

be applied generally, *i.e.*, to all cases where a childless couple die within a short time of one another. For example, if there are no parents surviving but the husband and wife leave brothers and sisters, it would seem reasonable to deal with the estate by analogy as a joint estate.

I would set aside the order of the District Court and direct that Letters of Administration to the estate of her deceased daughter and son-in-law should be issued to the appellant Ma Ein on her furnishing security in the ordinary course. The appellant's costs in both Courts should be borne by the respondent. Advocate's fee in this Court—five gold *ma-hurs*.

ORMOND, J.—I concur.

Order set aside.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1989 OF 1913.

August 10, 1915.

Present:—Mr. Justice Seshagiri Aiyar and Mr. Justice Napier.

APPAYYA SHETTY, MANAGER,
TILE FACTORY—DEFENDANT—APPELLANT
versus

P. M. MAHAMMADE BEARI AND OTHERS—
DEFENDANTS NOS. 1 AND 2 AND PLAINTIFF—
RESPONDENTS.

Landlord and tenant—Permanent lease with days of grace for payment of rent—Non-payment of rent—Forfeiture of tenancy, right to relieve against—Equitable principles, applicability of—Construction of Statute.

Where a permanent lease provides for payment of rent with days of grace on default in payment on the stipulated date and gives power to the landlord to re-enter when the rent is not paid even after the expiry of the days of grace:

Held, that default in payment of rent even after the days of grace does not work out a forfeiture of the tenancy and the tenant is entitled to be relieved against it and that the provision as to days of grace is only intended for the benefit of the lessee and cannot be made use of to deprive the Court of its power to grant relief. [p. 599, col. 1; p. 601, col. 1.]

Naraina Naik v. Vasudeva Bhatta, 28 M. 389; 15 M. L. J. 208, distinguished.

Peachy v. Duke of Somerset, 1 Strange 447; 93 E. R. 626; 2 Wh. & T. L. C. 255; *Bowser v. Colby*, 1 Haro 109; 11 L. J. Ch. 132; 5 Jur. 1106; 66 E. R. 969; *Narayana Kamti v. Handu Shetty*, 15 M. L. J. 210; *Ramakrishna Mallay v. Baburaya*, 17 Ind. Cas. 947; 23 M. L. J. 715; 12 M. L. T. 656; *Vidyapurna Thirtha Sumanjar v. Rangayayya*, 21 Ind. Cas. 405; 14 M. L. T. 344; (1913) M. W. N. 901; 25 M. L. J. 486; *Kottal Uppi v. Edavalath Thathan Nambudri*, 6 M. H. C. R. 255; *Subba-*

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raya Kamti v. Krishna Kamti, 6 M. 159; *Timmarsa Puranik v. Badiya*, 2 B. H. C. R. 66, followed.

Seshagiri Aiyar, J.—A proviso for re-entry on non-payment of rent is merely a security for the payment of rent and relief should be given if arrears and expenses are paid and if the parties can be placed in *status quo ante* and the insertion of such a clause should not be held to disentitle the tenant from equitable relief. [p. 598, col. 1; p. 599, col. 1.]

Nagappa v. Venkat Rao, 24 M. 265; *Balambhat Rajibhat Joshi v. Vinayak Ganpatrao Patwardhan*, 10 Ind. Cas. 746; 35 B. 239; 13 Bom. L. R. 154; *Kilmer v. British Columbia Orchard Lands Ltd.*, (19 3) A. C. 319; 82 L. J. P. C. 77; 108 L. T. 306; 57 S. J. 338; 29 T. L. R. 319, followed.

Napier J.—By providing for a right of re-entry under the Transfer of Property Act for non-payment of rent in non-agricultural leases, the Legislature did not intend that this principle should be extended to other leases also. [p. 600, col. 1.]

The principle which guides English Courts of Equity in relieving against forfeiture of tenancy for non-payment of rent, *viz.*, that the tenant, if not relieved against, should suffer enormous loss wholly disproportionate to the injury, applies also to India, and the provision in the lease for days of grace does not take the case out of that principle. [p. 600, col. 2.]

Sanders v. Pope, 12 Ves. 282; 33 E. R. 108; *Hill v. Barclay*, 18 Ves. 56; 11 R. R. 147; 34 E. R. 238, followed.

Second appeal against the decree of the District Court of South Canara, in Appeal Suit No. 73 of 1912, preferred against that of the Court of the District Munsif of Kasargod, in Original Suit No. 690 of 1910.

Mr. B. Sitarama Row, for the Appellant.

Mr. K. Ramanath Shenai, for the Respondents.

JUDGMENT.

SESHAGIRI AIYAR, J.—I have had the advantage of reading the judgment which my learned brother is about to deliver. As the question is one of considerable importance and as the decisions bearing on it are not consistent with each other, I think it desirable to state my views on the subject shortly.

The lease to defendants Nos. 1 and 2 is a permanent one. The plaintiff says that the produce was set apart for a religious service. I take it that the grantor was only anxious that he should be paid the rent. He gave up rights of possession, etc., when he granted this permanent lease. The original grantees paid the rent regularly for 16 years. It was after the transfer of their interests to the 3rd defendant in 1907 that default was made. There were three years' arrears of rent when the suit was brought. The

document in question provides for the payment of the first year's rent with that of the second year. If rent remained unpaid even then, the lessees were liable to be evicted. The question is whether, under the circumstance above set forth, the defaulting lessees are entitled to be relieved from forfeiture. There is no statutory provision for forfeiture on non-payment of rent regarding agricultural leases. It is open to Courts to look at legislative provisions regarding the liability of other lessees and tenants as embodying the principles of equity, justice and good conscience. I cannot accede to the proposition that such a guidance should be sought only from English decisions and not from statutory provisions in this country.

Let us first see how the Legislature has treated tenants under the Estates Land Act. Chapter VI of the Act deals exhaustively with the remedies open to the landholder. He can sue for the rent or distrain. The proceedings to be taken on distraint are hemmed in with strict conditions. The landholder has to exhaust all available sources before he sells the defaulter's interest in the holding. The distress will have to be withdrawn, if the arrears are deposited or security given for their payment. Even after the commencement of the sale, the tenant is given a *locus penitentiae* to save his property. It is thus clear that the Legislature has provided very salutary restrictions against turning out a tenant from his fields. As regards other lessees, the Transfer of Property Act lays down that the forfeiture clause must be express. Section 114 provides for relief from the forfeiture incurred even after the institution of the suit. The Indian Statute Law, therefore, distinctly leans against forfeiture for non-payment of rent. I may also refer to section 74 of the Contract Act, which has abolished the distinction between penalty and liquidated damages and has enacted a general rule affording relief to the defaulting party under certain limitations. Now, turning to the English Law, the course of decisions leaves no room for doubt that Courts have striven against evicting tenants from their holdings. The case of *Peachy v. Duke of Somerset* (1), to which our

(1) 1 Strange 417; 93 E. R. 626; 8 Wh & T. L. C. 255.

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attention was drawn by Mr. Sitarama Row and which was followed in the earlier decisions of this Court, enunciates the proposition that where the intention of the parties is only to enforce punctual payment, the forfeiture clause will be relieved against. In *Bowser v. Colby* (2) the tenant applying to redeem a forfeited lease was not required to pay the rent and costs into Court before being decreed possession. All the cases have been reviewed in *Peachy v. Duke of Somerset* (1) and the result of the authorities is stated to be that the proviso for re-entry on non-payment of rent is regarded in equity as merely a security for the rent and that relief will be given on payment of the arrears and of the expenses incurred. In England, there can be relief after suit is brought and before judgment. There is a further indulgence given even after judgment, provided the costs of the suit are paid in addition. The period within which this latter remedy is available is now restricted to six months after judgment (15 & 16 Victoria, Chapter 76, section 210). Relief after decree may not be granted in India, as the effect of it will be to enable the executing Court to vary the decree. The decision in *Nagappa v. Venkat Rao* (3) proceeded on the footing that the compromise decree was only evidence of the contract between the parties and that the Court was not varying the decree in such cases. *Balambhat Ravjibhat Joshi v. Vinayak Ganpat-rao Patwardhan* (4) is to the same effect.

The rule to be deduced from an examination of legislative provisions and authorities bearing on the subject is that *prima facie* the clause for re-entry on non-payment of rent is intended only as security for the payment of the rent. Therefore, Courts should relieve against this clause, if the arrears and expenses are paid and if the parties can be placed in *status quo ante*. In *Kilmer v. British Columbia Orchard Lands Ltd.* (5) it was pointed out that Courts should not encourage the enforcement of the strict letter of the contract which contains a penal provision. The payment

of the money being the principal aim of the contract, the proviso is designed to hold out a threat relating to its fulfilment. As has been concisely put in Story's Equity Jurisprudence, section 1316: "In reason, in conscience, in natural equity, there is no ground to say, because a man has stipulated for a penalty, in case of his omission to do a particular act (the real object of the parties being the performance of the act), that, if he omits to do the act, he shall suffer an enormous loss, wholly disproportionate to the injury to the other party. If it be said that it is his own folly to have made such a stipulation, it may equally well be said that the folly of one man cannot authorise gross oppression on the other side. And law, as a science, would be unworthy of the name, if it did not to some extent provide the means of preventing the mischiefs of improvidence, rashness, blind confidence, and credulity on one side; and of skill, avarice, cunning, and a gross violation of the principles of morals and conscience, on the other. There are many cases in which Courts of Equity interfere upon mixed grounds of this sort." In no country is there a greater need for the application of this beneficent statement of the law than in India; and if it is true that we are administering both equity and law in our Courts, there must be an endeavour on our part to soften the rigour of the law and to mete out substantial justice, unless our hands are tied by the Legislature.

It is this view of the functions of a Court that inclines me to hesitate to follow some of the decisions of this Court to which I shall presently refer. In *Naraina Naik v. Vasudeva Bhatta* (6), it was broadly laid down that if a contract provides for days of grace where rent is not paid in time, Courts should not relieve against forfeiture. *Narayana Kamti v. Handu Shetty* (7) is to the same effect. The learned Judges seem to suggest that the English decisions are distinguishable, inasmuch as ordinarily days of grace are not provided in lease-deeds executed in England. Our attention has been drawn by Mr. Sitarama Row to the forms of lease-deeds printed in Woodfall on Landlord and Tenant which give days

(2) 1 Haro 109; 11 L. J. Ch. 132; 5 Jur. 1106; 66 E. R. 969.

(3) 24 M. 265.

(4) 10 Ind. Cas. 746; 35 B. 239; 13 Bom. L. R. 154.

(5) (1913) A. C. 319; 82 L. J. P. O. 77; 108 L. T. 300; 57 S. J. 338; 29 T. L. R. 319.

(6) 28 M. 389; 15 M. L. J. 208.

(7) 15 M. L. J. 210.

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of grace (see page 1069). Apart from this, I fail to see on what principle the insertion of such a clause should be held to disentitle the tenant from equitable relief. The observations of that great jurist, Story, J., are particularly applicable to such carefully designed provisions. I think the true principle is that which *Ramakrishna Mullay v. Baburaya* (8) enunciates. Each case must be judged by itself. The delay, the conduct of the parties, the difficulties to which the landholder had been put should be weighed against the tenant. A number of circumstances may be mentioned which would induce Courts to condone the faults of the tenant. A hard and fast rule that a contract providing for days of grace ought to be enforced strictly is not calculated to advance justice. *Ramakrishna Mullay v. Baburaya* (8) has been followed by Sadasiva Aiyar and Tyabji, J.J., in *Vidyapurna Thirtha Swamiar v. Rangappayya* (9). In Second Appeal No. 2568 of 1912, the same learned Judges relieved against non-payment of six years' arrears. The earlier decisions of this Court are all favourable to the tenants. *Kottal Uppi v. Edavalath Thathan Nambudri* (10) and *Subbaraya Kamti v. Krishna Kamti* (11). In *Timmarsa Puranik v. Badiya* (12) the rule of *Peachy v. Duke of Somerset* (1) was applied.

In the present case, the pleadings and the findings do not show that the defendants have forfeited their claim to equitable relief by any conduct on their part.

I would, therefore, reverse the decrees of the Courts below and direct that if the defendant does not pay the arrears of rent due up to November 1914 with interest thereon at 12 per cent. per annum as well as the costs of the plaintiff in all the three Courts within four months from the date of this decree, they shall deliver up possession of the property and this second appeal will stand dismissed with costs. If the payment is made, they shall be put in possession of the suit property, if the plaintiff has already taken possession,

with mesne profits to be determined in execution.

NAPIER, J.—The only question that arises in this appeal is whether the 3rd defendant, the assignee from defendants Nos. 1 and 2 of the lease under the *mulgani karar*, is entitled to be relieved against forfeiture for non-payment of rent. The rent is one year in arrears and the *karar*, Exhibit A, allowed a period of one year before the operation of the forfeiture clause. On behalf of the plaintiff it is conceded that the forfeiture clause can be relieved against, but it is contended that where there are days of grace, the rule does not apply. On behalf of the defendants it is contended that the alleged rule that after the days of grace the clause must be enforced is not supported by authority. In *Narayana Kamti v. Handu Shetty* (7) and in *Naraina Naik v. Vasudeva Bhatta* (6) Judges of this Court undoubtedly laid down the strict rule; but in the earliest case of this Court, *Kottal Uppi v. Edavalath Thathan Nambudri* (10), the principle is stated to be thus: "that where the intention of the parties was that the forfeiture clause should be a penalty for the purpose of securing rent, should always be relieved against." It is true that in *this* case there were days of grace, but I fail to see how what was intended as a benefit to the lessee can be made use of to deprive the Court of its power to grant relief.

The latest case is *Ramakrishna Mullay v. Baburaya* (8). There the late Chief Justice and Mr. Justice Sankaran Nair laid down that relief must depend upon the facts of the particular case. They distinguish the case of *Narayana Kamti v. Handu Shetty* (7), on the ground that in that case a long period was allowed, some eight months, and there was no stipulation that the tenant should in default lose the value of his improvements; and rely on the doctrine laid down in the case of *Kottal Uppi v. Edavalath Thathan Nambudri* (10) and on *Mahalakshmi Amma v. Lakshmi* (13), a case in which a period of grace was allowed and in spite of that, the clause was relieved against. I quite agree that the question must to a certain extent depend upon the facts of each particular

(13) 12 Ind. Cas. 456; 21 M. L. J. 960; (1912) M. W. N. 385.

(8) 17 Ind. Cas. 947; 23 M. L. J. 715; 12 M. L. T. 656.

(9) 21 Ind. Cas. 405; 25 M. L. J. 486; 14 M. L. T. 344; (1913) M. W. N. 901.

(10) 6 M. H. C. R. 258.

(11) 6 M. 159.

(12) 2 B. H. C. R. 66.

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case, but I think that it is necessary to decide whether the existence of days of grace is a bar as held in the two cases quoted above.

It is sought to apply the provisions of the Transfer of Property Act as laying down the principle which should guide the Court, although admittedly those sections do not apply to agricultural leases; and this contention has found favour with some Judges of this Court. With all respect and deference to the contrary view held by my learned brother I regret I cannot agree with this view. I entirely accept the proposition that where the Statute embodies equities with respect to certain classes of transactions with which it is dealing, it is reasonable to found equities with regard to other classes of transactions on the principles there enunciated; but where the Statute specifically excludes one transaction of the same class as that which is being dealt with from its purview, we cannot apply the same doctrine. We do not know why the Legislature exempted agricultural leases from the purview of the Transfer of Property Act lease sections. It might be that the Legislature thought that the provisions for forfeiture of rent embodied in those sections were not suitable to agricultural leases. It is not open to us to investigate the reasons for the exclusion and we cannot, therefore, presume that some other cause operated on the mind of the Legislature. If we are to apply any equity in relieving against forfeiture, we must, in my view, seek for it outside the Transfer of Property Act; and the proper course is to ascertain the practice in England and apply it, subject to such modifications that seem proper in view of the conditions in this country. This was the course adopted by this Court in the case in *Kottal Uppi v. Edavalath Thathan Numbudri* (10). There reliance is placed on *Peachy v. Duke of Somerset* (1). The language of the Lord Chancellor is as follows: "The true ground of relief against penalties is from the original intent of the case where the penalty is designed only to secure money and the Court gives him all that he expected or desired." This is treated as the leading case in *White and Tudor*, Volume II where the learned Editor points out that even where the penalty of the bond is to secure a collateral object, the

Court will grant relief [Vide *Sloman v. Walter* (14) quoted on page 264] and states as the result of the examination of the authorities that "from a very early period equity would, at any indefinite time after a tenant had incurred forfeiture, and been ejected for non-payment of rent at a particular time, under the stipulation in his lease, relieve him upon his paying to the lessor the rent accrued due, interest, and costs, upon this principle that as the right of entry was intended merely as a security for the rent, the lessor thereby received full compensation, and was put in the same situation as if the rent had been paid to him when it was originally due." The principle was restated by the Lord Chancellor in *Sanders v. Pope* (15) with an explanation at page 289 as to the origin of the covenant which is as follows:—"The obvious intention of the clause is to secure the payment of the rent; that the landlord may not be put to his action of debt, coming from time to time against an insolvent estate; but may be enabled to recover possession of the premises. In that case equity is in the constant course of relieving the tenant, paying the rent and all expenses, and placing his landlord in exactly the same situation". In a later case, *Hill v. Barclay* (16), the Lord Chancellor distinguishes the case of forfeiture arising out of a covenant to repair, on the ground that in some cases it might not be possible to put the landlord in exactly the same position by ordering the tenant to make the necessary repairs. The doctrine is stated in Story's Equity Jurisprudence as founded on the theory that the right of entry is deemed to be intended to be a mere security for the payment of rent, and in paragraph 1316, the learned Editor states as follows: "In reason, in conscience, in natural equity, there is no ground to say, because a man has stipulated for a penalty, in case of his omission to do a particular act (the real object of the parties being the performance of the act), that, if he omits to do the act, he shall suffer enormous loss, wholly disproportionate to the injury to the other party." It seems to me that we should apply these principles in India and I find nothing in the cases and nothing in the principles on which they are

(14) 1 Bro. C. C. 418; 28 E. R. 1213; 2 Wh. & T. L. C. 264.

(15) 12 Ves. 282; 33 E. R. 108.

(16) 18 Ves. 56; 11 R. R. 147; 34 E. R. 235.

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founded to support the view that the insertion of days of grace in a lease will oust the jurisdiction of the Court to relieve. The origin of the covenant and its purpose are enunciated in the above cases. We have to apply it to the present case. This is a permanent lease, a lease very common on the west coast of India, one by which the lessor deprives himself of any possibility of increase of rent for all time. He has reserved nothing to himself but his *muli* right. The leaseholder has a permanent and alienable right in the property, a position infinitely stronger than that of the agricultural lessee in England for a term of 7, 14 or 21 years. In relieving against the forfeiture we can, therefore, give to the *jenmi* "all that he expected or desired," in the words of the Lord Chancellor in *Peachy v. Duke of Somerset* (1), *i. e.*, the rent reserved and in my opinion we should be very slow to refuse to do this in these circumstances. Neither the fact that there were days of grace nor that the rent is 6 years in arrears should operate to prevent the application of the doctrine. I recognize that this would lead to a systematic refusal to pay rents until after a suit to enforce the forfeiture clause; but I think that the injury is exaggerated. Such a practice will bring its own punishments for it would lead to the discontinuance of the permanent leases by *mulganidars* and compel them to grant *mulgani* chits for short terms only as is done in many cases, I would add that legislative authority was given to this doctrine of relief in 4 Geo. II, Ch. 28, and its extent curtailed by the Common Law of Procedure Act of 1852, section 210. I do not think it necessary, however, to refer to the specific provisions of the Act as I would prefer to base my judgment on the principles enunciated by the Courts of Chancery apart from the Act.

Appeal allowed; Decree reversed.

LOWER BURMA CHIEF COURT.

SECOND CIVIL APPEAL No. 181 of 1914.

June 7, 1915.

Present: Mr. Justice Young.

MA TON PAT—APPELLANT

versus

MA THAN—RESPONDENT.

Buddhist Law—Childless widow, right of, to succeed to her husband's property Sale of joint ancestral property by brother, validity of—Pre-emption.

A childless widow of a man who has died after his parents' death, succeeds to his share of the ancestral property whether it has or has not been divided, provided always that the property in question is not held on some feudal tenure or is not appurtenant to some hereditary office. [p. 602, col. 2.]

A sale by a surviving brother of the whole property is invalid and having regard to the law of pre-emption is also invalid as regards his own share. [p. 602, col. 2.]

Appeal against the judgment and decree of the District Judge of Mergui, dated the 9th February 1914, in Civil Appeal No. 2 of 1914 reversing those of the Township Court of Bokpyin.

Mr. *Ormiston*, for the Appellant.

Maung *Gyee*, for the Respondent.

JUDGMENT.—The only questions argued in this appeal were (1) whether when two brothers were in joint possession of immoveable ancestral property and one died leaving a widow but no children, a sale by the surviving brother was valid in whole or in part and (2) whether the parties being Siamese, the law of that country was not the law to be applied by virtue of section 13 of the Burma Laws Act. This last point was only taken in second appeal and as both parties had by their pleadings claimed to be bound by Burmese Buddhist Law, it does not seem to me to be an objection that should be entertained at this stage.

The plaintiff relies upon various Dhammathats, *e.g.*, Pyu Kungya and Kyannet quoted under section 7 and Myingun quoted under section 170 of the Kin Wun Mingyi's Digest.

He has also in his favour the great authority of Spark's Code, section 66 of which runs to this effect: "If a man dies without issue, his widow shall inherit all the property which was in his actual possession at his death, but she shall not share as his representative in any ancestral estate which is not divided until after his death." Sandford, J.C., cites this exposition of the law with approval

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in *Mi Pyu v. Mi Bon Dok* (1). The case, however, concerned divided property and the point did not really arise, and, moreover, he had expressed what seems to be an inconsistent opinion in the case of *Mi Tun Byu v. Nga Yan* (2) decided only a week or two before. Here too, however, the opinion was also *obiter*. No more recent case was cited.

The respondent relied on the great authority of the Manugye and cited a passage from page 277 of Richardson's Translation, which certainly seems to support his contention *viz.*, that the widow of a childless man succeeded to his share of the ancestral property. He criticised the Dhammathats cited by the other side by stating that they related to ancestral property appurtenant to some hereditary office, a proposition which is certainly true as regards some of the Dhammathats cited in sections 7 and 170 of the Digest, *e.g.*, Dhammathat Kyaw, Kandaw Ponam. He might also have relied, as it seems to me, on the two Upper Burma cases of *Mi Lan v. Maung Shwe Daing* (3) and *Maung Walk v. Maung Nyein* (4) where the question was exhaustively considered. These cases took the same view as that for which respondent contended, namely, that the childless widow succeeded, provided that the inheritance was within reach, *i.e.* provided that the husband or wife as the case might be, had not predeceased his or her parents and also provided that the property in question was not appurtenant to some hereditary office or held on some feudal tenure.

Major Spark's opinion, it was suggested, should be confined to cases in which the husband or wife had predeceased his or her parents and consequently the inheritance was not within reach and the opinions of Sanford, J. C., were also noted. In the first of these Upper Burma cases the evidence of Kin Wun Mingyi himself was taken and he supported the respondent's view, and in the latter the learned Judge had the advantage of having the Kin Wun Mingyi's Digest to which to refer. On the whole seeing that the point has apparently never been judicially decided in Lower Burma, and that the opinion of Major Spark was expressed at a time when

the available authorities were fewer, I am of opinion that I should follow the Upper Burma decisions and hold that a childless widow of a man who has died after his parents' death succeeds to his share in the ancestral property whether such has or has not been divided, provided always that the property in question is not held on some feudal tenure or is not appurtenant to some hereditary office. In my opinion, therefore, the sale of the property as a whole by the surviving brother was invalid and having regard to the law of pre-emption was also invalid as regards his share, *cf. Nga Maing v. Mi Baw* (5).

The property was undivided and the purchaser never even obtained possession.

The appeal must, therefore, be dismissed with costs.

Appeal dismissed.

(5) L. B. R. (1872-1892) 39.

LOWER BURMA CHIEF COURT.

CIVIL MISCELLANEOUS APPEAL NO. 13 OF 1914.

January 11, 1915.

Present:—Sir Charles Fox, Kt., Chief Judge, and Justice Sir Henry Hartnoll, Kt.

OFFICIAL ASSIGNEE—PLAINTIFF—

APPELLANT

versus

T. M. T. THOMPSON—DEFENDANT—

RESPONDENT.

Deposit of insurance policy—Effect of mere deposit at time of execution of pro-note—Lender if can rank as secured creditor in distribution of promisor's estate.

A deposit of an insurance policy with the payee of a pro-note by way of collateral security is neither a transfer nor an assignment of the policy and creates no security in favour of the payee and he cannot, therefore, be regarded as a secured creditor in the distribution of the estate of the promisor who subsequently becomes insolvent. [p. 604, cols. 1 & 2.]

Appeal against the order of Mr. Justice Young sitting on the Original Side of the Chief Court, dated the 8th January 1914, in Civil Insolvency No. 95 of 1913.

FACTS.—The facts of this case appear in the judgment of Young, J., which was as follows:—

(1) L. B. R. (1872-1892) 35.

(2) L. B. R. (1872-1892) 32.

(3) U. B. R. (1892-1896), II, 121.

(4) U. B. R. (1897-1901), II, 145.

OFFICIAL ASSIGNEE v. THOMPSON.

"This is a petition made by one T. M. T. Thompson, No. 40, 40th Street, praying for an order directing the Official Assignee to pay him as a secured creditor the full sum due to him before distributing among the general body of creditors of the deceased insolvent. The full amount due to Mr. Thompson is the sum of Rs. 2,000. According to Mr. Thompson for further securing the due amount of the said sum of Rs. 2,000 with interest the said W. G. Whittam, deceased, pledged with him his life policy for Rs. 5,000 in the Standard Life Assurance Co. It appears that two pro-notes, each for Rs. 1,000, were executed by four persons in favour of Mr. Thompson, viz., W. G. Whittam (insolvent), A. V. Whittam, J. M. Rajh and Maung Tun In. Each of the pro-notes was drawn on a piece of paper taken out of a book and consecutively numbered 28 and 29. With regard to the promissory note No. 28, an unstamped portion appearing to be the counterfoil of the pro-note is produced by Mr. Thompson which is signed by Mr. George Whittam and refers to a pro-note signed by himself, Mr. A. B. Whittam and the other two executants and stating that collateral security was given for Rs. 1,000 only as follows:

First Grade Clerk, Customs House, Rs. 250.
Preventive Officer, Customs House, Rs. 150.
Two 4th grade Clerks, Customs House, each of them Rs. 150, and lastly,

A policy in the Standard Life Assurance Co, the policy in suit.

We are not concerned with the meaning of the collateral security, which apparently means that the other signatories only signed as sureties and to the extent mentioned in the counterfoil. It will be observed that the document, Exhibit A,* is unstamped and I

have ordered it to be stamped with ten times the amount of the proper stamp, which seems to be Rs. 1-14-0. It purports to be signed by George Whittam, but there is no distinct evidence in the document that it was given to Mr. Thompson. It is admitted, however, that Mr. Thompson produced to the Official Assignee the pro-note No. 28 and that he also produced before him the policy in question, the amount of which has been recovered by the Official Assignee from the Insurance Company in question. Now Mr. Thompson contends or rather his Advocate contends that the whole of the Rs. 2,000 was secured by the deposit of this policy. In the face of the document, Exhibit A, and of the decision of the Privy Council to which I shall have occasion to refer in a moment, I am unable to hold that the mere deposit of a policy gave him any rights at all. The case, however, seems to me to be different with regard to the pro-note No. 28, because with reference to that pro-note there is this document, Exhibit A., also numbered 28 which says that the policy of the Standard Life Assurance Company No. 06855, which is admittedly the policy in question, was given as collateral security though there is no such note with regard to the pro-note No. 29, and so really it seems to me that the only question in this case is whether the handing over of this document by Mr. Whittam to Mr. Thompson constitutes a transfer of an actionable claim within the meaning of section 130 of the Transfer of Property Act and in accordance with the decision of the Privy Council in *Mulraj Khatau v. Vishwanath Prabhuram Vaidya* (1). Under the circumstances of the case I have no doubt that though Mr. Thompson's name was not mentioned, he is the person to whom this collateral security was given inasmuch as he produced the pro-note in question which was made out in his favour and it was also he who produced the policy in question. Well, section 130 says that the transfer of an actionable claim shall be effected only by the execution of an instrument in writing signed by the transferor or by his duly appointed agent and shall be complete and effectual upon the execution of such instrument and thereupon

(1) 17 Ind. Cas. 627; 37 B. 198; (1912) M. W. N. 1247; 12 M. L. T. 652; 11 A. L. J. 7; 24 M. L. J. 60; 17 C. W. N. 209; 15 Bom. L. R. 9; 17 C. L. J. 162; 40 I. A. 24.

*Exhibit A referred to in the judgment is a counterfoil of pro-note No. 28 and is as follows:—

Rangoon, 10th February 1911.

Made by W. G. Whittam, A. V. Whittam, J. M. Rajh and Maung Tun In.

For Rupees One Thousand only at 3 per cent.

Collateral security given as follows:—

1. First Grade Clerk Customs House 250.
2. Preventive Officer do. do. 150.
3. Fourth Grade Clerk do. do. 150.
4. Do. do. do. 150.

Policy Standard Life Assurance Company No. 06855—C, T. K. C. Calcutta, 22nd September 1910.

(Sd.) WM. GEO. WHITTAM.

SHWE THA U v. HLA RHI.

all the rights and remedies of the transferor whether by way of damages or otherwise shall vest in the transferee, whether such notice of the transfer as is hereinafter provided be given or not. It seems to me, and is admitted, that the claim upon the policy of insurance is an actionable claim, and the Legislature seems to me to provide that that actionable claim may be transferred by the execution of an instrument in writing signed by the transferor, and, in my opinion, there is in Exhibit A, a document signed by the transferor transferring his actionable claim. As was observed by their Lordships of the Privy Council, the decision in the matter in issue turns entirely on the interpretation of section 130, sub-section 1, of the Transfer of Property Act of 1900. Mr. Anzum for the Official Assignee pointed out that this was not an assignment. But so far as I can see, the question is whether there is any difference between the terms transfer and assignment and, *secondly*, whether if so, it is an assignment and not a transfer. I am not aware myself that an assignment, is anything else but a transfer. If it is anything else, then it seems to me that the assignment of an actionable claim is not required, but only the transfer of an actual claim. It is obvious that this transfer was by way of security, but it is laid down by the Privy Council that such a transfer by way of security is contemplated by the section. It may be that Mr. Thompson is correct in saying that the title-deed was deposited, as a matter of fact, by way of collateral security for the other pro note of Rs. 1,000, but the Privy Council case in question clearly shows that unless the deposit of an actionable claim is accompanied by an instrument in writing it is inoperative. His claim to Rs. 1,000 under the pro-note No. 29 must be disallowed. But, in my opinion, it should be allowed as regards the pro-note No. 28. Mr. Wells must have his costs on the amount of Rs. 1,000 with interest at 3 per cent. up to date of adjudication. Costs of this application three gold mohurs."

Mr. Anzum, for the Appellant.

JUDGMENT.—In our opinion the document, Exhibit A, was not a transfer or assignment of the policy. It is merely a memorandum of what collateral security had been given and is consistent only with the policy having been deposited as security.

Such deposit created no security in favour of the respondent. The order appealed against is set aside. The respondent must pay the appellant's costs of this appeal. Three gold mohurs allowed as Advocate's fee.

Order set aside.

LOWER BURMA CHIEF COURT.
SECOND CIVIL APPEAL No. 291 OF 1913.
March 12, 1914.

Present:—Justice Sir Henry Hartnoll, KT.
SHWE THA U AND OTHERS—DEFENDANTS—
APPELLANTS
versus

HLA RHI AND ANOTHER—PLAINTIFFS—
RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 11—
Res judicata between co-defendants—Conflict of interests between defendants—Judgment defining rights and obligations inter se.

Where an adjudication between co-defendants is necessary to give the appropriate relief to the plaintiff, the adjudication will be *res judicata* between the co-defendants as well as between the plaintiff and the defendants provided there was a conflict of interests between the defendants and the judgment defines the rights and obligations of the defendants *inter se*. [p. 604, col. 2.]

Appeal against the judgment and decree of the District Judge of Akyab, dated the 2nd August 1913, in Civil Appeal No. 28 of 1913, confirming those of the Township Court, Rathedaung, in a suit for recovery of shares of land bought jointly.

Mr. Bose, for the Appellants.

Mr. Ba Dun, for the Respondents.

JUDGMENT.—The sole point for decision is whether the learned District Judge was right in holding that the rule of *res judicata* decides the suit. It seems to me that the law is correctly stated in the case of *Ramchandra Narayan v. Narayan Mahadev* (1), namely, that where an adjudication between the defendants is necessary to give the appropriate relief to the plaintiff, the adjudication will be *res judicata* between the defendants as well as between the plaintiff and defendants; but for this effect to arise, there must be a conflict of interests between the defendants and a judgment defining the real rights and obligations of the defendants *inter se*.

SECRETARY OF STATE v. PERARULALA RAMANUJA JEER SWAMIGAL.

In the former case the plaintiffs in this suit were defendants, and in that suit they supported the plaintiff's claim which was based on the same cause of action as the present suit. There was a conflict between the present plaintiffs and the present defendants, who were defendants in the former suit based on the same cause of action as the present one. The suit was decided against the present defendants' allegations and in favour of the present plaintiffs' allegations.

The rule laid down in the case I have quoted above, and which I am of opinion is a correct rule, applies to the present case. I accordingly dismiss the appeal with costs.

Appeal dismissed.

MADRAS HIGH COURT.

FIRST CIVIL APPEAL NO. 53 OF 1914.

July 26, 1915.

Present:—Sir John Wallis, Kt., Chief Justice, and Mr. Justice Srinivasa Aiyangar.

THE SECRETARY OF STATE FOR INDIA
IN COUNCIL, THROUGH THE COLLECTOR OF
TINNEVELLY—DEFENDANT—

APPELLANT

versus

Sri PERARULALA RAMANUJA JEER
SWAMIGAL—PLAINTIFF—RESPONDENT.

Madras Irrigation Cess Act (VII of 1865)—Inam title-deed—Inamdar—Claim to irrigate free of charge larger area than entered in inam title-deed, if allowable—Separate engagement, necessity of.

Where an inamdar claims that he is entitled to irrigate free of charge in respect of a much larger area than that entered in the inam title-deed, it must be by virtue of some engagement with the Government other than the inam title-deed. [p. 605, col. 2.]

Appeal against the decree of the Court of the Subordinate Judge of Tinnevelly, in Original Suit No. 2 of 1907.

FACTS.—This is an appeal preferred by Government against the decree of the Subordinate Judge at Tennevelly in a suit brought by Sri Perarulala Ramanuja Jeer Swamigal against the Secretary of State for India in Council through the Collector of Tinnevelly. The plaintiff prayed for a declaration that the Government were not entitled to levy water rate for wet crops raised by plaintiff on any land under the Oochikulam tank and for recovery of Rs. 411-3-6, being the amount

levied from plaintiff as such rate for *fastis* 1314 and 1315. The plaintiff averment was that the plaintiff had been raising wet crops on the entire land under his cultivation from time out of mind, that the Government had no right to levy water-cess on any portion thereof, and that the *jodi* was fixed as a permanent assessment, irrespective of the area under wet or dry cultivation from time to time. The defendant's contention was that the *jodi* was fixed with reference to the extent of lands cultivated as wet and on the dry lands at the time of the inam Settlement and that the plaintiff had since increased the wet cultivation and was liable to pay water-cess on the increased area, and that the claim was barred by limitation.

The suit was at first dismissed with costs, the Subordinate Judge holding that the plaintiff was precluded from adducing evidence to show that no land shown as wet in the *ayacut* accounts ever remained uncultivated with wet crop at any time.

On appeal to the High Court, their Lordships Miller and Abdur Rahim, J.J., remanded the suit for re-trial, and directed the lower Court to admit the plaintiff's evidence formerly disallowed.

The Subordinate Judge, on re-hearing the case, gave a decree to the plaintiff as prayed for on the evidence produced by the plaintiff. The Government now appeal against that decree.

Mr. J. L. Rozario, for the Government.

Mr. M. A. Thirunarayanaachariar, for the Respondent.

JUDGMENT.—This is a suit by the plaintiff to recover water-cess levied by Government on the amount of wet cultivation in the plaintiff's inam village of Oochikulam, which is in excess of the amount mentioned for that village in the inam title-deed, Exhibit O. Admittedly the inam title-deed constitutes an engagement with Government within the meaning of Act VII of 1865 to supply water free of charge for the area of wet cultivation in the village mentioned therein, but the Subordinate Judge has held that the plaintiff is entitled to irrigate free of charge in respect of a much larger area, and if this be so, it must be by virtue of some engagement with Government other than the inam title-deed. The plaintiff's case is that he has been all along since the *paimash* in 1802

IDINE BEARY v. UMMATHUMMA.

cultivating about double this quantity of wet and that the amount entered in the title-deed is a mistake. Exhibit I, on the other hand, shows that the wet cultivation at the time of the *paimash* was only 41k. 4m. 2½p. In support of this contention, he relies on certain *cadijan* accounts beginning with the early years of last century. We are not prepared to rely on these *cadijans* which have a very modern look and may well have been fabricated. In 1904 he was asked to support his case by accounts and failed to produce these *cadijans*. It is curious that in the very year in which the *inam* inquiry was held the plaintiff's *cadijan* accounts show a much greater extent of wet cultivation in this village than was given by the plaintiff's predecessor to the Commissioner in his signed statement, Exhibit Ia. We know how carefully the *Inam* Register was prepared and that the plaintiff had an opportunity of correcting the statement of the Revenue Officials, and that instead of so doing he gave a statement practically to the very same effect. It is not to be supposed that the Revenue Authorities would have fallen into such an error, or that if they had, the *inamdar* would have failed to point it out or would have accepted a title-deed in the terms of Exhibit O. The plaintiff's explanation that his statement to the *Inam* Commissioner related to the whole five villages and that there may then have been a deficiency of wet cultivation in the other villages which made his total accurate, is most improbable and no attempt has been made to show that there was any such deficiency in the other villages by producing the village accounts. In these circumstances we cannot act upon the *cadijan* accounts now put forward as proof that at the date of the *Inam* Settlement the plaintiff was really cultivating the amount which he claims. We cannot place any reliance either on the statements of the plaintiff's witnesses that the lands now cultivated as wet were always so cultivated.

We allow the appeal and dismiss the suit with costs throughout.

Appeal allowed; Suit dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 563 OF 1914.

April 16, 1915.

Present:—Mr. Justice Sadasiva Aiyar and
Mr. Justice Napier.

IDINE BEARY—DEFENDANT No. 3—

APPELLANT

versus

UMMATHUMMA AND OTHERS - PLAINTIFFS
AND DEFENDANTS NOS. 1 AND 2—RESPONDENTS.

Fraud—Decree obtained through collusion—Parties to it or their representatives, whether can treat it as nullity—Decree for possession—Possession given by judgment-debtor—Fresh dispossession—Cause of action.

A decree of Court, though obtained by collusion in order to carry out a scheme of fraud, cannot be treated as a nullity as between the parties to the decree or their representatives, and any of them cannot be permitted to show that the transaction upheld by the decree was not really what it purports to be and does not bind him. [p. 606, col. 2.]

Rangammal v. Venkatachari, 18 M. 378; *Kondeti Kama Row v. Nukamma*, 31 M. 485; 4 M. L. T. 331 18 M. L. J. 576, followed.

Barkat un-nissa v. Fazl Haq, A. W. N. (1904) 25; 26 A. 272, distinguished.

Where a decree is one for possession the decree-holder is not bound to obtain possession through Court, if the judgment-debtor gives it up amicably. Any subsequent dispossession gives rise to a different cause of action upon which a different suit may be brought. [p. 607, col. 1.]

Second appeal against the decree of the District Court of South Canara, in Appeal Suit No. 415 of 1912, preferred against the decree of the Court of the District Munsif of Mangalore, in Original Suit No. 168 of 1911.

Mr. B. Sitarama Row, for the Appellant.

Messrs. C. V. Ananthakrishna Aiyar and K. Y. Adiga, for the Respondents.

JUDGMENT.—We think that we ought to follow the decisions of this Court in *Rangammal v. Venkatachari* (1) and *Kondeti Kama Row v. Nukamma* (2), which lay down that a decree of Court, though obtained by collusion in order to carry out a scheme of fraud cannot be treated as nullity as between the parties to the decree—not only this, the Court ought not to permit any of the parties to such fraud and collusion to show that the transaction upheld by the decree was not really what it purported to be and does not, therefore, bind him. We are not prepared to follow some of the observations in the judgment in *Barkat*—

(1) 18 M. 378.

(2) 31 M. 485; 4 M. L. T. 331; 18 M. L. J. 576.

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un-nissa v. Fazl Haq (3), which go to the length of stating that a person, who had merely a hope of succession and no present legal right in the property affected by a collusive decree, is entitled to impeach that decree though he is the heir and representative of one of the parties to the decree. (See also Bigelow on Fraud, page 91.)

The decree in Original Suit No. 71 of 1902 awarding the plaintiff possession of the plaint property is, therefore, binding on the 3rd defendant, who is the heir of one of the parties to that suit, as held by the learned District Judge.

The next contention of the appellant (the 3rd defendant) is that the execution of that decree has become barred and that the plaintiff's only remedy as decree-holder under that decree was to execute that decree for possession and not to bring a separate suit for possession treating that decree as a decree for possession and not as a declaratory decree. A decree-holder is not bound to obtain possession through Court if the judgment-debtor gives up possession amicably. In that case the decree is satisfied and there is no cause of action to take out execution proceedings in the suit. If the decree-holder is dispossessed afterwards, his dispossession gives him a fresh cause of action and it is on that fresh cause of action that this suit was brought.

Lastly, it is contended that the plaintiff never did get possession of the properties from his deceased mother (the judgment-debtor) and that the District Judge's finding to the contrary cannot be supported. The learned District Judge is, no doubt, mistaken in his assertion that it was not "disputed that defendants Nos. 1 and 2 originally attorned to the plaintiffs in 1905 (Exhibit K)." The District Munsif found on the 3rd defendant's contention that Exhibit K was very recently manufactured to support the plaintiff's case. There are, however, the documents D and J (of which the genuineness of Exhibit D seems to be conceded by the District Munsif), and the fact of the plaintiff and his mother having been thick friends, and the fact that the plaintiff managed his mother's affairs and was in actual possession even of her other properties for her. The

general probabilities of the case are also in support of the District Judge's finding on the 3rd and 4th issues (which relate to the question of possession) and though it would have been more satisfactory if the learned District Judge had given fuller and better reasons for his conclusion, we do not think that this is a case in which we should refuse to accept his finding of fact or to send it down for a fresh finding.

This second appeal is accordingly dismissed with costs.

Appeal dismissed.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 3249 OF 1912.

December 2, 1914.

Present:—Justice Sir Asutosh Mookerji, Kt., and Mr. Justice Chapman.

SUMEKA DASI—PLAINTIFF—APPELLANT

versus

BAIKUNTHA CHANDRA DAS AND

OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act I of 1908), O. II, r. 2 cls. (1) and (2 — Whole of claim to be included by every suit — Causes of action distinct — Suit, if barred.

Order II, Rule 2 of the Code of Civil Procedure, 1908, does not compel the plaintiff, who has several causes of action to lump them together under the penalty of having subsequent suits barred. The section does not say that every suit shall include every cause of action or every claim which the party has, but only that every suit shall include the whole of the claim arising out of the cause of action, meaning the cause of action for which the suit is brought. [p. 608, col. 2.]

Where the causes of action are distinct, a subsequent suit is not barred. [p. 608, col. 2.]

Appeal against the decree of the Additional District Judge, Sylhet, dated the 13th of August 1912, reversing that of the Munsif, Sunamgunj, dated the 4th of May 1912.

Babu Jadu Nath Kanjilal, for the Appellant.

Babu Hamendra Kumar Das, for the Respondents.

JUDGMENT.—This is an appeal by the plaintiff in a suit for declaration of title to immoveable property and for recovery of possession thereof. The case for the plaintiff.

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iff is that the disputed properties belonged to her husband, and, after his death were held by her jointly with the defendants, who are relations of her husband. She alleges that in *Magh* 1307 she was unlawfully dispossessed by the defendants and consequently seeks to recover possession. The Court of first instance held that her title was established and gave her a decree. Upon appeal, the District Judge has dismissed the suit on the ground that it is barred under clauses (1) and (2) of rule 2 of Order II of the Code of 1908. This objection has been sustained on the ground that in 1910 the plaintiff had sued these defendants and two other persons for joint possession of other lands, which she alleged had been inherited by her from her husband and from which she had been wrongfully evicted by the then defendants. In our opinion the view taken by the District Judge cannot be supported.

Clause (1) of rule 2 of Order II provides that every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action. Clause (2) lays down that where the plaintiff omits to sue in respect of any portion of the claim, he shall not afterwards sue in respect of the portion so omitted. We have, consequently, to determine whether the cause of action now alleged by the plaintiff is identical with what was the foundation of the previous suit. On behalf of the appellant, it has been contended that the causes of action are not identical. It has been pointed out that in the previous suit the plaintiff alleged that the properties then in dispute had been inherited by her from her husband, that while she was in possession thereof, she was dispossessed by some of the then defendants, who are relations of her husband, in *Magh* 1307, and that thereafter from *Falgun* 1307, she had been kept out of possession by other defendants in collusion with the principal defendants. These other persons are not parties to the present suit, and it was not open to the plaintiff to join the present claim with the earlier one in the previous suit. If this claim had been included in the previous suit, objection might well have been taken on the ground of misjoinder of parties and causes of action. This is clear from the decision of this Court

in the case of *Ram Prosad v. Sachi Dasí* (1). Reliance has been placed on behalf of the respondents upon the decision of the majority of the Full Bench in the case of *Murti v. Bhola Ram* (2). The facts of that case are clearly distinguishable from those which have given rise to this appeal; and we are inclined to follow the line of reasoning adopted in the judgment of the dissenting Judge rather than that accepted by the majority of the Full Bench. As was pointed out by the Judicial Committee in the case of *Pitapur Raja v. Suriya Rau* (3) the rule does not compel the plaintiff, who has several causes of action, to lump them together under the penalty of having the subsequent suit barred. The section does not say that every suit shall include every cause of action or every claim which the party has, but only that every suit shall include the whole of the claim arising out of the cause of action, meaning, the cause of action for which the suit is brought. Here, the plaintiff has a cause of action against the relations of her husband. In the earlier litigation she had a cause of action in respect of properties not now in suit against persons who had derived title by purchase from the relations of her husband. In our opinion, the causes of action are distinct and the suit is not barred.

The result is that this appeal is allowed, the decree of the lower Appellate Court set aside and the case sent back to the lower Appellate Court for disposal on the merits. The appellant is entitled to his costs in this Court.

Appeal allowed.

(1) 6 C. W. N. 585.

(2) 16 A. 165; A. W. N. (1894) 65.

(3) 12 I. A. 116; 8 M. 520; 9 Ind. Jur. 274; 4 Sar. P. C. J. 638.

SECRETARY OF STATE v. KANNEPALLI JANAKIRAMAYYA.

MADRAS HIGH COURT.
FULL BENCH.

LETTERS PATENT APPEAL No. 39 OF 1913.

August 6, 1915.

Present:—Mr. Justice Oldfield, Mr. Justice
Sadasiva Aiyar and Mr. Justice
Bakewell.THE SECRETARY OF STATE FOR INDIA
IN COUNCIL, BY THE COLLECTOR OF
GANJAM—DEFENDANT No. 1—APPELLANT
versus.KANNEPALLI JANAKIRAMAYYA
& OTHERS—PLAINTIFFS

—DEFENDANTS NOS. 2 AND 3—RESPONDENTS.

Madras Irrigation Cess Act (VII of 1865), s. 1—Madras Land Encroachment Act (III of 1905)—Inam village—Irrigation from Government source—River flowing through a zemindari—Water taken off in channel belonging to zemindar and used by inamdar for irrigating second crop and dry crop—Water cess, if can be charged by Government—Madras Land Encroachment Act (III of 1905), retrospective effect of—Crown grant—Construction—Madras Act VII of 1865, applicability of, to zemindaries and inam villages—Grant—Construction—Presumption—Statute, construction of—Flowing water, whether can be owned—Riparian owner—Presumption of ownership of half bed, whether applicable to zemindars—Applicability of new rules of evidence to pending suits.

Where the inamdars of Varahanarasimhapuram utilised the water of the Vamsadbara river, flowing in the Mobagam channel belonging to the zemindar of Utlam, for irrigating second crop cultivation and wet crops grown on dry land:

Held, per Oldfield and Bakewell, JJ. (Sadasiva Aiyar, J., dissenting) that under the combined operation of the Madras Acts III of 1905 and VII of 1865, the Government was entitled to levy water-cess for the same. [p. 622, col. 2; p. 633, col. 1.]

Per Oldfield, J.—Madras Act III of 1905, being a declaratory Act, has retrospective effect. [p. 613, col. 1.]

A person who claims exemption from payment of water-cess under Madras Act VII of 1865 is bound to prove that the water used by him was not Government water but that of a zemindar or inamdar or a person claiming under him. [p. 613, col. 2.]

A grant from the Crown, unlike one from a private individual, must be construed beneficially to it. [p. 616, col. 2.]

Vaman Janardan Joshi v. Collector of Thana and the Conservator of Forests, 6 B. H. C. R. 191; Collector of Ratnagiri v. Antaji Lakshman, 12 B. 534 at p. 546 and Adusumulli Suryanarayana v. Acchutta Potanna, 22 Ind. Cas. 339; 15 M. L. T. 268; 26 M. L. J. 99 at p. 107; 38 M. 608, followed.

Balbir Singh v. Secretary of State, 22 A. 96; A. W. N. (1899) 194, not followed.

Madras Act VII of 1865 applies not only to ryotwari but also to zemindari and inam villages. [p. 618, col. 2.]

Where by a Statute, the burden of proving a fact in issue is placed on the subject as against the Government, a Court will not be justified in presuming or accepting inadequately supported

inferences in support of a grant of which direct evidence is wanting, out of mere regard for the hardship that might ensue owing to the difficulty of proving it after the lapse of several years. [p. 619, col. 2.]

Where a grant is alleged as founded throughout the Presidency in the same manner, the fact that in two districts its existence has been negatived by practice is against its validity in others. [p. 620, col. 1.]

Zamindar of Kapileswarapuram v. Secretary of State, 26 Ind. Cas. 590; 37 M. 355 note; Bachu Ramesam v. Mukala Bhanappa, 7 M. 182 and Narasimha Naidu v. Ramasami, 14 M. 44, referred to.

Per Sadasiva Aiyar, J.—A historical retrospect of the relations between the Government and zemindars and ryotwari tenants, and those between zemindars and inamdars and their tenants is of little importance in arriving at a true view of the provisions of the Statute and Case-Law governing their rights. [p. 623, col. 1.]

In construing a Statute considerations such as whether the Government could have intended to be guilty of so much harshness and oppression as would result if a particular Statute were to be interpreted in one way, or whether the Legislature could have intended such a sudden change in the law as would result from a particular interpretation, are of very doubtful utility and it is not legitimate to have recourse to such extraneous considerations, unless the words of the Statute are very ambiguous. [p. 624, col. 1.]

In deciding on the rights of Indian litigants references to the technicalities of English Common Law actions ought to be avoided as merely tending to confuse the mind. [p. 624, col. 2.]

According to Indian Law flowing water is capable of being owned. [p. 624, col. 2.]

The words 'river', 'stream', 'channel' and 'tank' in clause (a) of section 1 of Madras Act VII of 1865 are used in the sense of the collective body of waters which are called river, stream, channel or tank, according to the respective configurations of the receptacles. [p. 625, col. 1.]

The word 'supplied,' when used in connection with water-supply, does not imply a previous request by the owner of the land which is supplied with water. [p. 625, col. 1.]

Venkatappayya v. Collector of Kistna, 12 M. 407 and Krishnayya v. Secretary of State, 19 M. 24, dissented from.

So far as beds of non-tidal and non navigable rivers and streams bounded by zemindari and whole inam lands are concerned, it is too late to question the applicability of English Law that a zemindar who owns only one of the banks of a river is entitled to half the bed of the river along the length bounded on that side by his land. But in other cases, the Indian Common Law vests such rights in the village community as a whole within the village limits and in the Sovereign power as representing the community in other places. [p. 625, col. 2; p. 626, col. 1.]

Rules of evidence enacted by the Legislature come into force at once and must be followed by the Courts in deciding on the rights of the parties, whatever may have been the previous state of the law in regard to the proper presumptions and burdens of proof. Under Madras Act III of 1905,

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the Government starts with a strong presumption in its favour that all standing and flowing waters belong to it, but the presumption is rebuttable. The fact that the enactment was passed during the pendency of the suit does not estop the Government from invoking the aid of such presumption. [p. 627, col. 1.]

Section 2 (1) of Madras Act III of 1905 has not the effect of declaring plenary rights in standing or flowing water in favour of Government. The Legislature never intended by that section to give to the Government greater rights of ownership in flowing water than the principles of general jurisprudence would allow. Flowing water by its very nature can never be the absolute property of the Government or anybody else, though the ownership in a very real sense can be predicated of it as vesting in a person so long as the water continues to be situated vertically over land belonging to that person. [p. 627, col. 2; p. 628, col. 1.]

The right of distributing water among their *ryotwari* tenants is exercised by the Government as the Sovereign landlord. Where, however, they have parted with proprietary rights over the beds of particular streams in favour of *zemindars* or *inamdars*, it is impossible to hold that they retain proprietary rights over waters standing in tanks in *zemindaries* or flowing through *zemindari* lands, or in water flowing in all natural channels, or through artificial channels constructed with the knowledge and permission of Government and owned by the *zemindar* or *inamdar*, or in water percolating into *zemindari* and *inam* tracts. [p. 628, col. 2.]

Kandukuri Mahalakshamma Gru v. Secretary of State for India, 8 Ind. Cas. 67; (1910) M. W. N. 595; 8 M. L. T. 389; 20 M. L. J. 823; 34 M. 295 at p. 303 and *Secretary of State v. Ambalavana Pandara Sannadhi*, 18 Ind. Cas. 294; 37 M. 369 note, not followed.

Appeal under clause 15 of the Letters Patent against the judgment of the Hon'ble Mr. Justice Sankaran Nair in Appeal No. 124 of 1906, preferred against the decree of the District Court of Ganjam in Original Suit No. 30 of 1904.

FACTS.—The *inamdars* of Varahanar. simhapuram used the water of the Mobagam Channel, belonging to the *zemindar* of Urlam, which took off water from the Vamsadhara river, for irrigating second crop cultivation and wet crops grown on dry land in their *inam* village. The Government having collected water-cess for such use of the water, the *inamdars* filed the present suit against the Secretary of State for India for the recovery of the cess so collected on the ground that the levy thereof was illegal. They also sued for an injunction to restrain the future levy of the same. The District Judge of Ganjam decreed the suit. On appeal to the High Court Miller and Sankaran Nair, JJ. differed in opinion, with the result that the confirming judgment of Sankaran Nair, J.,

prevailed under section 98 of the Civil Procedure Code. The report of the case appears in *Secretary of State for India v. Kannepalli Janakiramayya* (1). The Secretary of State for India in Council then preferred this appeal under the Letters Patent.

The Hon'ble Mr. F. H. M. Corbet, the Advocate-General, the Government Pleader and Mr. S. Sundararaja Iyengar for the Appellant:—The Government is entitled to levy the cess, as it is not denied that the water of the Vamsadhara river has been used. Section 2 of Madras Act III of 1905, read with section 1 of Madras Act VII of 1865, makes it perfectly clear that the water of the Vamsadhara river is *prima facie* Government property. The respondents have not shown that the water belongs to a *zemindar* or *inamdar* or any person claiming under either. Nor do they allege any engagement on the part of the Government to exempt them from the cess. It is admitted that the lands now charged for are not included in the extent referred to as wet in the *inam* titlesdeed. The burden of proving non-liability lies very heavily upon the plaintiffs. A *zemindar* has now no proprietary rights in the soil of the lands included in his *zemindari*. Even under the old indigenous Government he was only a farmer of revenue. He has, therefore, no claim to *poramboke* lands and much less to beds of rivers and water flowing therein. Whatever may be the case with regard to *zemindaris* in the case of *inams*, there is no liability on the part of the Government not to raise the quit rent when extra water is used: *Chidambara Rao v. Secretary of State* (2); *Secretary of State for India v. Ambalavana Pandara Sannadhi* (3). The suit village is not part of the Urlam estate but of the Jalmur *zemindari*, which was sold for non-payment of *peishkush* in 1807 and bought in by the Government. It is immaterial to whom the Mobagam Channel belongs or by whom it was dug [*Kandukuri Mahalakshamma Gru v. Secretary of State for India* (4)]. It flows through Chicacole Taluk which is Government

(1) 18 Ind. Cas. 770; 13 M. L. T. 235 (1913) M. W. N. 225; 24 M. L. J. 365; 37 M. 322.

(2) 26 M. 66.

(3) 8 Ind. Cas. 357; 9 M. L. T. 47; (1911) M. W. N. 119; 34 M. 366.

(4) 8 Ind. Cas. 67; (1910) M. W. N. 595; 8 M. L. T. 389; 20 M. L. J. 823; 34 M. 295 at p. 303.

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territory. The river Vamsadhara is the boundary of the *zemin-dari* for revenue purposes. Half of its bed does not necessarily belong to the *zemin-dar*. The *sanad* issued to the *zemin-dar* does not carry any right to the water. The fact that the channel may belong to the Urlam estate cannot benefit the plaintiff. The *sanad* evidences a Crown grant and such grants should be construed favourably to the Crown *Vaman Janardan Joshi v. Collector of Thana and the Conservator of Forests* (5). Madras Act III of 1905 is a declaratory Act and must, therefore, have retrospective effect: Maxwell on Interpretation of Statutes. The real test of liability to pay cess is, what is the source from which water is taken? It cannot be seriously argued that the Vamsadhara is not a Government source.

Messrs. T. Rangachariar and P. Nagabushanam, for the Respondents:—The levy of the cess is clearly illegal. The Mobagam Channel, whose water has been used for the cultivation in question, is purely a *zemin* channel and belongs to the Urlam *zemin-dar*. It branches off from the Vamsadhara river at a place entirely within the Urlam *zemin*. The Government has no right to the water of the said channel. That is the finding of the District Judge. Our contention is that the water in the channel belongs either to the Urlam *zemin-dar* or the plaintiffs. As regards the *zemin-dar* ownership of the water, our submission is that the Urlam *zemin-dar* is the owner of half the bed of the Vamsadhara adjoining his *zemin-dari* as well as of the water thereon. Vide *Narasimha Sastriar v. Secretary of State* (6) *Secretary of State v. Kannapalli Vencataratnamah* (7) and *Ambalavana Pandara Sannadhi v. Secretary of State* (8); and Coulson's Law of Waters, 3rd Edition, page 78. Even if it is to be held that the Government is the owner of the bed, our submission is that there has been a grant of the river-bed and the water by the Government to the Urlam *zemin-dar* at the time of the Permanent Settlement. The form of the *sanad* is found at page 119 of the Board's Standing Orders, Volume II, Edition of 1907. Though the *sanad*

does not expressly grant the rivers and waters, still the inference is clear. It expressly refers to land and land assessment or revenue. It, therefore, follows that no other payment is to be made in connection with cultivation and consequently for the use of river water for such cultivation. Clause 4 of the *sanad* is still more significant. Though provision is made therein for payment of various other items of revenue, water cess does not find a place there. The inference, therefore, is irresistible that the charges enumerated there are the only ones payable, that the enumeration is exhaustive and that water-cess is not payable. For the rule of construction, see *Balbir Singh v. Secretary of State* (9). See also *Ponnusawmi Tevar v. Collector of Madura* (10); *Muria Susai Muli-lar v. Secretary of State* (11); *Secretary of State for India v. Ambalavana Pandara Sannadhi* (3); *Secretary of State v. Ambalavana Pandara Sannadhi* (12) and *Zamin-dar of Kapileswarapuram v. Secretary of State* (13). Passages from the fifth report were also referred to.

[Mr. Rangachariar was not allowed to refer to Baden Powell's Land Tenures and to 'Records printed for the Madras Government,' Volume LXV.]

Before the Settlement of 1802, some *zemin-dars* including Urlam had rights over rivers and these rights were retained by them after the Settlement. It was as a consequence of such retention that the duty of maintaining and constructing tanks and water-courses had been transferred to them. Again renters were not only required to develop the lands by improving the channels and other existing works, but were also expected to bring waste area under cultivation, and whatever was done in the way of improvement, was done on the faith that the existing supply of water would be continued. Then as regards the position that the plaintiffs are the owners of the water, the facts are these. There was a channel which took off water from a river. At the time of the Settlement it was part of the irrigation system of the estate. Our contention, therefore, is that the channel and all

(5) 6 B. H. C. R. 191.

(6) 1 M. L. J. 167.

(7) 15 Ind. Cas. 594; 37 M. 364 note; 23 M. L. J. 109; (1912) M. W. N. 771.

(8) 28 M. 539; 15 M. L. J. 251.

(9) 22 A. 96; A. W. N. (1899) 194.

(10) 5 M. H. C. R. 6.

(11) 4 M. L. J. 350.

(12) 18 Ind. Cas. 294; 37 M. 369 note.

(13) 26 Ind. Cas. 590; 37 M. 355 note.

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the water in it belong to the estate subject to the customary rights of others; and the fact that the channel did not run entirely through the estate is immaterial. Since the channel in question runs through the plaintiffs' village before running through a Government village and as the plaintiffs have been using the water of it, they have become by lapse of time the owners of the water. At any rate plaintiffs had a sort of easement or customary right against the Uralam, which entitled them to claim exemption from payment of cess to Government. (This point was not allowed to be argued as it was not put forth in the earlier stages of litigation.) Madras Act III of 1905 has no application to the present case, inasmuch as it was passed during the pendency of the suit before the first Court. Further, the Legislature cannot be supposed to have intended the enactment to confer a right in a thing which is not capable of ownership, such as flowing water. Again the Acts in question, viz., III of 1905 and VII of 1865, having been passed with the express object of legalising charges for unauthorised occupation and use of land and water, they cannot be construed so as to affect or work a forfeiture of existing rights of irrigation.

The next contention is that Act VII of 1865 is inapplicable to charges for river water in *zemin্দaris* and *inam* villages. The preamble of the Act itself shows that it was passed in view of the necessity for realising returns from the Godavari and Krishna anicuts then constructed and not to charge for irrigation from private sources, when no improvement had been effected; and further the Act applies to rivers in *ryotwari* tracts alone and not to those in *zemin্দaris*. Otherwise, the Government would, under the Act, be able to levy cess even in cases where an engagement exists. The proviso to section 1 of the Act will not prevent this, as the word used there is 'supplied' and not 'supplied or used' as elsewhere and, that is inappropriate in respect of *zemin্দaris* and *inams* inasmuch as it connotes a previous request for water which *zemin্দars* and *inamdars* do not and need not make. See *Krishnayya v. Secretary of State* (14). Further, the word 'engagement' in the proviso above referred to cannot have been restricted to such of the lands only

which had been under wet cultivation in 1865, for the obvious reason that it would have been impossible to distinguish the extent of wet cultivation on which, with other assets, *peishkush* was fixed in 1803.

JUDGMENT.

OLDFIELD, J.—This is an appeal from the decision of two learned Judges, given under section 98 of the Code of Civil Procedure, in accordance with the confirming judgment of one of them, Sankaran Nair, J. The question is whether water-cess was legitimately levied by Government, the appellant, from plaintiffs for the water of the Vamsadhara river, which they have admittedly used in their *inam* village for the irrigation of (1) second crop, (2) wet (or irrigated) crops grown on dry (or ordinarily unirrigated) land. The decision of this question will be a sufficient adjudication on the plaintiffs' claims to a refund of past collections and an injunction as to the future.

Plaintiffs did not dispute that they used the water of the Vamsadhara, as alleged. The dispute is, therefore, only whether it belongs to and can be charged for by Government. Government has relied on section 2 of Act III of 1905 in support of its ownership of the water and section 1, Act VII of 1865, in support of its right to charge for it. The material portion of the former is as follows :

"(1) All public roads, streets, lanes and paths, the bridges, ditches, dikes and fences, on or beside the same, the bed of the sea and of harbours and creeks below high water mark and of rivers, streams, *nalas*, lakes and tanks, and all canals and water-courses, and all standing and flowing water, and all lands, wherever situated, save in so far as the same are the property (a) of any *zemin্দar* . . . or *inamdār* or any person claiming through or holding under any of them, . . . are and are hereby declared to be the property of Government except as may be otherwise provided by any law for the time being in force, subject always to all rights of way and other public rights and to the natural and easement rights of other land-owners, and to all customary rights legally subsisting."

And of the latter :

"Whenever water is supplied or used for purposes of irrigation from any river, stream,

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channel, tank, or work belonging to, or constructed by, Government, it shall be lawful for the Government to levy, at pleasure, on the land so irrigated, a separate cess for such water, provided that where a *zemindar*, *inamdar*, or any other description of landholder not holding under *ryotwari* settlement is, by virtue of engagements with the Government, entitled to irrigation free of separate charge, no cess under this Act shall be imposed for water supplied to the extent of such right and no more."

As regards the first of these enactments, it is not material that it was passed only during the pendency of this litigation in the Court of first instance. For it is, as regards the ownership of water, a declaratory Act, and such Acts have retrospective effect (Maxwell on Interpretation of Statutes, 3rd Edition, page 309). Plaintiffs demur to its application, on the grounds that the Legislature cannot be supposed to have intended (1) to confer a right of ownership in flowing water, a thing not capable of ownership, or (2) to confiscate existing rights of irrigation or to affect them at all, when the purpose of the Act is only to justify charges for the unauthorised occupation of water and land. These objections are invalid. For (1) it is only in the last resort, and for clearer reason than has been shown, that the meaning of the general provision declaring that water belongs to Government can be nullified. For, as regards (1) the Act statedly makes a general declaration that water belongs to Government; and it is only in the last resort and for clearer reason than has been shown that I can construe it by holding that flowing water can belong to no one. And as regards (2) there is no question of taking away existing rights, but only of reserving them and assigning the burden of proof regarding them. The reference to water would be pointless with regard to its occupation as by a boat on it, the example suggested, since nothing makes such occupation chargeable; whilst the inclusion of only a declaration of ownership as to water without a machinery for charging for its unauthorised use, such as is provided for land, is easily intelligible in view of the fact that the requisite machinery in the case of water had already been

provided in Act VII of 1865. It will be necessary to return to the provisions of that Act in another connection. At present it is material only that plaintiffs allege no engagement exempting from water-tax the cultivation now charged for and admit that it is not included in the extent referred to in their title-deed as wet. They are, therefore, bound to prove that the water in question is not Government water, that is, that in the words of Act III of 1905, it is the property of a *zemindar* or *inamdar*, or a person claiming under one.

The plaintiffs' village, Varahanarasimhapuram, is not on the bank of the Vamsadhara river, and the water reached it by the Mobagam Channel which passes through the Urlam *zemindari*. The judgment of Sankaran Nair, J., refers throughout to the village as part of the *zemindari*, but mistakenly. For it is, it is admitted, an independent *inam* village, which was part of the Jalmur Estate and, having been bought in with the rest of that estate about 1808, is now held directly under Government. Mr. Rangachariar for the plaintiffs has accordingly attempted to establish that the water was either theirs or the property of Urlam. He at one time proposed to argue that plaintiffs had easement or other customary rights against Urlam, which would, in some way not explained, justify them in claiming the water against Government. But this corresponded with nothing in the plaint, or, so far as the judgments showed, in the arguments at earlier stages of the case, and we refused to hear it. His contention was then that the water, being the absolute property of plaintiffs or Urlam, was, in the latter alternative, used by plaintiffs in accordance with some arrangement or license by the Urlam proprietor, the nature of which could have no bearing on the material point that the water did not belong to Government and, therefore, was not material for the purpose of his argument. That case is intelligible. It is only to be borne in mind that, so far as it relates to Urlam, proof of nothing less than absolute ownership is essential in order to sustain it. For we have been shown no authority for holding that mere riparian rights, short of ownership of the

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water, extend to its diversion for the irrigation of land other than that belonging to the riparian owner himself. Section 7, illustration (f), Indian Easements Act, negatives the wider view of such rights. The Calcutta High Court refused in *Belbhadar Pershad Singh v. Sheikh Barkat Ali* (15) to apply the American doctrine on the subject to India. And this Court in *Robert Fischer v. Secretary of State for India* (16) held that, if the English Law were applicable, the disability of a riparian owner to use water for non-riparian tenements was absolute and did not depend on proof that actual damage was caused by his doing so. Mr. Rangachariar put his case for the ownership of the river water by Urlam on two alternative foundations; and I shall now deal with the first of them.

It was stated by Mr. Rangachariar as follows: When a river, such as the Vamsadhara, flows by a *zemindari*, such as Urlam, half the river-bed adjacent to the *zemindari*, and the water thereon belongs to the *zemindar*, and the other half to the opposite riparian owner, subject to superior riparian rights in the water. The District Judge dealt with this, apparently with the consent of the parties, by a reference to his judgment, Exhibit M in this suit, in another litigation relating to the same river and estate, Original Suits Nos. 37 and 38 of 1904, his finding being that the bed and consequently the water did not belong to Government.

That judgment was, of course, given before the Act III of 1905 and the imposition of the burden of proof on the private claimant prescribed in it became law. It is sufficient that it was based on the rejection of an argument from the alleged tidal and navigable character of the river and an inference as to the ownership of its water from the ownership of the channels conveying them to the irrigated land, which I shall deal with later. It is not, in my opinion, clear that the English and American principles relied on by Mr. Rangachariar, as supporting the ownership by the riparian owner of half the bed adjacent to his holding,

can be applied to India, where Government has special rights and as regards irrigation special functions. The Indian authorities dealing with accretion are not relevant, since they are concerned, not with ownership of the river-bed, but with a special method of acquiring ownership in formations in it above water. And I am inclined to share the doubt expressed by Sadasiva Aiyar, J., in *Mukkassa Nair Veetil v. Secretary of State for India* (17). A decision on this part of plaintiffs' contention is, however, unnecessary, because I do not think that ownership of the water will follow from the ownership of the bed, or the moiety of it adjacent to the holding.

It is evident that this principle must be scrutinised carefully, before it can be accepted. For its practical application would be most difficult. The right of Government, for instance, to control water for irrigation purposes has been recognised in *Robert Fischer v. Secretary of State for India* (16); cited above, and other cases; but when that right is in question, whether it is general, as founded on authority, or it arises only from the ownership of the opposite bank, how is it to be exercised or limited to the control of only half the water? and how is such limitation to be imposed on opposite proprietors? It is significant that no decisions appear to have been given by the Courts on claims so likely to result in controversy. As regards authority, plaintiffs rely mainly on the early doctrine, embodied in the maxim "*Cujus est solum, ejus est usque ad cælum*," which is stated at page 78, Coulson's "*Law of Waters*," 3rd Edition. But they neglect the learned author's conclusion, that it is supported by modern authors only as regards standing and percolating water and running water which remains for the whole of its course on the land of a single owner, but that "with regard to natural streams flowing through adjoining lands, the enjoyment of which is only usufructuary and not absolute, the right to use the water does not arise from the ownership of the soil on the stream, but from the right of access to it which land owners on the banks have by the law of nature." It

(15) 11 O. W. N. 85; 4 O. L. J. 370.

E. (16) 2 Ind. Cas. 325; 32 M. 141 at p. 164; 5 M. L. T. 149; 19 M. L. J. 131.

(17) 24 Ind. Cas. 547; 26 M. L. J. 385 at p. 404; 15 M. L. T. 247; 1 L. W. 307; (1914) M. W. N. 521.

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will be observed that this statement of the English Law, which I adopt, since it has not been shown to be incorrect, attributes to individuals a right of user in certain circumstances, not of ownership; and I recall the fact that, as observed *supra*, the establishment of the right to such user will be insufficient to justify Urlam in supplying plaintiffs. The Law in England as regards ownership will be made clearer by a quotation from *Embrey v. Owen* (18):—

"Flowing water is *publici juris*, not in the sense that it is a *bonum vacans*, to which the first occupant may acquire an exclusive right, but that it is public and common in this sense only that all may reasonably use it who have a right of access to it, that none can have any property in the water itself except in the particular portion which he may choose to abstract from the stream and take into his possession, and that during the time of his possession only".

On the English Law plaintiffs have relied almost exclusively, as regards this part of their case, and it does not support the plenary ownership of the water by Urlam, or more than its right of user for cultivation of its own adjoining lands, and not for any supply to the lands of others such as plaintiffs. That is sufficient to negative the case of private ownership, as based on the ownership of the bed and banks, and to authorise the application of the presumption referred to in Act III of 1905. It will be convenient to postpone dealing with the Indian cases, until plaintiffs' alternative foundation for the ownership of the river water by Urlam has been considered.

It was stated by Mr. Rangachariar as being that in a permanently settled estate, such as Urlam, where a river flows through or by the estate, the river-bed and waters, to the extent to which they are in that estate, were granted with it to the *zemindar* in 1803, subject to superior riparian rights.

It is admitted that the Urlam Estate was formed out of *haveli* lands; that is, lands which, before the Permanent Settlement, were in the possession of no *zeminda*. There can, therefore, be no question of the

existence of any rights, such as *zemindars* enjoyed before 1802, in this case; and it can be said at most that rights identical with those of *zemindars* elsewhere were then conferred. The *sanad* containing the terms, on which the estate was granted in 1803, has not been exhibited. But it is agreed that it is in the standard form given at page 119, Volume II, Board's Standing Orders (1907). It is conceded that it supports plaintiffs' contention in no degree directly. For it refers only to land and land assessment and makes no reference to rivers, or other water-supply, in connection with the grant. The argument is accordingly that, as the references are to land and land assessment or revenue alone, no further payment was to be made on any other account in connection with cultivation and, therefore, none on account of river water. Particular reliance has been placed on clause 4 by which provision was made for the liability of the estates for payments, in addition to the land tax, for various other articles of revenue, of which water-tax is not one, the inference being that, as such articles are enumerated and the enumeration must be supposed to be exhaustive, the omission to mention water-tax entails that none was leviable. These are the only grounds, on which it is proposed to imply a grant of all river water for irrigation, past and future, from the terms of the *sanad* itself; and they are, in my opinion, inadequate. No doubt ordinary existing irrigation was granted, since payment for one irrigated crop would, in accordance with usage, be included in the total consolidated land tax or *peishkush*, so far as it was for the wet land in the estate. That *peishkush* was, as Sankaran Nair, J., has shown in another connection in his judgment, fixed arbitrarily, and it is not possible to distinguish the portions of it payable for irrigation and land revenue proper. But that is the most that can be allowed, or with which authority and revenue practice are consistent. Extraordinary or second crop irrigation and extensions of irrigation are, no doubt, not mentioned in the *sanad*. But it is not a necessary inference that they also were included in the grant. For the intention may equally have been to charge for them separately, as has, it will be found in some cases at least, been done.

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As regards clause 4, the enumeration does not seem to be either exact or comprehensive. It has not, for instance, debarred Government from levying a duty on the possession of arms in *zemindaris*, or a road and railway cess for the benefit of local Boards, although neither of these imposts comes within the descriptions of those the right to which is reserved. In *Vedanta v. Kanniyappa* (19), this Court dealt with the clause and the connected section of the Permanent Settlement Regulation XXV of 1802, holding that the dues, then in question, included in the *sayer* were not exigible by the owners of land as such, but by the Sovereign, and that, whatever the origin of their title, Government intended to treat the *zemindars*, with whom it effected a Permanent Settlement, as landed proprietors, and to ignore any rights which conflicted with its own sovereignty. And the judgment goes on:—

"Such a large proportion of the Crown revenues of India was derived from the land, directly or indirectly, that it was difficult for the early British Administrators to separate with precision the revenue which could conveniently be collected by the Crown from that the collection of which could more conveniently be left to those subjects who had exercised the functions of collection under native rule."

and later (page 25).

"It cannot be denied that in *sanads* issued in virtue of the, Permanent Settlement Regulation the Government dealt ordinarily only with the land revenue. The insertion in *sanads* issued by the Government of Madras of a clause repeating the declaration contained in the Regulation as to the exclusion of items of revenue other than the land revenue was surplusage. . . . Had the clause been omitted, it could not have been contended that the *zemindar* was entitled to collect revenue other than the land revenue, because of its omission."

All this enunciates what the wording and matter of *sanad* and Regulation indicate, that the Settlement proceeded on general lines and that a grant of one item of revenue is not to be inferred from silence regarding it. Such an inference, it must be added, is intrinsically improbable. For

whatever the actual irrigation in 1802 under the great deltas of the Kistna and Godavari, it cannot be supposed that their potentialities were overlooked or dealt with by implication, or that, if they had been transferred, there would have been no attempt in the *sanad* and Regulation, or by some other contemporaneous enactment, to provide for responsibility for their control, or the decision of conflicting claims to their waters. The grant under construction was made by the Crown; and the rule of construction in point is not, as it was in *Balbir Singh v. Secretary of State* (9), that applicable to the grants of a particular description of property, but the general rule, that grants by the Crown must be construed beneficially to it. *Vaman Janardan Joshi v. Collector of Thana and the Conservator of Forests* (5), *Collector of Ratnagiri v. Antaji Lakshman* (20) and *Adusumilli Suryanarayana v. Achutta Potanna* (21). These, the direct and in my opinion, the only legitimate grounds for a decision, because they alone are available from the actual terms of the grant, entail that no grant of the river water to the Urlam proprietor in 1803 is established

Direct construction of the grant yielding nothing favourable to the plaintiffs, they have endeavoured to support their case further by collateral considerations; and they have, it will be found, made similar attempt in connection with their proposed interpretation of Act VII of 1865. Those considerations consist in the alleged opinions and intentions of Government and its officers at the time of the Settlement, as expressed in various publications. I do not think that they are a legitimate ground of decision with reference to section 93, Indian Evidence Act, or the general principle that, if "the language of the Statute admits of no doubt or secondary meaning, it is simply to be obeyed, without more." Maxwell on Interpretation of Statutes, 3rd Edition, page 72. Here the fact that the *sanad* makes no reference to a topic to which it might have referred, does not render its language ambiguous or defective; and the Regulation and Act are, in my opinion, susceptible of a reasonable interpretation as they stand. I, therefore, enter on this branch of the argument solely.

(20) 12 B. 534 at p. 546.

(21) 22 Ind. Cas. 339; 26 M. L. J. 99 at p. 107; 15 M. L. T. 265; 38 M. 608.

(19) 9 M. 14 at p. 19.

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because it has bulked largely here and in the judgment of the learned Judge.

It is a difficulty of a different kind that the matters in question were (as plaintiffs' learned Vakil admits) never relied on at the trial in the District Court or the hearing of the appeal, when Government might have dealt with them by explanation or counter-citation, but were first referred to in the learned Judge's judgment. The learned Advocate-General has, however, waived objection to them on that ground, claiming only the right to file documents in reply in case, we think, that such reply is required, and filing Civil Miscellaneous Petition No. 1862 of 1915 for their admission. We have not thought them necessary; and we need only add that we felt bound to refuse to allow plaintiffs' Vakil to make further references for the first time at this stage in the case to other publications, including Baden Powell's "Land Tenures" and Volume LXV of "Records printed for the Madras Government."

It is not necessary to reproduce the extracts relied on, as the greater part of them are given in the learned Judge's judgment. The inference from them must be weak, since they consist in the broadly expressed opinions and pious expectations of bodies so diverse as the Select Committee and the Famine Commission of 1880. The general argument in Court and in the learned Judge's judgment, so far as it is distinguishable from that based on the terms of the *sanad* already dealt with, seems to me to require more definite support from evidence than it has been given. In particular the assertion that some *zemindars* had rights over rivers before the Settlement of 1802 and retained them after it and the attempt to corroborate that by reference to the transfer to other *zemindars*, of which Urlam is one, of the duty of maintaining and constructing tanks and water-courses in *haveli* lands, are open to question. For the present dispute which relates only to rivers, which are not mentioned in connection with *haveli* lands and the ownership of tanks, to which (for all that appears) the water-courses referred to may have been appurtenant, and of the water in them would be subject to quite different considerations, with which we are not concerned. For the rest, only three conclusions, which, in my opinion, require notice, have been drawn from these materials

and I do not think that they in any way probablise the grant of river waters alleged. They are that (1) renters were expected to develop the lands entrusted to them by improving the channels and other works transferred to, or left in, their control; (2) it was hoped that cultivation would be extended over land waste at the time; (3) there was an impression that the existing supply of water would be continued. But as regards (1) it has still to be decided, with reference to the authorities to be referred to, whether the assignment to renters of the duty of maintaining channels would involve any exemption of water flowing through them from charge, or any transfer of its ownership; (2) if an extension of cultivation was anticipated, it did not follow that the renter's profit was to accrue from his charging for water and not merely for the land and, unirrigated cultivation being common throughout the Presidency it need not have been assumed that the new cultivation would be irrigated or would be irrigated gratuitously; and (3) if the continuance of existing irrigation was secured, that did not entail the grant of free additions to it. On the other hand, if evidence of this description is to be considered, it is significant that no more direct reference to anything approaching a plenary grant of the river water has been found, if one in fact was made, and that the one statement regarding irrigation works in the Instructions to Collectors, that at page 331, Fifth Report, refers only to tanks and water-courses, not to rivers, or works on them. In these circumstances I do not think that this line of argument, if admissible, assists plaintiffs appreciably.

There is, next, a contention that Act VII of 1865 is either inapplicable to charges for river water in *zemindars* and *inam* villages, or that its wording is consistent only with a grant of rights of ownership in river water to *zemindars* and *inamdars* before its date, on the grounds that (1) the Act was passed in view of the necessity for realising returns from the lately constructed Kistna and Godavari anicuts and not in order to charge irrigation from private sources, where no improvement in or addition to those sources had been made; (2) it applies to rivers in *ryotwari* tracts only, not in *zemindaris*.

As regards (1) I do not feel at liberty to interpret an Act the body of which is clearly

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and comprehensively expressed, with reference to the alleged motives of the Legislature. We have been referred to the preamble; but it can be treated as indicative of the scope of the Act, only when legitimate doubt regarding the latter arises from the uncertainty of its terms; and I feel none here. Moreover, it is not clear that the preamble in this case justifies any conclusion. It, no doubt, refers to the necessity for "a fit return" being made to Government "on account of the increased profits derivable" from works constructed or improved by it. But the reference to both drainage and irrigation works, as the preliminary to provisions which authorise a charge only for irrigation, makes it doubtful whether any accurate statement was attempted; and in the absence of any subsequent provisions for the calculation of the charge to be imposed with exclusive reference to the expenditure on some new work or improvement with which the irrigation can be connected, it is impossible to hold that the right to charge is restricted to cases in which such connection can be established, or that other cases were intended to be exempt because of a previous grant of river water or for any other reason.

Then as to the alleged restriction of the operation of the Act to charges for river water in *ryotwari* tracts, that again is based solely on inference, though it would have easily been susceptible of direct expression. It is urged that section 1 must not be read as applicable to *zemindaris* and *inams*, because, but for its proviso, it would authorise the charging even of irrigation in respect of which an engagement with Government exists, a result so unjust that the Legislature cannot be supposed to have contemplated it, and that the proviso is useless to exclude this result, because it cannot apply to irrigation in *zemindaris* and *inam* villages, since the term "supplied," which is used in it, not "supplied or used" as elsewhere in the sections, is inappropriate to those tracts, inasmuch as it connotes a previous request for water which *zemindars* and *inamdars* do not and need not make. This attenuated line of construction must be distrusted, if only because its acceptance would leave it doubtful what class of cases the proviso was framed for. But in fact it rests entirely on the distinction between supply and use drawn in

Venkatappayya v. Collector of Kistna (22) and *Krishnayya v. Secretary of State* (14). It is not necessary for the present purpose to consider whether those decisions were correct. For they dealt with *ryotwari* cultivation in the Kistna District. In that district, as I shall show immediately, Government was at that date insisting on its rights, and under the rules for levy of water cess on *zemindari* and *inam* lands in the Kistna and Godavari deltas at page 2, Board's Standing Orders, Volume II (1907), land-holders or the cultivators under them immediately concerned were being required to submit previous applications for the use of water. The interpretations of the term "supply" and the distinction now relied on between it and "use" would, therefore, have had no such implication in the district in which these decisions were given as that now suggested; and it may be doubted whether they would have been adopted if the cases had come from other districts, such as Ganjam, than now in question. I, therefore, find no difficulty in applying the proviso generally to land irrigated under an engagement and the Act, as a whole, to river irrigation in *zemindaris* and *inam* villages.

Something has been said, in this and other connection in argument and in the learned Judge's judgment under appeal, of the history of the relations between Government and the *zemindars*. It is argued, for instance, that the "engagement" in the proviso just referred to cannot have been merely for the exemption of lands cultivated wet in 1865, because it would have been impossible to distinguish for that purpose the extent of wet cultivation on which, with other assets, the *peishkush* was fixed in 1803. In some cases again it is known to have been fixed then on the extent of cultivation as ascertained before 1786; and it is not to be supposed that the increase between that year and 1802 would have been left out of the calculation, if the extent in 1802 had been intended to bind the *zemindar* or Government in future. And similarly, to quote the learned Judge, "if the *zemindar* is now made to pay cess for the excess area (over that allowed as wet at the Settle-

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ment), he cannot now localise the area, if any, then under cultivation, so as to demand their contribution from the tenants of the excess area." And reference has also been made to the failure of Government in this case to make any demand for many years up to 1894. These arguments, however, are not relied on as supporting any plea of prescription or estoppel against Government, but as relating to conduct which will throw light on the meaning of the *sanad*, Regulation and Act and the meaning of "engagement" in the last mentioned; and I deal with them only on that basis, and, as before, rather because the learned Judge has relied on them than because they are, in my opinion, admissible. *Firstly*, as to *peishkush*, the particular facts referred to by the learned Judge appear to have been among those imported into the case in his judgment. But, accepting them as given, I cannot, with all respect, see how they prove more than that the *peishkush* was fixed in some *zemindaris* in more and in others in a less arbitrary way; and I cannot, even in the case of the latter such as Pittapur, draw any inference from the omission to bring sixteen years' wet cultivation into the calculation. It is common ground only that at least wet cultivation existing before 1802 was included in it and became exempt from separate charge. When the calculation was, it is admitted, in all cases inexact and differed only in the degree of its inexactitude, it is conceivable, as matter of conjecture, that either, as plaintiffs contend, the potential right to the use of water in the future was included in the grant, or that it was reserved to be the subject of future arrangement, which was never made. But the choice between these two theories must then be made on the considerations already set out. It would appear to be true that no effort was made contemporaneously with the Permanent Settlement to identify and register, that is to localise, the particular fields entitled to irrigation at its date. The omission was, no doubt, unfortunate and has led to litigation; and the hardship may, no doubt, be real as between the *zemindar* and his tenants, when the former has to select from the latter the individuals from whom he will recover what he

has paid to Government. But similar hardship must ensue and presumably is taken into account in connection with every Statute by which the burden of proof is placed on the subject against Government and has to be discharged after the lapse of years; and that fact cannot justify the Court in presuming, or accepting inadequately supported inferences in support of a grant, of which direct evidence is wanting.

There is, moreover, evidence available, which, if this line of argument is legitimate deserves consideration, since it consists in rules published by Government, which are, it is to be presumed in the absence of anything to the contrary indicative of the extent to which Government has claimed and *zemindars* and *inamdars* have acquiesced in a restriction of free irrigation, irreconcilable with these arguments. The theory of a grant of free irrigation from rivers in 1803 was, no doubt, stated by Mr. Rangachariar, as I gave it above, as confined to those *zemindaris* through which the river in question flows. But that restriction was frequently lost sight of in argument and does not appear to have been recognised in the judgment under appeal, the contention dealt with in it being for a general grant in 1802 of existing irrigation and such further irrigation as might ever be made available, without reference to the proximity of any part of the *zemindari* to the source. And naturally so. For the restriction can have no logical foundation when the grant is not supported with reference to riparian ownership and every argument for it which has been adduced would be equally valid, if the broader statement in the learned Judge's judgment had been in question before us. It will then be materially against plaintiffs, if it can be shown that some *zemindaris* have been subjected to the charge for water for many years inconsistently with the grant which they allege as made to all and with their interpretation of Act VII of 1865. That, however, has been the case as regards the large *zemindaris*, including Nuzvid and Pittapur in the Kistna and Godavari Districts, under rules published originally in 1861, and re-published last in 1906, which are printed in the judgment of Sankaran Nair, J., in *Zamindar of Kapileswarapuram v. Secretary of State* (13) and page 2, Board's

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Standing Orders, Volume II (1907). Rule 10 of the original rules and rule 6 of the later, no doubt, restrict liability to water-tax payable on lands charged as irrigated at the time of, or possessed of means of irrigation before, the construction of the anicuts. But the reason for this restriction, the effect of which was discussed in the case above mentioned, is presumably to be found in the difficulty, already referred to, of determining what land was and was not irrigated at the date of the Permanent Settlement, not in any consciousness that land newly irrigated since it would not have been liable to charge in consequence of the *zemindar's* ownership of the river water. For if that ownership had been tacitly admitted, it would have been impossible to do what the rules certainly provide for; that is, to treat *zemindars* as liable for any charge for river water at all. It is not, it should be pointed out, possible to regard the charge under the rules as made in consideration only of the part played by the anicut in making the water available and as supplementary to a water rate imposed and retained by the *zemindar* on account of the water itself. For, it is not suggested and it is not, I believe, the case that any such payment is made to the *zemindar* by the actual cultivator, though evidence of such a payment should have been available to support plaintiffs' argument, if it corresponded with facts. Moreover, the tenancy law in force at different times in the Presidency, section 11 (4), Act VIII of 1865, and section 30 (3) and 33, Act I of 1908, would discountenance such a pretension on the part of the *zemindar*; *vide* also *Bachu Ramesam v. Nukala Bhanappa* (23) and *Narasimha Naidu v. Ramasami* (24). When, as is the case, the grant in 1803 is alleged as founded throughout the Presidency in the same manner, the fact that it has been formally negatived by practice in two districts, in which the rights of Government have been continuously asserted, is against its validity in others, where they have not.

The conclusions reached are against the establishment of the alleged grant in 1802

either directly or indirectly with reference to the wording of Act VII of 1865, or, if the evidence is admissible, the conduct of Government and the expressions of contemporaneous opinions and expectations relied on. It remains to deal shortly with the cases, so far as they are in point, with reference to each of the foundations on which plaintiffs' claim has been argued, the ownership by Urlam of the river-bed and the grant. I have reserved both classes of cases for treatment together, because both are subject to the same observation, that they rather show the vexed nature of the questions in issue than support the existence of a current of affirmative authority in respect of them. For the earlier really decide very little and the later contain hardly any attempt to reconcile the conflicting opinions, which have been expressed.

The only early case as to the claim based on ownership of the river-bed is *Narasimha Sastry v. Secretary of State* (6). In it the claim, as originally made, was as wide as plaintiffs'. But in second appeal that was abandoned, and the decree allowed merely the right of a riparian proprietor to a reasonable use of the water. The legitimate extent of such reasonable use was not defined; there is nothing to suggest that it included what plaintiffs here require, the right to irrigate the land of others; and the fact that Government claimed only the right of a lower riparian proprietor is immaterial, since a wider claim would have resulted in no more favourable decision. On account, it may be, of some systematic and novel attempt by Government to assert its rights, the other decisions on this part of the argument and the majority of those relating to the grant date from 1908. *Robert Fischer v. Secretary of State for India* (16) recognised the paramount right of Government without reference to Act III of 1905, not only to regulate river water, but also to ownership in it, since, after deciding that any surplus of water after the *zemindar's* customary requirements had been satisfied was at the disposal of Government, the learned Judges held that the paramount right of Government under the law of the Presidency was independent of the ownership of the bed of the stream, in *Secretary of State for India v. Nauthes-*

(23) 7 M. 182.

(24) 14 M. 44.

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warar (25), the plaintiff was an *inamdar*, but it is admitted that his rights would be identical with those of a *zemindar*; and it was held immaterial that the natural stream, which was in question, had been swelled by rain water. The conclusion was in favour of Government, and it was observed that Act VII of 1865 is not based on any theory of the ownership of the bed of a water-course being the foundation of a right to use the water free of charge. *Kandukuri Mahalakshammamma Garu v. Secretary of State for India* (4) was decided in appeal against the judgment in the case already referred to, as containing the District Judge's finding on this point, and is statedly dissented from by Sankaran Nair, J. in his present judgment. The conclusion in favour of Government is based on Act III of 1905 and a statement that the owners of land on the river banks do not own its water. So far the current of authority is clearly in favour of Government. But in *Secretary of State v. Kannapalli Venkataratnammah* (7) the Court decided for plaintiff, on the ground that the ownership of water from a Government source followed the ownership of a branch channel by which it was conveyed. *Ambalavana Pandara Sannadhi v. Secretary of State* (8) was referred to, but in it the ownership of the branch channel was not established and it was unnecessary to consider what its effect on the ownership of the water would have been. So far as *Secretary of State v. Kannapalli Venkataratnammah* (7) is in point (for it refers only to a channel carrying Government water, not to a river), its authority is impaired by the fact that it does not take account of Act III of 1905, or the reference to water, as well as water-courses, in it and makes no reference to other cases already mentioned. In *Secretary of State v. Ambalavana Pandara Sannadhi* (12) the judgment adopted the positions as to the effect of Act III of 1905 and the connection between ownership of the river-bed and water now under consideration, though it may be observed that the finding as to the plaintiffs' right to water sufficient to fill his tanks would have been ground for a decision in his favour. Vide *Maria Susai Mudaliar v. Secretary of State* (11). Lastly, there is the judgment of Sankaran Nair, J. in *Secretary of State v. Simhadri* (26) 6 Ind. Cas. 199; 34 M. L. J. 407; 20 M. L. J. 766; (1910) M. W. N. 495.

Jaghapathiraju (26) to the same effect, whilst the other learned Judge concerned, Spencer, J., did not, if I understand him correctly, express a definite opinion on either point. The safe conclusion from these authorities is, I think, only that the theory of a connection between the ownership of the river-bed and water is of recent growth and that the affirmative reasons which are necessary in order to support it and to displace the earlier decisions have not been given.

The first case relied on as supporting a grant in 1803 is *Ponnusawmi Tevar v. Collector of Madura* (10); and there is, no doubt, some language used, particularly in the judgment of Innes, J., which implies that a transfer of the right to use the water in a channel was the basis of the decision. But he connected that transfer, not with the Permanent Settlement, but with the acquiescence of Government in the plaintiff's enjoyment of what had become a customary right. And there is a caution to be observed in the application of this and other cases to the question before us, that references to and findings in favour of a right to water do not necessarily relate to water free of charge, or deal with more than the right to water from a particular source or provided in a particular way. Thus in the case under consideration the plaintiff's right to free irrigation was never disputed, Government alleging that other sufficient provision had been made for it; and the decision is, therefore, irrelevant to the present argument. In *Maria Susai Mudaliar v. Secretary of State for India in Council* (11) and *Secretary of State for India v. Ambalavana Pandara Sannadhi* (3) *mittahs*, parts of *zemindaris* granted in 1803, were in question, the irrigation being by artificial channels taking off from rivers; and these cases are relied on by the plaintiffs, though the estates were not riparian. But the rule laid down in general terms gave no support to their contention, since it was that the only undertaking to be implied from a grant of land by Government is one to supply water free of charge to the extent of the accustomed flow at its date, that flow in the earlier case being measured by the capacity of tanks, which the proprietor was entitled to fill, and

(26) 26 Ind. Cas. 692; 28 M. L. J. 51; 17 M. L. T. 29; 2 L. W. 31.

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in the later by the extent of land irrigated. In *Secretary of State v. Ambalavana Pandara Sannadhi* (12), there is nothing to show whether this principle was referred to in argument; and it is not referred to in the judgment, parts of which appear inconsistent with it. The argument based on a grant in 1803 made its first clear appearance in *Kandukuri Mahalakshamma Garu v. Secretary of State for India* (4), in which in fact the Urlam proprietor was plaintiff; and it is significant that it was postponed so long. It was rejected shortly, the Court describing the only engagement involved in the Permanent Settlement as it was described in *Secretary of State v. Ambalavana Pandara Sannadhi* (12) and as it has been earlier in this judgment, "that the *peishkush* being fixed with reference to the area under irrigation, no further charge for the use of water should be made in respect of that area." There is next the judgment of Miller, J., in the case before us in favour of Government. *Zamindar of Kapileswarapuram v. Secretary of State* (13) relates to the Kistna District and has already been discussed. My conclusion is that the recognition of a grant in 1803 is of recent date, though it is not clear how far the earlier decisions incompatible with one were given after any such full argument for the contention as has subsequently been put forward. In the circumstances I can only hold that authority, if it does not support, is no obstacle to the decision I have come to.

The result is that neither the right of Urlam to the river water, whether as founded on ownership of the river-bed or on grant in 1803, nor plaintiffs' right, so far as it is alleged to be derived from Urlam, has been established. The presumption in favour of Government ownership, authorised by Act III of 1905, must, therefore, be made.

The remaining ground, on which Mr. Rangachariar argued the case, was an assertion of plaintiffs' direct ownership of the water. In consequence of the misapprehension of their position by the learned Judge, it is not distinctly referred to in his judgment; but it was stated before us as being that, where there is a channel taking off from a river and it is at the time of Settlement part of the irrigation system

of the estate, then, whether or no that channel runs entirely through the estate, it and all the water in it belong to the estate, subject to the customary right of others. In the present case the Mobagam channel, that in question, no doubt, runs through the plaintiffs' *inam* village after running through part of the Urlam *zemindari* and before running through a Government village. But then we have the finding of the learned District Judge, which we have been shown no reason for dissent from, that there is practically no evidence to show that the channel was dug by plaintiffs' ancestor, or that any repairs were executed by them or their fellow-*inamdars* on it, or of any title of plaintiffs or their ancestor to it. In these circumstances it is impossible to hold what plaintiffs' argument requires, that the channel is part of the irrigation system of their village. Further, if any part of the channel were plaintiffs' property, the conclusion already reached, that the river water is the property of Government, would be valid against them; and we have been shown no reason for holding that Government water becomes the property of any individual who succeeds in bringing it into a channel on his land. That position would, no doubt, be justified directly by the case of *Secretary of State v. Kannapalli Venkataratnammah* (7) already referred to, and indirectly perhaps by other cases which I have declined to follow. It is, however, negatived by the statement in *Kandukuri Mahalakshamma Garu v. Secretary of State for India* (4) :—

"It does not follow, because the *zemindar* provides the necessary channels to enable the irrigation of the *zemindari* lands, that although those channels carry water supplied from a river or channel belonging to the Government, the irrigation is nevertheless exempt from water-cess;" and the same conclusion is also supported by other cases among those already dealt with. It is to be observed that the plaintiffs have not and probably could not have based their right to water without charge as distinguished from mere supply of water, on custom. The decision on plaintiffs' claim, as based on their own independent right to free water, must also be against them.

I would for the foregoing reasons allow the

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appeal, dismissing plaintiffs' suit with costs throughout.

SADASIVA AIYAR, J.—It is unnecessary for me to state in detail the facts and contentions fully set out in the judgment of Sir Sankaran Nair, J., under appeal.

I might begin by saying that when two very learned Judges (Sir Leslie Miller and Sir Sankaran Nair) have differed on a question of law, after each of them had bestowed an extraordinary length of consideration to the matter, it is with great diffidence that I express my own opinion on the question on which they have differed.

I wish in the first place to clear the ground by a few short remarks on questions which are not either relevant or very remotely relevant to the points to be decided in this case and also on certain arguments advanced on both sides, which, to my mind, are of dubious soundness.

(A. 1). The proviso to section 1 (b) of the Madras Act VII of 1865, which refers to engagements with the Government by *zemindars*, *inamdars* or other landholders, need not be considered in this case. [What the engagement of a *zemindar* or *inamdar* with the Government is, how it is to be ascertained, whether the area mentioned in an *inam* title-deed as wet is binding on the *inamdar* or the Government and several similar questions connected with this matter have been considered in numerous cases, of which the latest was decided by my Lord the Chief Justice and Mr. Justice Srinivasa Aiyangar about ten days ago in *Secretary of State v. Sri Perarulala Ramannja Geer Swamikal* (27)].

(A. 2). A historical retrospect of the relations between the Government and the *zemindars*, between the Government and their *ryotwari* tenants, between *zemindars* and *inamdars*, between *zemindars* and their *ryots*, between the *inamdars* and their tenants, of the conflicting claims as to the ownership and proprietary rights over the soil made by each of these parties, of the claims to communal lands and so on and so forth, seems, in my opinion, to be of little assistance in arriving at a true view of the provisions of the Statute and Case-Laws which now mostly govern the rights of these parties. Historical deductions almost always differ according to

various idiosyncracies, sympathies and prejudices of the students of historical data. Further, the rights of *zemindars*, as they once existed or are alleged to have existed, cannot affect for better or worse their present rights. I am, therefore, unable to agree with the argument of the Advocate-General based on historical data that a *zemindar* has now no proprietary right in the soil of the lands enclosed within his *zemindari* limits, the argument being that as at one time he was 'a mere farmer of revenue under the old indigenous Governments, his claim to proprietorship of the soil of *poramboke* lands should be now negatived. Nor do I attach much weight to the contentions of Mr. Rangachariar based on the sovereign rights which are alleged to have vested once upon a time in *zemindars*, such sovereign rights being alleged to include absolute powers of disposal of all lands within their territories. Regulation XXV of 1802, section 2, vests the proprietary right over the land within a *zemindari* in the landholder, although that proprietary right may be subject to the communal rights of the villagers and to the occupancy rights of *ryots*, all which rights are now protected by Statute Law, that is by the Estates Land Act and other Acts. Numerous cases both in this Presidency and in Bengal) where permanent *sanads* were issued in practically the same form as in Madras) decided by the Privy Council and by the High Courts of Madras and Calcutta have established the rights of the owners of permanently settled estates over the beds of the rivers passing through their *zemindari*, over the forest lands and hills, and over the mines and minerals found within the *zemindari*, and over the tanks and the fisheries in the tanks and over the waters therein, that is, they have, in my opinion, established the rights of the *zemindars* as proprietors of the *poramboke* lands within their *zemindari* limits. The *inam* title-deeds for whole *inam* villages granted by *zemindars* prior to the Settlement and confirmed by the Government (both prior to and at the time of enfranchisement) also vest the proprietary right in the *poramboke* lands (in *inam* villages, subject, of course, to the customary rights of the *ryots* and residents) in

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the *inamdars*; and the Case-Law has, in my opinion, uniformly recognised that right of the *zemindars* and *inamdars*. The judgment in *Kandukuri Mahalakshamma Garu v. Secretary of State for India* (4) has accepted this position, so far as proprietary rights over *poramboke* lands are concerned. [See also *Po nusawmi Tevar v. Collector of Madura* (10) and *Narasimha Sastrial v. Secretary of State* (6)].

(A. 3). The consideration of the questions whether the Government could have intended to be guilty of so much harshness and oppression as would result if a particular Statute were to be interpreted in one way, and whether the Legislature could have intended such a sudden change in the law as would result from a particular interpretation,—the consideration of these questions, in my opinion, is of doubtful utility unless the words of the Statute are so very ambiguous that it is legitimate to resort to such extraneous considerations. Speaking for myself, I am not satisfied that there is in this case justification for resort to such extraneous considerations. Further, what might be deemed harshness and oppression on the part of the Government by a mind holding conservative views as regards the sacred rights arising from individual property in land might be considered by a mind with socialistic leanings (socialism, except of the very extreme kind, not being a heretical doctrine in these days) as the proper beneficial exercise by the Government (representing the public communal interests) of its right to get the benefit of unearned increments and of the performance of its duty to utilize the sacred inalienable claims of the people as a whole to the common enjoyment of the benefits arising from all the lands within a State. I shall, therefore, dismiss from my mind the arguments of Mr. Rangachariar based on the alleged glaring iniquity and injustice of trying to get some more revenue out of *zemindars* and *inamdars* after the solemn promises alleged to have been made to them by high officers of Government several decades ago.

(A. 4). Further, I do not feel much pressed by the wide language used in old English cases and relied on by Mr.

Rangachariar as to no individual human being being entitled to claim ownership of flowing or standing waters, as water standing on or flowing over land (in this respect resembling the air of the atmosphere) cannot be made the subject of ownership until it is separated in vessels, or solidified into ice and severed and appropriated as a moveable. Mr. Rangachariar quoted English text-books and cases in support of his contention. Under the old English Common Law, it seems that as water is neither land nor tenement, it cannot be sued for *separately* in a real property action under the name of water or by measure, so long as it is standing on or flowing over land, although the land which underlies it may be the subject of a Common Law action. I think that references to the technicalities of English Common Law actions merely tend to confuse the mind when it has to decide on the rights of Indian litigants. I shall, therefore, not deal with the arguments based on antiquated forms of action. The Indian Legislature in Madras Act III of 1905 has made reference to the "property" rights not only of Government but of *zemindars*, *inamdars*, Government *ryots*, Malabar *jenmis*, etc., in standing and flowing water, and Indian Courts must recognise such "property" rights so far as they are recognised by the Indian Legislature. Further, the use of the wide words "owner," "property" and "proprietor" even in the case of lands has led to great confusion in the determination of occupancy and other rights, as pointed out by Sir Subrahmania Aiyer, J., in the *Cheekati* case, *Cheekati Zemindar v. Rana-sooru Dhora* (28).

(A. 5). There were some arguments advanced at the Bar on the question whether the words "river," "stream," "channel," and "tank," found in section 1 (a) of the Madras Act VII of 1865 meant (1) the bed, banks and the volume of waters taken together in the river, stream, channel or tank, or (2) whether it meant the bed alone, or the bed and banks alone of the river, stream, channel or tank, or (3) whether it meant only the collection of the waters in the river, stream, channel or tank. I think clause (b) of section 1 of that Act which

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speaks of water *from* any such river, stream, channel or tank," clearly indicates that the words "river, stream, etc.," are used in the sense of the collective body of waters which are called river, stream, channel, or tank according to the respective configurations of the receptacles. The judgment in *Kandukuri Mahalakshamma Garu v. Secretary of State for India* (4) also takes the above view.

(A 6). The question whether, in a case where the irrigating waters, though flowing over or standing on *zemindari* or *inam* land, have been assisted in their beneficent work of irrigation by a work "belonging to or constructed by Government" (see the preamble and section 1 (a) of Act VII of 1865), the Government can impose water-cess does not arise in this case (while it arose, though only very partially, in the *Urlam* case, as pointed out in the judgment under appeal). The finding of the District Judge in this case (not disputed before us) is that no such work has been constructed by Government in connection with the *Mobagam* Channel, or with the branch channel, till it leaves the *inamdar's* limits.

(A 7). Lastly, on the view I take of the facts of this case, it is also unnecessary to decide on the meaning of the word "supplied" in the first proviso to section 1, clause (b), of Act VII of 1865. I might, however, say that I do not agree with the interpretation of that word, given in *Venkatappayya v. Collector of Kistna* (22) and *Krishnayya v. Secretary of State* (14); namely, that the word "supplied," when used in connection with water-supply, implies a previous request by the owner of the land which is supplied with water. As far as water-supply is concerned; rivers, streams, channels and tanks are usually spoken of as supplying fields irrigated under them with water for such irrigation and the idea of a request to the source of supply is inadmissible in such cases. The argument based on the Legislature not having, in the Amendment Act of 1900, changed the word "supplied," judicially interpreted as above in *Venkatappayya v. Collector of Kistna* (22) and *Krishnayya v. Secretary of State* (14), does not convince me that the Legislature adopted that interpretation, as those cases related to water supplied to *ryotwari* lands

and the amendment of 1900 fully established the rights of Government to levy assessment in respect of water even involuntarily supplied to such *ryotwari* lands. One other question may be shortly considered here. Assuming that the beds of streams and rivers, flowing between banks, both of which belong to a *zemindar* or an *inamdar*, are the property of the *zemindar* or *inamdar* and assuming that the waters standing on or flowing over such beds within the limits of the *zemindari* belong to the *zemindar* or the *inamdar* (subject, of course, to the rights of lower riparian *ryot* in natural rivers and streams, and subject to the ownership over those waters ceasing to exist in the proprietor on the waters leaving such limits by evaporation or by flowing away) the question is whether, when one of the banks alone of a stream or river belongs to a *zemindar* or an *inamdar*, he is entitled to half the bed of the river or stream on his side. The rule of English Law no doubt is that such half along the length bounded on that one side by the riparian owner's land belongs to that riparian owner, provided of course the river is not a tidal or navigable river. But is that also the Indian Law in all cases? In the case in *Mukkassa Nair Veettil v. Secretary of State for India* (17) I ventured to express an opinion that the Indian Common Law did not recognise this alleged right of the owner of the land in *ryotwari* tracts or in Malabar which are not under the Permanent Settlement to half the breadth of a highway, or to half the breadth of the bed of a river adjoining such land. I am still inclined to hold that the historical incidents and peculiar feudal tenures connected with English real property law (which was probably further affected by notions derived from the Roman Law) may have had much to do with the establishment of the doctrine that the soil of highways and of the beds of natural waterways belong in equal half-breadths to the owners on both sides. I think that the Indian Common Law vested such rights in the village community as a whole within the village limits and in the Sovereign power as representing the community in other places. However, I think it is too late to question the applicability of this English Law so far as the beds of non-tidal and non-navigable rivers and streams bounded by

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zemindari and *whole inam* lands are concerned as the case-law has established such rights in favour of the *zemindar* and *inamdar*.

Mr. Rangachariar, if I understood him aright, would not admit the right of the Government even to beds of rivers bounded by *ryotwari* lands on both sides. I can only say that I have never in my pretty long experience come across any case in which a *ryotwari* tenant-owner under Government has ever disputed the right of Government to dispose of islands thrown upon the bed of the river bounding his land, or to make reclamations by planting with reeds (*nanal*) or otherwise from the bed of the river close to its banks and to grant such reclamations to anybody they like. *Ryotwari* lands stand on an entirely different footing from *zemindari* and *inam* lands, as Government has not lost proprietary rights over *ryotwari* lands. That *ryotwari* land continues "to be Government land", while land in a permanently settled estate is not Government land is further indicated by the definition of "Government land" in the Madras Survey and Boundaries Act, IV of 1897, section 3 (i), which says that "Government land means any land not forming an estate or any portion thereof", while clause (i) defines the word "Estate" as *zemindari*, *jagir*, *mitta*, *palayam*, *inam* village, etc. Thus the Government treats itself as owner of its *ryotwari* tenants' lands while it treats the *zemindar* and *inamdar* as owner of the lands in permanently settled, estates. A *zemini* holding lands in Malabar (where also there is no Permanent Settlement) is placed on the same footing as a person holding under *ryotwari* tenure in clause 2 (1) (a) of Act III of 1905. In *ryotwari* tracts river-bed *porambokes* and even small channel *porambokes* (though running through *pattah* lands) are entered as Government property in public Revenue Records. Gradual and imperceptible accretions to *ryotwari* tenants' holdings from adjoining *porambokes* are prevented by placing demarcation stones round *patta* lands. The Government still treats itself as the proprietor of the *ryotwari* lands, whereas in *zemindari* tracts, the *zemindar* is the proprietor, taking the place of Government so far as proprietary rights are concerned, Government having, as admitted in page 300 of the judgment in

Kandukuri Mahalakshamma Garu v. Secretary of State for India (4) not, reserved to themselves the beds of channels or tank-beds or the village sites or other *poramboke* lands within the *zemindari* limits.

As regards river-beds, however, bounded by *zemindari* lands on one side, the *Gedavari Lanka* case decided so long ago as in 1858 (see *Sudder Adawlat Decisions* of 1858, page 188) has established the right of the *zemindar* to the soil of the bed of the river up to half its breadth on his side. Further, in my opinion, the learned Advocate-General's argument *contra* cannot be accepted in this case in view of the admission in the written statement, paragraph 3, which says that the portion of the bed of the Vamsadhara river where the Mobagam Channel takes off is within the limits of the permanently settled estate of Urlam. I might further add that the *zemindar's* right to half the bed of the Vamsadhara river along the length bounded by the Urlam *zemindari* is taken as undisputed by the learned District Judge, Mr. Ayling (now Justice Sir William Ayling, one of the Judges of this Court), and his finding was not attacked in the memorandum of appeal filed in this Court. I might also state that in the written statement, the Government's right to levy assessment for the waters used by the *inamdars* (plaintiffs) for irrigating their lands was based on the specific ground that the irrigating Mobagam Channel and the branch Merakabatte Channel belonged to and were under the control of the Government. (See paragraphs 3, 4 and 5 of the written statement.) The learned District Judge found that these channels did not belong to Government, that the soil of the beds of these channels (at the point where the branch channel leaves the *inam* limits) had been granted to the Urlam *zemindar* about 1803 under the permanent *sanad* fixing his *zemindari* limits and that the channels were never under the control of the Government. This finding of the learned District Judge is accepted by Sir Sankaran Nair, J., and not dissented from by Sir Leslie Miller, J., and, on the evidence, I am clear that that finding is correct. [See also the plan, Exhibit J, prepared by the Revenue Survey Department in 1871, which demarcates half the river-bed (including

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the site of the take off of the Mobagam channel) as belonging to the *zemindari* village.]

Having thus cleared the ground, the only remaining question in this case might, in my opinion, be formulated thus:

"Do the waters flowing in the Vamsadhara river at the length and over that portion of the bed, which bounds the Utlam *zemindari*, and from which bed the Mobagam Channel takes off, belong to Government within the meaning of the expression 'water from river belonging to Government' found in section 1 of Madras Act VII of 1865?" There can be no doubt that the Government start with a strong presumption in their favour under Madras Act III of 1905, that all standing and flowing waters belong to them, but it is a rebuttable presumption. Though this suit was brought before Madras Act III of 1905 was enacted, and though the Government in their written statement relied upon the ownership of the Mobagam Channel-bed and the control over the waters in that channel as the foundation of their claim to treat the waters flowing into that channel from the Vamsadhara river as their property, I cannot say that they are estopped from claiming proprietorship in those waters under the general presumption in their favour raised by Act III of 1905 passed during the pendency of this suit. The provision of that Act raising such a presumption in favour of the Government cannot, strictly speaking, be said to take away any rights vested in persons who had claims over standing and flowing waters. Rules of evidence enacted by the Legislature come into force at once and must be followed by the Courts in deciding on the rights of parties, whatever may have been the previous state of the law in regard to the proper presumptions and burdens of proof under particular circumstances.

Taking it, then, that the plaintiffs in this case have to prove that the waters of the Vamsadhara river at the particular place where the Mobagam channel takes off do not belong to Government, the question is, has that burden of proof been discharged in this case? If I understand the judgment in *Kundukuri Mahalakshamma Garu v. Secretary of State for India* (4) rightly, the opinion there expressed is that, even though

the bed of the river may be vested in the owner of the land situated along the banks so as to give him the right to accretions or *lankas* forming therein (as has been decided in the *Godavari Lanka* case), and though the bed of the river itself may belong to that adjacent owner, still the collection of waters flowing over the bed can never in any sense belong to that owner and can only belong to Government. The judgment says, for instance, at page 303:—

"The river, it seems to me, belongs to Government even though the bed may be vested in the owners of the land along the banks."

It is said further on in the judgment:

"Now clearly the waters of the Vamsadhara river do not belong to any one else but the Government. The owners of the land at the banks of the river do not own the water."

Thus, if I understand the decision aright, all flowing and standing waters, though flowing over beds belonging to others, or standing on tank beds belonging to others, are the property of Government. In this connection, I wish to point out that not only "all standing and flowing waters" wherever situate are and are declared to be the property of Government, but the words just coming after "all flowing and standing waters" in section 2 (1) of Act III of 1905 are "*all lands wherever situated.*" Thus as regards all lands also wherever situate, the presumption is created by that section that they belong to Government unless proved to belong to *zemindars*, *inamdars*, etc. As regards standing water in tanks, can it be reasonably argued that the ownership of the tank bed has nothing to do with the ownership of the water standing on it? Can it be said that, even though rain water fills the tank, standing waters are the property of Government though the tank bed may not be the property of Government? It will be seen further that section 2, clause 1, reserves all right of way and other public rights, all the natural and easement rights of other landowners and all customary rights legally subsisting. Thus all standing and flowing water is not made the absolute property of Government even, when it is not proved to belong to the *zemindars* or *poligars* or *inamdars* or *ryots*. That is, "plenary" rights are not declared in standing or flowing water in favour of Government. The section again assumes that *zemindars*, *poligars*, *inamdars*,

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e.c., can have the same kind of "property" or ownership in standing and flowing water as Government is declared to possess. The judgment in *Kandukuri Mahalakshamanma Garu v. Secretary of State for India* (4) says that it was not contended by the Vakils for the appellants in that case that the water was their property (see page 303). I do not know what precise admissions were made in that case. That flowing water by its very nature can never be the absolute property of the Government or anybody else (though the ownership in a very real sense can be predicated of it as vesting in a person so long as the water continues to be situated vertically over land belonging to that person) is clear to my mind; and when section 2 (1) says that all standing and flowing waters are hereby declared to be the property of Government (except as may be otherwise provided for by any law for the time being in force, subject always to all public rights and natural and easement rights of other land-owners and to all customary rights), it seems to me that the Legislature did not intend to give to the Government greater rights of ownership in flowing water than the principles of general jurisprudence would allow. It has been held in this Court that the Government cannot divert water even against the customary rights of their own *ryotwari* tenants (though the water flow over beds of rivers belonging to Government) without providing other equally effective facilities for irrigation. When water flows in a river over the bed-portion belonging to one owner, that water is temporarily and usufructually his property (subject to well-known natural rights of others). As soon as it leaves that portion of the bed and begins to flow over another bed-portion belonging to another owner, the water becomes the property of the owner of that bed-portion, subject again to the same rights. So, as all land also are presumably declared to belong to Government, water flowing over any lands is presumably the "property" of Government, the "property" in the water following the "property" in the land. I can find nothing in section 2 of the Madras Act III of 1905 which was intended to give the Government greater rights over water standing or flowing vertically over their land than any other proprietor of land like a *zemindar* or *namdar* has over water standing or flowing

over his. The distribution of water among their own *ryotwari* tenants [see Chief Justice Scotland's judgment in *Ponnusawmi Tevar v. Collector of Madura* (10)] is no doubt a right which the Government exercise as sovereign landlord; but after they had parted with proprietary rights over the beds of particular streams in favour of *zemindars* or *inamdars*, it is impossible, in my opinion, to hold that they retain proprietary rights over water standing in tanks in *zemindaris*, or flowing through *zemindari* lands, or in water flowing in all natural channels, or through artificial channels constructed with the knowledge and permission of Government and owned by the *zemindar* or *inamdar*, or in water percolating into *zemindari* and *inam* tracts and such a claim was clearly negated in the case of *Ponnusawmi Tevar v. Collector of Madura* (10). The Mobagam Channel itself is an artificial channel belonging to the Urlam *zemindar* (the channel at its tail end feeding the Mobagam Tank belonging to that *zemindar*). If *Kandukuri Mahalakshamanma Garu v. Secretary of State for India* (4) has been uniformly followed from which it was decided in September 1910, I ought not, of course, to lightly differ from it. The only case in which it was so followed seems to be the case of *Secretary of State for India v. Ambalavana Pandara Sannadhi* (3). But, as pointed out in the judgment under appeal, there is a later decision of Benson and Sundara Aiyar, JJ., added to the report of the decision of the Division Bench on the present case reported as *Secretary of State v. Kannepalli Janakiramayya* (1); this later decision being found in *Secretary of State v. Kannapalli Vencataratnammah* (7) as a footnote case to the present case. The learned Judges, Benson and Sundara Aiyar, JJ., say at page 368:-

"The channel was not one which passed through any Government property before it reached the village of Lakkinidi. It is apparently not a large stream connected with any system of irrigation maintained by Government.... There was no intention on the part of the Government at any time to derogate from the grant made in 1767. Both of the learned District Judges who dealt with the case proceeded on the footing that the channel and other *poramboke* in the village belonged to the *inamdar*. On the whole,

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we see no reason to dissent from that conclusion. *It has, therefore, not been proved that the water irrigating the village belongs to Government.*"

The learned Judges, therefore, clearly held that when flowing water passes over a river or channel-bed which does not belong to Government, the water cannot be said to be the property of Government while it is so flowing over that bed. Of course, it may be said that the learned Judges did not refer to the decision of *Kandukuri Mahalakshamma Garu v. Secretary of State for India* (4). The case, however, of *Kandukuri Mahalakshamma Garu v. Secretary of State for India* (4) could not have been absent from the mind of at least one of the Judges (namely Mr. Justice Sundara Aiyar) who decided the footnote case reported as *Rama Das v. Hanumantha Row* (29), for it was Mr. Justice Sundara Aiyar (though he was not a Government Law Officer) whose well-known strenuous and powerful advocacy had been evidently specially secured by the Government for the conduct of the appeals in these Urlam cases in the High Court. If Mr. Justice Sundara Aiyar expresses an opinion as a Judge opposed to the opinion for which he argued at the Bar, such an opinion of his as a Judge carries by that fact much more weight, and his non-reference to the decision of *Kandukuri Mahalakshamma Garu v. Secretary of State for India* (4), from which he clearly differed in *Secretary of State v. Kannapalli Vencataratnammah* (7), is not difficult to understand under those circumstances.

There are two well-known legal maxims which usually come to mind in such cases. One is *aqua currit et debet currere ut currere solebat*, which signifies that water flows and ought to flow as it used to flow. Grounding on this maxim, it is usually stated that there is no property in running water, but merely a right to use it, and this right may only be exercised so as not to interfere with the use of the water by other persons similarly entitled. But the right to use it can itself be called a property in running water, and (as I have said already) it is not wise to confuse ourselves by juggling with the word "property" or the word "owner."

(29) 12 Ind. Cas. 449; 36 M. 364; 21 M. L. J. 952; 10 M. L. T. 356; (1911) 2-M. W. N. 387.

The other maxim is *cujus est solum etc.*, meaning that whoever is the owner of the soil, it is his even to the firmament and to the middle of the earth. This maxim is the basis of the rule that waters in ponds and wells situated on land owned by a person belong to him in a very real sense, and that on the flowing waters also running over his land he has got a real right of property, though of a qualified kind. Section 2 of Madras Act III of 1905, though it talks of property in waters both in the Government and in the *zemindar* or *inamdar*, contains (as I said) several clauses qualifying such right of property. I am reasonably clear that the maxim *aqua currit, etc.*, was not intended to be abrogated in favour of Government. That it was not so intended in the case of a *zemindar* or *inamdar* is not disputed and the language of the section does not to my mind constrain us to hold otherwise in the case of water flowing over even Government lands. On the other hand, how else is a *zemindar* or *inamdar* to prove his "property" in "standing or flowing water" except by proving his "property" in the land situated over or under such water, it being clear from the section 2 (i) (a) itself that such "property" can exist in him? [See *Narasimha Sastri v. Secretary of State* (6).]

There is, no doubt, a distinction in the extent of the proprietary or ownership rights of a man in water over his soil according as the water is standing water (as in a tank), or water naturally flowing as a river (though the waters cannot be said to belong to anybody else so long as the waters are still vertically over his soil).

But I find it very difficult to hold that there is another distinction between (a) the ownership rights of a man in the waters over the soil owned by him, without liability on his part to be taxed by Government for exercising the right of use of such waters springing from such ownership, and (b) the ownership of such waters with the right of user springing from such ownership being subject to the liability to be taxed by Government. I am unable to find that any such new distinction between the extents of rights in waters has been created by Act VII

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of 1865 or Act III of 1905. The former Act refers to a body of waters belonging to Government, and the latter enacts that all waters and lands *prima facie* belong to Government and that other claimants of rights of ownership in any such waters or lands have to prove their rights as against Government. The former Act gives a right to the Government to tax waters belonging to Government and used in the irrigation of the lands of persons *not owning the right in the said waters*. A new intermediate class of ownership in waters, in which the soil proprietor has all the ordinary and natural rights to use the water which is his "property" but with liability to pay assessment to Government (though the Government cannot be said to own the waters as they do not own the soil under the waters), seems to me to be not contemplated by either Act, and no such distinction seems to have been made before *Kandukuri Mahalakshamma Garu v. Secretary of State for India* (4). On the other hand, it was assumed, as a matter of course, in almost all the cases dealing with this question that if the *zemindar* or *inamdar* owns the right to use the waters unlimitedly (excepting, of course, the natural right of lower riparian owner) within his bed without interference from Government, he is entitled to use them free of assessment and he is entitled even to a refund of the assessment collected from him by the Government on the wrongful claim made by the Government that the irrigating waters belong to them. If a man has the ordinary juridical ownership over waters standing on or flowing over his land (the extent of his right being governed by the well-known rules relating to standing waters, flowing waters, upper and lower riparian rights, etc.), he must also be free from assessment by Government for the use of such waters belonging to him, as the Government can have no ownership at all in such waters till they leave his soil. A new ownership in waters in the Government entitling them to impose assessment for the use thereof, though they have no ownership therein according to ordinary juristic principles, is again difficult for me to grasp and I am not satisfied that

any such new kind of ownership was created by either of the two Acts.

I am aware that by the amendment of 1900 to Madras Act VII of 1865 it has been enacted that when water from a river *belonging to Government* by direct or indirect flow or percolation or drainage irrigates any land under cultivation, the Government is entitled to levy a separate cess for such water. In the case of rivers running over Government *poramboke*, the water is the property of Government and if it irrigates a *ryotwari* tenant's land by percolation, it continues even after entering the tenant's holding, as I said, to be Government water, as the tenant's land also belongs in proprietary right to Government and is called Government land in the Survey and Boundaries Act. These considerations do not apply to water flowing over or percolating into *zemindari* or *inam* lands and no cess can, therefore, be levied under Act. VII of 1865 for use of that water, excepting probably in case of the water having been made available for beneficial irrigation through works belonging to or constructed by Government.

In the result, I would dismiss this Letters Patent Appeal with costs.

BAKEWELL, J.—The principal question in this appeal is whether the Vamsadhara river, at the place where the Mobagam Channel takes off water which flows to and irrigates the plaintiffs' land, is a river or stream belonging to Government within the meaning of Madras Act VII of 1865.

A river cannot be the exclusive property of any person unless it flows throughout its whole course within his land, since, if another person has a right of access to it, he obtains certain rights of appropriating water from the stream and of preventing other persons from interfering with his rights, even though he has no right of ownership over the land whereon the river flows. [See *Lyon v. Fishmongers' Company* (30).] It cannot have been the intention of the Legislature to deal only with exceptional cases of this kind, and I think that this Act may be construed as applying to such cases of limited property

(30) (1876) 1 A. C. 662 at pp. 673, 683; 46 L. J. Ch. 68; 35 L. T. 569; 25 W. R. 165.

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as arise from ownership of the river-bed. I think that the English authorities show that the owner of the river-bed has a qualified ownership in the stream of water which flows over it, by virtue of which the river and stream may be said to belong to him.

It is admitted on behalf of the respondents that at the beginning of last century the British Government were the owners of the river-bed and of the Uralam *zemindari* which abuts thereon, and through which the Mobagam Channel conveys water to the plaintiffs' land. It is also admitted by both parties that at about that time the Government issued a *sanad* of this *zemindari* in common form, and it is argued on behalf of the plaintiffs that this *sanad* constitutes a grant of the full ownership of the land comprised in the *zemindari*, subject to the rights of tenants, and that this grant must be construed in the same manner as a grant of land under English Law and accordingly includes either the whole of the river-bed and the bank adjacent to the *zemindari*, or at least the river-bed *ad mediam filum aquae*. The common form of *sanad* under the Permanent Settlement is not in form a grant of property: it contains no parcels, no dimensions, no boundaries or abutments, and does not follow any precedent known to a British lawyer, but it is to a great extent a literal copy of the preamble and provisions of Regulation XXV of 1802 and differs from it principally in specifying the amount of the assessment to be paid by the *zemindar*. Paragraph 13 states that "The foregoing conditions contain an abstract of the obligations and duties which you shall incur and of the rights which you have acquired under the new constitution erected for the security, protection and prosperity of the subjects of the British Government;" and the *sanad* concludes, after an exhortation to good conduct, with a declaration that the grantee is "Hereby authorised and empowered to hold in perpetuity to your heirs, successors and assigns at the permanent assessment herein named, the *zemindari* of....."

The *sanad* also contains a direction to the grantee to keep accounts, and for that purpose to maintain the village *karnams* or accountants, and to enter into agreements with the *ryots*. Both the *sanad* and the

Regulation already mentioned contain the expressions "a permanent property in their land for all time to come," and "the proprietary right of the soil", but the words "proprietors of land" and "proprietary possession" have a technical signification in the Regulations, and "proprietary possession" has been explained by their Lordships of the Privy Council to mean "the possession and rights of a proprietor in the technical sense in which that word is used, *viz.*, the person who pays the rent immediately to Government" [*Oolagappa Chetty v. Aruthno*: (31)].

In Regulation IV of 1822 the Government found it necessary to declare that the provisions of previous Regulations, including XXV of 1802, were not meant to define, limit, infringe, or destroy the actual rights of any description of landholders or tenants, and that tenants' rights should be determined by the Courts. I think that these Regulations and the form of *sanad* show that it was not intended to create any rights of property or to make a grant of a particular estate in land, but rather to invest a certain person with the position or status of *zemindar* of a particular *zemindari*, to make that position permanent, transferable and inheritable, and to fix the land tax or share of produce payable by the *zemindar* or his assigns to the Government. Upon this construction the rights of the *zemindar* are such as were appurtenant to the *zemindari* at the date of the *sanad* and, I think, that the burden is upon him to show that his rights extended beyond the natural boundaries of the *zemindari*. Doubtless the *zemindar* and his *ryots* would continue to exercise all rights, naturally and openly enjoyed by them at the date of the grant; thus not only would the riparian villages be entitled to take water from the river, but the cultivators on an artificial channel in existence at that date, such as the Mobagam Channel, would also be entitled to take as much water therefrom as would pass thereby and as the terms of their holding allowed. Any other construction would be contrary to the intention of the Government, that the lands within the *zemindari* should be profitably cultivated and that the *zemindar* should obtain his proper share of the produce and be able to pay his assessment

(31) 1 I. A. 268 at p. 281; 14 B. L. R. 115; 21 W. R. 358.

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to the Government, and would be in derogation from the grant.

The riparian villagers may have made some use of the river-bed and banks, but there is no evidence that any proprietary rights over them or the stream of water were exercised by these villagers or the *zemindars* at the date of the *sanad*, and in my opinion the burden is upon those who assert that any such rights passed under the *sanad* to prove that they were appurtenant to the *zemindari* and enjoyed therewith.

It is, I think, obvious that decisions relating to the construction of English conveyances of land, which assume conditions and presumptions different from those prevailing in India, are wholly inapplicable to a *sanad* under the Permanent Settlement. Even if those decisions apply, the *sanad* can only be construed as granting the river-bed *usque ad medium filum aquæ* and the stream of water flowing thereon; and since the other moiety of the river has not been shown to have been transferred by Government it must be taken to be a river or stream of water belonging to Government.

In the natural course of things part of the latter stream must cross the moiety of the river-bed assumed to belong to the *zemindar* and flow down the Mobagam Channel, and part of the water which reaches the respondents' land comes by direct or indirect flow from a river or stream belonging to Government from or through adjoining land, and is, therefore, chargeable [Act VII of 1865, section 1 (b)].

The learned Judge from whose judgment this appeal is brought based his decision upon the ground that the *sanad* was a grant of all rights vested in the Sovereign in respect of the *zemindari* and its appurtenances, except such as were expressly reserved thereby. Regulation XXV of 1802 and the common form of *sanad* issued thereunder no doubt recognise that the *zemindars* had formerly exercised certain sovereign rights over the territories under their control, and I think they show the intention of British Government to curtail those rights. Even assuming that the *zemindars* as petty chieftains exercised some form of sovereignty, it has not been shown that it assumed the form known in the West. As Sir H. S. Maine has pointed out, the idea of the Sovereign as proprietor was

derived by the European jurists from Roman Law (see Ancient Law, 10th Edition, page 104 *et seq*; International Law, page 55); and the idea of sovereignty in India, more especially among such subordinate rulers as the *zemindars*, was most probably that of a tax-gathering Empire.

The *ryots* grouped in villages were the possessors and cultivators of the soil under immemorial custom, and the right of the *zemindar* was probably to extract as much of the produce of the soil as he could from them and from the tenants whom he planted upon the cultivable waste. Paragraph 13 of the *sanad*, which reserves full legislative powers to the British Government, introduces the European idea of "eminent domain" over the property of the members of the community, under which the Sovereign claims the power of disposing of everything contained within its territory for the general good, and seems to me to negative any intention to transfer "sovereign rights." (See Hall, International Law, 6th Edition, page 45). There is no evidence that the *zemindar* in this particular case ever exercised any proprietary rights over the Vamsadhara river, or that as ruler he considered himself to possess such rights, and the *sanad* itself contains no provision whatever with reference thereto.

I am of opinion that the plaintiffs have failed to prove that the Vamsadhara river is part of the Utlam *zemindari*, and that from their own admission as to the property in the river at the date of the *sanad* as well as from the general presumption as to the rights appurtenant to the *zemindari*, and the special presumption now raised by Madras Act III of 1905, the river must be held to belong to Government, subject to the ordinary riparian rights and to the special right of taking water through the Mobagam Channel arising from its existence at the date of the *sanad*. I agree with Oldfield, J., that the general terms of Act VII of 1865 are not limited by the preamble. The plaintiffs' land is irrigated by water from a Government river, and I think that the burden is upon them to prove an "engagement" which entitles them to irrigation free of charge [Madras Act VII of 1865, section 1 (b)]. Such an engagement appears in the common form issued upon the *Inam* Settlement, which states the number of wet and dry acres claimed by the

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inamdar. It appears from the plaint that the original grant under which plaintiffs hold specified the number of wet and dry acres, and that since the Settlement six acres of the dry lands have been converted into wet, but it is not averred by what right or at what date this conversion was effected. It appears to me that the object of specifying in the original grant and at the *Inam* Settlement the number of wet acres was to declare the extent of the grantee's rights of irrigation; that is, he was to be allowed to take only sufficient water to irrigate the number of acres described as wet.

The claim to irrigate for a second crop is in effect a claim to take water for double the number of acres specified in his grant, and I think that in order to substantiate the claim he should aver and prove his title.

I agree with the order proposed by my learned brother Oldfield, J.

By THE COURT.—The result is that the appeal succeeds and the plaintiffs' suit is dismissed with costs throughout.

Appeal allowed.

LOWER BURMA CHIEF COURT.

FIRST CIVIL APPEAL No. 163 OF 1913.

June 2, 1915.

Present:—Sir Charles Fox, Kt., Chief Judge, and Mr. Justice Parlett.

BALLADIN AND ALLADIN FIRM—

DEFENDANTS—APPELLANTS

versus

PURANMUL BALBEHARI LALL—

PLAINTIFF—RESPONDENT.

Trade mark—Proof of actual deception of any person, if necessary—Misdescription of place of manufacture, effect of.

In cases of infringement of trade marks it is not necessary for the plaintiff to show that defendant's colorable imitation of plaintiff's mark did actually deceive any person or persons. [p. 633, col. 2.]

Where it is clear from the evidence that traders in rose water used the words 'Ghazipoor Rose Water' as descriptive merely of a good kind of such water just as the word 'Cologne' is used for a particular kind of scent, though not necessarily manufactured at Cologne:

Held, that people buying such goods do not set any particular store upon their coming from the particular places to which they are ascribed and that such misdescription not being calculated to deceive any one does not disentitle the plaintiff to the reliefs which he might otherwise have obtained. [p. 634, col. 1.]

Appeal against the judgment and decree of Mr. Justice Young, sitting on the original side of this Court, dated the 17th September 1913.

Mr. Bagram, for the Appellants.

Mr. J. R. Das (with him Mr. A. B. Banerji, for the Respondent.

JUDGMENT.—The decisions cited in support of the first three grounds of appeal have little application to the present case. In this case the plaintiff did not seek relief in respect of a number alone. His case was that his "Peacock" mark in conjunction with the number 1,000 had been infringed. There can be no possible doubt that he had acquired the exclusive right to the use of a picture of a peacock. The label started by the defendant was a manifest imitation of the plaintiff's peacock mark and of the general get-up of his label including the adoption of the number 1,000.

There was no evidence of any one having been actually deceived by the defendant's mark, but it is settled law that it is not necessary for a plaintiff to prove this in order to entitle him to succeed—Sebastin, 5th Edition, page 134.

The defendant's label was certainly calculated to lead purchasers buying or seeking to buy rose-water on the repute of the Peacock Brand into the belief that bottles bearing the defendant's label might be that brand.

The only other question is, whether the plaintiff was disentitled to relief by reason of his using a false description on his label. He failed to satisfactorily prove that his rose-water was made at the place named, Ghazipoor, but from the evidence it seems clear that traders in rose-water use the words "Ghazipoor Rose Water" as descriptive merely of a good kind of such water, and no particular store is set by any one on such rose-water coming from either the Ghazipoor district or any town or village called Ghazipoor.

The word seems to be used in much the same way as "Cologne" is used for a particular kind of scent, or "Worcester" and "Yorkshire" are used for sauces, or "Patna" for rice.

The public must be credited with some common sense, and it cannot be believed that persons buying articles with such names

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set any store upon their coming from the particular places to which they are ascribed. The misdescription in calling his manufacture Ghazipoor rose-water was not shown to be calculated to deceive any one.

The decree in the case was justified.

The appeal is dismissed with costs, ten gold mohurs allowed as Advocate's fee.

Appeal dismissed.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No 330 OF 1914.
August 20, 1915.

Present:—Mr. Justice Seshagiri Aiyar.

RATNA PATHAN— PLAINTIFF—
PETITIONER

versus

PARA SUNDARAM—DEFENDANT—
RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XVIII, r. 13—Provincial Small Cause Court—Abstract of evidence incomplete—Judgment based on such abstract, whether legal.

In a suit tried by a Provincial Small Cause Court, the note appended to the judgment showed that five witnesses had been examined for the plaintiff and one for the defendant. The record, however, of the memorandum of evidence prepared under Order XVIII, rule 13, Civil Procedure Code, and found on the record, was incomplete and contained only the evidence of the witnesses Nos. 1, to 4 and the words 'I am' in the evidence of the 5th witness for the plaintiff and the evidence of the defendant's witness was not at all found.

Held, that the judgment based upon such evidence was illegal and ought to be set aside.

Chethru Gope v. Sri Charan Bhagat, 9 C. W. N. 420, followed.

Petition, under section 25 of Act IX of 1887, praying the High Court to revise the judgment of the Court of the District Munsif of Chingleput, dated the 30th September 1913, in Small Cause Suit No. 774 of 1913.

FACTS.—The facts of the case appear from the judgment and the head-note, the only additional fact being that the memorandum of evidence was not signed as required by law.

Mr. O. P. Venkataragavachariyar, for the Petitioner:—The judgment is illegal. Order XVIII, rule 13, Civil Procedure Code, requires that the memorandum of evidence of each witness should be taken down as the examination proceeds and that it should be signed

by the Judge. That rule has been contravened in this case. Only the abstract of the evidence of four witnesses on the plaintiff's side is found and the words 'I am' in that of the 5th witness. The evidence of the defendant is altogether absent. The memorandum of evidence is, therefore, illegal and cannot be acted upon. There is, therefore, no legal evidence to support the judgment. Vide *Chethru Gope v. Sri Charan Bhagat* (1). So far as it goes the evidence is all one way.

Mr. P. Chenchiah, for the Respondent, argued *contra*.

JUDGMENT.—The point for decision was whether the defendant executed the note sued on. The conclusion came to by the District Munsif is that that document is not genuine. This is based upon the evidence of witnesses who, it is contended by the petitioner before me, all speak to the execution of the document. In the note appended to the judgment it is stated that six witnesses were examined, five for the plaintiff and one for the defendant. In the notes sent up to this Court the evidence of the sixth witness does not appear. As regards the fifth witness for the plaintiff, the only portion of his evidence is that which stops with "I am" and is not taken any further. It is contended before me that the Judge did not take an abstract of the deposition of the 5th witness, nor of the witness for the defendant. The learned Counsel for the counter-petitioner is unable to say whether this contention is well-founded or not. The records sent up to this Court do not show that the deposition of the defendant's witness was taken on any other day or that the Judge made any note of his deposition. Under these circumstances I must regard this procedure of the District Munsif as illegal and as being opposed to Order XVIII, rule 13. [See also *Chethru Gope v. Sri Charan Bhagat* (1).] I must set aside the order of the District Munsif and direct him to record as required by law and to pass a proper decree in the case.

Petition allowed.

(1) 9 C. W. N. 420.

MA ON BWIN v. MA TU.

LOWER BURMA CHIEF COURT.

FIRST CIVIL APPEAL NO. 98 OF 1912.

May 15, 1914.

Present:—Mr. Justice Ormond and
Mr. Justice Parlett.MA ON BWIN—DEFENDANT—APPELLANT
versusMA TU AND ANOTHER—PLAINTIFFS—
RESPONDENTS.*Buddhist Law—Inheritance—Succession to nephew—
Division between paternal and maternal aunts per
capita and not per stirpes—Equality of division.*

Under the Burmese Buddhist Law the paternal and maternal aunts succeed to their nephew's estate *per capita* and not *per stirpes*. Equality of division is the rule usually adopted in the division of property among persons of the same degree. [p. 636, col. 2; p. 637, col. 1.]

Appeal against the judgment and decree of the District Court of Tharrawaddy in Civil Regular No. 5 of 1912.

Mr. Palit, for the Appellant.

Mr. Lentaigne (Junior), for the Respondents.

JUDGMENT.

PARLETT, J.—This case arises out of conflicting claims to the estate of Maung Tha Nu, a minor who died on the 20th December 1909; he was an only child and both his parents predeceased him. His father Maung Nyo Sein died in 1899. His mother Ma On Gaing married Maung Pan Nyun about two years later, and herself died in November 1906. She left one sister Ma On Bwin, the defendant, whose husband Maung Po Lu also died in 1906. Maung Nyo Sein had two sisters, Ma Tu and Ma Nyein Bu, the plaintiffs. He had also a brother, Maung Shwe E, who died in July 1907 leaving a family. They are not parties to the suit and it is clear that they have no claim to Tha Nu's estate, being excluded by their two aunts, the plaintiffs. See *Maung Hmaw v. Ma On Bwin* (1), *Ma Ma Gale v. Ma Me* (2) and *Kan Gyi v. Ma Ngwe Nu* (3). The defendant took Maung Tha Nu into her house after his mother's death and obtained Letters of Administration to his estate. The plaintiffs sued her for $\frac{1}{3}$ rd share each of that estate. The defendant pleaded that she had adopted Maung Tha Nu and, therefore, was entitled to the whole of his estate, and further that in any case she was entitled

to half the estate and plaintiffs to only one-half between them. The District Court held against her on both points and she now appeals.

As regards the adoption, defendant's story is that in about March 1907 Maung Shwe E came and asked the boy to go back with him to his father's relations, but he declined. To avoid trouble with them defendant and her husband thought it wise to formally adopt the boy and the next day they called in six neighbours to witness the adoption. Three of them are dead, but three have given evidence; as has also a carpenter, Maung Pu, who happened to be working in the house at the time. Their account is to the effect that the couple expressed their desire to adopt the boy, the latter signified his assent and defendant and her husband then said that they adopted him as their son. Not one of these witnesses appears to be really independent. Shwe Thaw is a neighbour and is in the habit of looking after defendant's affairs; he had been in debt to her and gave her land in satisfaction, keeping it, however, in his own name. U Nu is Po Lu's father: Tun E is a dependant of Ma On Bwin and a man of no standing. Ma Pu's wife is related to Po Lu. The evidence of what happened on this occasion is, therefore, far from satisfactory. But even if it were satisfactory, it would require to be supplemented by proof of publicity of the relationship between the adoptive parents and the adopted child. Of this there is absolutely none. Not one of the defendant's witnesses can say that they called one another mother and son. On the contrary the boy continued to call her aunt as before; nor does any of them say that the boy was looked upon in the village as their adoptive son. On the other hand, all the plaintiff's witnesses, whom there appears no reason to distrust, say that they never once heard of the relationship. It is clear that the adoption was not proved.

As regards the shares of the three aunts, the decision of the District Court is fully covered by the authority of *Maung Tun Arung v. Maung Yan Pyo* (4), *Ko Kan Gyi v. Ma Pyu* (5),

(1) 1 L. B. R. 104.

(2) U. B. R. (1905), II, Buddhist Law, 5.

(3) 3 Ind. Cas. 630; 5 L. B. R. 70.

(4) U. B. R. (1897), II, 172.

(5) 18 Ind. Cas. 497; 6 L. B. R. 164; 5 Bur. L.T. 283.

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where the rule of equality of division in such cases is laid down. We are asked to hold that the Bench ruling of this Court should be reconsidered and a division *per stirpes* declared to be the rule in such cases. No authority for this view is cited, either in the Dhammathats or among reported cases. But reliance is placed on the analogy to be drawn from the case of *Maung Kyaw v. Ma Tu* (6), which was followed without discussion by a Bench of this Court in *Ma Mya v. Ma Su* (7). In the former case out of a brother and two sisters, a brother and one sister predeceased the other sister, each leaving a family, and when the last sister died childless the nephews and nieces inherited *per stirpes*. It is clear that the decision was based more upon considerations of fairness than upon any express rules, and certain passages in a later case, *Ma Gun Bon v. Maung Po Kywe* (8), indicate possible grounds for a contrary view. In the particular case, however, had either the brother or sister been living when the second sister died, he or she would entirely exclude his or her nephews or nieces. He or she having died, however, it might appear unfair that the family should lose more than half of the estate in favour of their cousins merely because the latter were more numerous than they.

If it was intended that uncles and aunts should always inherit *per stirpes* as representing the grand-parents, one would expect that the shares of the grand-parents would be expressly laid down where two of them survive on one side and only one on the other, but it would appear that all the surviving grand-parents divide equally. Again were the division to be *per stirpes*, the case where the grand-parents survive on one side only and uncles and aunts on the other, should be provided for; in such a case, however, a single grand-parent would exclude uncles and aunts on both sides. In *Ma Kyi Kyi v. Ma Thein* (9) the tendency of Buddhist Law towards equality of shares is pointed out and several cases illustrating it are referred to.

That case was even one in which, according to certain texts, an unequal division

should be made. In the present instance no such texts can be cited. On the contrary, of the sections of the Digest, Nos. 308, 309 and 311, which refer to the right of uncles and aunts to inherit in certain circumstances, the two former at least appear to me to imply strongly that the division among them should in all cases be an equal one. Section 308 provides for the case of a married couple dying childless within a short time of one another and leaving no parents or grand-parents. The man's uncles and aunts, paternal and maternal, inherit the property he brought to the marriage and the woman's uncles and aunts what she brought. The rule seems designed to keep the property in the family to which it belonged, and in each instance it would appear that the division among the members of that family declared to be entitled to inherit would be an equal one. It is expressly laid down that property acquired jointly by the deceased couple must be divided equally among the paternal and maternal uncles and aunts of the husband and of the wife.

Section 309 provides for the death of the couple at a considerable interval, leaving only the same relatives. Here the paternal and maternal uncles and aunts, of the one who dies last, inherit the whole of the estate of both the deceased, those of the one who died first having a right of pre-emption as regards the property which came from his or her family. Here again there is no mention of inequality of shares and I think the inference is strong that they should be equal.

The tendency of modern custom towards equality even where the Dhammathats suggest a different rule is beyond doubt. A rule of equality of shares in a case like the present has been binding on all Courts in Upper Burma for nearly fourteen years, has probably been followed by the Courts in Lower Burma in many cases that may have arisen, and has recently been adopted by a Bench of this Court. It would require very clear and strong authority to justify a reconsideration of what has for so many years been the law in Upper Burma and has now been held to be the law in lower Burma. None whatever has been shown. I would dismiss this appeal with costs.

(6) U. B. R. (1892-96), II, 189.

(7) 13 Bur. L. R. 374.

(8) U. B. R. (1897-1901), II, 66.

(9) 3 L. B. R. 8.

MAUNG PO LU v. BEGBIE & CO.

ORMOND, J.—I concur in the judgment of my learned colleague on the question of adoption, and in his conclusion as to the shares to be taken by the aunts, but I think it is sufficient to say that in the Burmese Buddhist Law of Succession there is no rule that when the succession ascends and there are kindred of the same degree on both the paternal and maternal sides, those on the paternal side take half and those on the maternal side take half. In this case the two paternal aunts and the one maternal aunt do not claim "*jure representationis*," in the right of another person; but they claim in their own right as being in equal degree of kindred. They, therefore, each take an equal share.

Appeal dismissed.

LOWER BURMA CHIEF COURT.

FIRST CIVIL APPEAL NO. 126 OF 1914.

January 12, 1915.

Present:—Mr. Justice Ormond.

MAUNG-PO LU—DEFENDANT NO. 2—

APPELLANT

versus

J. A. BEGBIE & CO.—PLAINTIFFS—

RESPONDENTS.

Surety's liability—*Surety, if discharged by creditor's giving time to principal debtor—Contract Act (IX of 1872), s. 135.*

Where, in respect of a debt which bore no interest, the creditor gave three months' time for its payment in consideration of the principal debtor promising to pay him interest at 12 per cent. per annum in case of her failure to pay up at the end of three months:

Held, that the surety was discharged from his liability on account of the agreement to give further time. [p. 638, col. 1.]

Appeal against the judgment and decree of the Small Cause Court Judge of Rangoon, dated 15th July 1914, in Civil Regular No. 2843 of 1914.

FACTS.—Plaintiffs were carrying on business with a sister of the present defendants, but she died on 5th January 1912 and the plaintiffs, who were anxious to secure their claim in respect of their dealings with her, sent for the defendants and on the 20th February 1912 obtained from the 2nd defendant (present appellant) a guarantee, which guaranteed not only

debts of the deceased sister but also debt which might be incurred by the 1st defendant in carrying on the same business. On 7th October 1913 the first defendant executed a pro-note for Rs. 1,957-15-6 for the amount of certain piece-goods. The pro-note contained no stipulation for interest. The plaintiffs, however, agreed to give her time till 7th December 1913 on her promising to pay interest at 12 per cent. per mensem commencing from 7th December 1913 on failure to redeem the said pro-note by that date.

In disposing of the 2nd defendant's contention that his guarantee was discharged by the plaintiffs' subsequent agreement to give time in consideration of a promise to pay interest, the learned Judge of the Small Cause Court said:—

"It only remains then to consider whether the 2nd defendant is discharged by the plaintiffs' allowing time to the first defendant to pay off the pro-note in suit. It appears to me that he is not. A surety is discharged if there is a binding contract between the creditor and the principal debtor giving the latter time, but not otherwise. In this case the pro-note was payable on demand and an agreement that it should not be so paid could not be proved, as evidence to that effect would not be admissible and it would, therefore, not be binding."

The 2nd defendant filed this special appeal.

Mr. Lentaigue, for the Appellant.

Mr. Gregory, for the Respondents.

JUDGMENT.—The first defendant bought goods from the plaintiff and the 2nd defendant stood security for the 1st defendant, who was his sister, as far as any debts incurred by her when carrying on business with Messrs. J. A. Begbie & Co. under a letter of guaranty. The plaintiff sued on a pro-note for the balance due for the price of goods sold. On the 15th September 1913 the plaintiff wrote to the 2nd defendant intimating that an amount of Rs. 13,281-2-9 was then due from the 1st defendant. On the 16th and 17th September the 2nd defendant wrote to the plaintiff through a Pleader, denying that he ever undertook to stand surety for all debts that might

MA THIT T. MAUNG TUN THA.

be incurred by the 1st defendant and said that if there was any written document to that effect, it must have been obtained from him under misrepresentation. The 2nd defendant states that he understood when he signed the letter of guaranty that he was only standing surety for his deceased sister's debts, Ma Kye May, who had before her death been trading with the plaintiff. Beyond his own statement there is nothing to show that he was misled in any way and I am satisfied that he knew what he was signing. His letter of the 17th September is, I think, sufficient notice to the plaintiff that if there was a legal contract of guaranty, he revoked it.

Mr. Gregory for the plaintiff-respondent states that the amount mentioned in the promissory note was merely the balance due for goods supplied before the 15th September, but there is no evidence to that effect; and if the case rested there, I should remand it in order to ascertain whether the amount sued for was a debt incurred prior to the 16th September. But the 2nd defendant-appellant contends that he is not liable, on the ground that the plaintiff has given time to the principal debtor. I think it is clear that he has done so. At the trial Mr. Clifton for the defendant asked if the plaintiff admitted that time was granted to the principal debtor for the payment of interest and Mr. Gregory for the plaintiff stated "yes." In the plaint the cause of action is stated to have arisen on the 7th December 1913, which shows clearly that the amount claimed was not due before that date.

The appeal is allowed with costs. The decree against the first defendant stands good and the suit is dismissed as against the 2nd defendant with costs in both Courts.

Appeal allowed.

LOWER BURMA CHIEF COURT.

FIRST CIVIL APPEAL No. 15 OF 1914.

March 31, 1915.

Present:—Mr. Justice Ormond and
Mr. Justice Twomey.

MA THIT T AND OTHERS—DEFENDANTS—
APPELLANTS

versus

MAUNG TUN THA—PLAINTIFF—
RESPONDENT.

Buddhist Law—Inheritance—Orasa son—Limitation within which he should assert his claim to one-fourth—Right, if lapses if not asserted without unreasonable delay.

Under the Burmese Buddhist Law it is necessary in the interests of the family that the eldest son should promptly decide whether he is to claim one-fourth share of the estate of his parents and if the option is not exercised without unreasonable delay, it should be regarded as having lapsed altogether. [p. 639, col. 1.]

Appeal against the judgment and decree of the District Judge of Thaton, dated the 20th December 1913, in Civil Suit No. 6 of 1913.

Mr. *Coitman*, for the Appellants.

Mr. *Chit Hlaing*, for the Respondent.

JUDGMENT.—The plaintiff was the eldest son of Ma Thit and U Tu. U Tu died in December 1906. The plaintiff instituted this suit in June 1913 for one-fourth share of the joint estate of his parents as at the death of his father. At the time of the father's death, there were six children including the plaintiff. The plaintiff made no demand from his mother in respect of his one-fourth share until 6½ years after his father's death; but, on the other hand, he collected the rents of the property for his mother as being her property.

The question in this appeal is whether an eldest son must act with reasonable promptitude in exercising his option of taking one-fourth of his parents' joint property on the death of his father, or whether he has 12 years within which he can exercise that option under Article 123 of the Limitation Act. We are referred to the case of *Maung Po Min v. U Shwe Lu* (1) where it is held that the period of limitation for the recovery of one-fourth share by an eldest son is 12 years from the date of the parents' death, under Article 123. The facts of that case are not given in the report, but we must assume that the eldest son's option had not lapsed owing to delay in exercising it. The effect of undue delay on

(1) 2 L. B. R. 110.

BOMMAREDDI POLIREDDI v. BOMMAREDDI BAPIREDDI.

the part of the eldest son was not considered and no question was raised on that point. The case can only be regarded as an authority for applying Article 123 and reckoning the period of limitation from the date of the parents' death when as a matter of fact the eldest son has acted promptly. In the present case we are not concerned with the period of limitation. If the plaintiff had demanded his one-fourth share promptly after his father's death and had been refused, he would no doubt have 12 years from the date of his father's death to sue for the share. But though he was a married man with a family of his own and living apart from his mother when his father died, he did nothing for $6\frac{1}{2}$ years and the question we have to decide is whether he should not, therefore, be deemed to have abandoned his claim to partition and elected to wait for his mother's death and then share with his brothers and sisters. It is not expressly provided in the Dhammathats that the eldest son must decide promptly which course he will take. But from the nature of the option it is necessary in the interests of the family that it should be exercised without delay. According as it is exercised or not, the mode of managing the property must vary and the prospects of the other heirs would also vary. It can hardly be intended that a widow should be compelled to keep one-fourth of the estate tied up indefinitely on the chance that at anytime within 12 years the eldest son may demand his one-fourth share. Such a restriction would materially affect the widow's management of the estate. If such a course were admissible the eldest son might conceivably wait till three-fourths of the estate has, through misfortune, been lost and then claim the whole of the remaining one-fourth to the entire exclusion of his brothers and sisters although they may have counted for years on coming in when their mother dies and sharing equally with the eldest son.

We think that the right given to the eldest son (Manu Kye, Book X, section 5) of claiming a one-fourth share of the joint estate on his father's death must be exercised as soon as possible after that event and that if the option is not exercised without unreasonable delay, it lapses altogether.

The appeal is allowed. The decree of the lower Court is set aside and the suit dismiss-

ed with costs in both Courts. The appellants will have their costs of the commission issued in the suit.

Appeal allowed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 933 OF 1914.

August 3, 1915.

Present:—Mr. Justice Ayling and

Mr. Justice Tyabji.

BOMMAREDDI POLIREDDI—DEFENDANT

No. 1—APPELLANT

versus

BOMMAREDDI BAPIREDDI AND OTHERS—

PLAINTIFFS—RESPONDENTS.

Evidence Act (I of 1872), s. 44—Compromise decree—Defence that consent to it was obtained by misrepresentation and fraud, it can be set up—Suit to set aside compromise, necessity of.

Under section 44 of the Evidence Act a party to a compromise decree can show that his consent to it was obtained by misrepresentation and fraud without bringing a suit to set it aside. [p. 640, col. 1.]

Nilmony Mookhopadhyaya v. Aimunissa Bibee, 12 C. 156; *Rajib Panda v. Lakhan Sindh Mahapatra*, 27 C. 11; 3 C. W. N. 660, followed.

Second appeal against the decree of the Court of the Additional Temporary Subordinate Judge of Guntur, in Appeal Suit No. 317 of 1912, preferred against that of the District Munsif, Tenali, in Original Suit No. 680 of 1910.

Mr. P. Nagabhushanam, for the Appellant.

Mr. R. Vembu Aiyar, for the Respondents.

This second appeal coming on for hearing on the 4th February 1915, the Court delivered the following

JUDGMENT.—From the issues framed and the whole tenor of the judgment of the District Munsif it is clear that the suit was dealt with as one based on the *kararnama*, and the point urged on behalf of appellant (1st defendant) is that the Subordinate Judge was not justified in disregarding the *kararnama* and giving a decree for plaintiffs merely on the basis of the compromise decree in Original Suit No. 298 of 1908 as he has done. It is argued that appellant has thereby been prejudiced in that he has had no fair opportunity of showing that, as alleged in paragraph 5 of his written statement, his consent to the *razinama* was obtained by misrepresentation and fraud.

MAUNG KYI-HLAING v. MA HTU.

The Subordinate Judge has held that it is not open to appellant to attack the decree in Original Suit No. 298 of 1908 on these grounds without bringing a suit to set it aside. This is wrong, *vide* section 44 of the Indian Evidence Act, and also *Nilmony Mookhopadhy v. Ainunissa Bibee* (1) and *Rajib Panda v. Lakhan Sendh Mahapatra* (2).

We must call for findings from the Subordinate Judge on the following

Issues:—

1. Was appellant's consent to the *razinama* in Original Suit No. 298 of 1908 obtained by fraud?

2. Is the decree in that suit for that reason not binding upon appellant?

3. Is appellant by reason of his having enjoyed the benefit of that decree estopped from questioning its binding nature upon him?

Either side may adduce fresh evidence.

The finding should be submitted within two months and seven days will be allowed for filing objections.

In compliance with the order of this Court contained in the above judgment, the Additional Temporary Subordinate Judge, Guntur, submitted the finding on the 1st issue in the negative and on the 2nd in the affirmative.

This second appeal coming on for final hearing after the return of findings of the lower Appellate Court upon the issues referred by this Court for trial, the Court delivered the following

JUDGMENT.—We accept the findings and dismiss the appeal with costs.

Appeal dismissed.

(1) 12 C. 156.

(2) 27 C. 11; 3 C. W. N. 660.

LOWER BURMA CHIEF COURT.
SPECIAL SECOND CIVIL APPEAL No. 314
OF 1915.

March 22, 1915.

Present:—Sir Charles Fox, Kt., Chief Judge,
and Justice Sir Henry Hartnoll, Kt.

MAUNG KYI HLAING—PLAINTIFF—

APPELLANT

versus

MA HTU AND OTHERS—DEFENDANTS—

RESPONDENTS.

Buddhist Law—Inheritance—Orasa son—Mother not marrying again—Manu Kye Book X s. 5—Kin Wun Mingyi's Digest, s. 30—Atta Sankheppa s. 155.

Under the Burmese Buddhist Law whether the mother re-marries after the death of the father or not, the *orasa* is entitled to get one-fourth share and the mother and younger children three-fourths.

Appeal against the judgment and decree of the Divisional Judge of Hanthawaddy, dated the 27th September 1913, in Civil Appeal No. 27 of 1913, reversing the judgment of the Sub-Divisional Court of Kyauktan.

Mr. *Po Han*, for the Appellants.

Mr. *R. N. Burjorjee*, for the Respondents.

JUDGMENT.

HARTNOLL, J.—Maung Kyi Hlaing is suing for a quarter share of the estate of his parents, Maung Shwe Hla and Ma Htu. His cause of action is given him by the death of his father. He sues his mother and his sisters. It is not denied that he is the '*orasa*' son, but it is claimed that as his mother, Ma Htu, has not married again he cannot obtain any share of the estate. The Divisional Judge has acceded to such a claim and dismissed the suit. His judgment is largely based on the texts given in sections 36 and 37 of the *Kin Wun Mingyi's Digest*, as Maung Kyi Hlaing is living separately from his mother. The texts comprised in those sections are meagre. No text from the *Manugye* is amongst them. They deal with the case of a child who has been given property prior to the death of the father. In my opinion the general rule is that given in the texts collected under section 30 of the same Digest. Such texts are generally in accordance with the rule given in the fifth section of the 10th Book of the *Manugye*. This section is said to state the law even when the mother does not marry again. The eldest son is to get one share and the mother and younger daughters three shares. The case of *Seik Kaung v. Po Nyein* (1) is distinguishable from this one. Here an eldest son is claiming from his mother and sisters. In the case of *San Dwa v. Ma Min Tha* (2) it is not clear whether the mother had married again or not.

On the authority of the fifth section of the 10th Book of the *Manugye*, the texts collected in section 30 of the *Kin Wun Mingyi's Digest* and also section 155 of the *Atta Sankheppa Dhammathat*, I am of opinion that Maung Kyi Hlaing is entitled to the fourth share he is claiming. I accordingly reverse the decree of the Divisional Court and restore that of the Sub-Divisional Court.

Appellant will get his costs in all Courts.
Fox, C. J.—I concur.

Decree reversed.

(1) 1 L. B. R. 23.

(2) 2 Chan. Toon. 207.

TIKARAM v. EMPEROR.

BOMBAY HIGH COURT.
CRIMINAL REVISION APPLICATION No. 126
OF 1915.

June 24, 1915.

Present:—Mr. Justice Batchelor and
Mr. Justice Hayward.

TIKARAM SAKHARAM KASAR —
ACCUSED—APPELLANT

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898, s. 403—
Accused acquitted of offences under ss. 366, 368, 376,
Penal Code—Re-trial on husband's complaint under
s. 498, Penal Code—Previous acquittal, whether bar
to subsequent trial.

The accused was tried under sections 366, 368, 376, Indian Penal Code, and was acquitted. On complaint of the husband of the woman the accused was re-tried and convicted on the same facts under section 498, Indian Penal Code:

Held, that, as the earlier Court was incompetent to try the accused under section 498 in the absence of a complaint by the husband, the later trial of him under that section upon such complaint did not violate the provisions of section 403, Criminal Procedure Code.

Criminal application for revision from an order passed by the Sessions Judge of Khandesh, confirming conviction and sentence recorded by the first Class Magistrate, East Khandesh.

Mr. D. C. Virkar, for the Accused.

Messrs. P. B. Shingne and P. V. Kane, for the Complainant.

Mr. S. S. Patkar (Government Pleader), for the Crown.

JUDGMENT.—This is an application in revision made against a conviction under section 498 of the Indian Penal Code. The only point taken on behalf of the applicant is that the conviction is bad under section 403 of the Criminal Procedure Code by reason of the fact that at the preceding trial before the Court of Session the applicant was acquitted in respect of certain offences said to have arisen out of the same transaction.

The trial before the Court of Session proceeded under sections 366, 368 and 376 of the Indian Penal Code, and there was not before the Court of Session any complaint by the husband of the woman. Under section 199 of the Criminal Procedure Code such complaint by the husband is a condition precedent to the Court's jurisdiction to try under section 498: see *Bangaru Asari v. Emperor* (1). There being no such

(1) 27 M. 61; 2 Weir 236.

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complaint by the husband before the Court of Session, that Court not only did not in fact try, but was in law incompetent to try the offence alleged under section 498. Since then the earlier Court was incompetent to try the accused under section 498, the later trial of him under that section upon the husband's complaint does not violate the provisions of section 403 of the Criminal Procedure Code.

Thus the point taken by the applicant fails and the Rule must be discharged.

Rule discharged.

PUNJAB CHIEF COURT.

CRIMINAL REVISION PETITION No. 283 OF 1914.
April 3, 1915.

Present:—Mr. Justice Shah Din.

RAM CHAND—COMPLAINANT—PETITIONER
versus

JAI DIAL—ACCUSED—RESPONDENT.

Penal Code (Act XLV of 1860), s. 415—Cheating—
Deception by conduct.

To constitute the offence of cheating it is not necessary that the deception should be by express words but it may be by conduct or implied in the nature of the transaction itself. [p. 643, col. 1]

Where an accused, after his application under Order XXI, rule 83, Civil Procedure Code, had been rejected by the executing Court, induced the complainant to advance him money on the security of his house under auction, representing that he was empowered to effect the mortgage in order to pay off the decree-holder, and paid the decree-holder out of the money which he had got from the complainant but afterwards intentionally neglected to obey the directions of the executing Court and took no steps to prevent the sale being confirmed, but on the other hand received the sale-proceeds from the executing Court, saying that he had paid the decree-holder from his own pocket and after receiving the money from the Court paid nothing to the complainant mortgagee:

Held, that the facts constituted the offence of cheating as the intention of a party to a transaction must be inferred from his conduct. [p. 642, col. 2; p. 643, col. 1.]

Petition, under section 439, Criminal Procedure Code, for revision of the order of the Magistrate, first Class, Lahore, dated the 19th May 1913, acquitting the accused.

Lala Hukam Chand, for the Petitioner.

Bakhshi Tek Chand, for the Respondent.

JUDGMENT.—There has been a miscarriage of justice in this case and the respondent, Jai Dial, has been acquitted by the Magistrate on erroneous grounds. The facts of the case are fully given in the order of the Magistrate, dated the 19th May 1913

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which is under revision, and partly also in my order, dated the 12th March 1912, [*Ram Chand v. Jai Dial* (1)] by which I set aside the Magistrate's order of discharge, dated the 29th June 1911, and sent the case back for further inquiry.

In his order of acquittal the Magistrate has noted four circumstances which, according to him, appeared in the evidence against the respondent; and after discussing those circumstances, he has come to the conclusion that they do not establish the offence of cheating with which the respondent has been charged. I cannot agree in the Magistrate's conclusion. The circumstances referred to by the Magistrate are these:—

1. That the accused in spite of the fact that his application, dated the 8th March 1910, under Order XXI, rule 83, Civil Procedure Code, praying for permission to raise the amount of the decree by a private transfer of his house had been rejected, induced *Musammam Radhi* to advance Rs. 1,000 to him on the mortgage of the house, on the representation that he was empowered to effect the mortgage in order to pay off the decretal amount due to the decree-holder.

2. That the accused was amiss in taking steps to prevent the confirmation of the sale of his house.

3. That the accused promised to deposit the commission fee within the prescribed limit of time but failed to do so.

4. That the accused received the sale-proceeds of his house from the executing Court and did not compensate the complainant.

In connection with the *first* point, the Magistrate thinks that there was only a concealment of a fact on the part of the respondent, and that such concealment did not amount to cheating. As regards the *second* point, the Magistrate says that the absence of the accused on the date fixed for the hearing of the case was unfortunate, and that it was the delay of one day which spoiled the whole thing. In considering the four points mentioned above the Magistrate has overlooked the following facts. The executing Court in its order of the 25th February 1910, which was passed on the application made by the respondent under

Order XXI, rule 89, Civil Procedure Code, had directed that the respondent should pay into Court two sums of Rs. 747-8-0 and Rs. 81-4-0 and had noted that thereafter the question as to the cancellation of the sale would be decided. The case was fixed for the 21st March 1910. The mortgage in question was executed by the respondent in favour of *Musammam Radhi* on the 21st March but it was not registered on that date; and so the respondent and the decree-holder appeared in Court on the 21st March and stated that the deed would be registered on the following day. The Court accordingly fixed the case for the 22nd March. The deed was registered on the 22nd March; on that day the respondent received Rs. 233 in cash from the mortgagee before the Sub-Registrar and Rs. 747 were received by the decree-holder from the mortgagee, the understanding being that the decree-holder would acknowledge the receipt of the amount due to him in Court and that the respondent would deposit in Court Rs. 81-4-0 as directed by the order of the 25th February 1910. After the registration of the deed, however, the respondent did not put in an appearance in the executing Court; the Court noted his absence, the auction-purchaser being present on the occasion, and fixed the case for the 23rd March. On the 23rd March also the respondent was absent, but the decree-holder appeared and filed a receipt for Rs. 747 which was due to him on his decree. On the auction-purchaser insisting that the auction-sale should be confirmed, because the proper amount had not been deposited within the time prescribed by law in accordance with the order of the 25th February, the Court confirmed the sale. It seems clear from these facts that the respondent had not the intention, on the dates when the deed was executed and registered, to deposit in Court the sum of Rs. 81-4-0 which he had been directed to deposit by order dated the 25th February. The intention of a party to a transaction must be inferred from his conduct, and the only reasonable conclusion which can be drawn from the circumstances established in this case is that not only had the respondent represented to the mortgagee that he had power to mortgage the house to her, but that he would carry

(1) 15 Ind. Cas. 88; 114 P. L. R. 1912; 13 Cr. L. J. 456; 10 P. W. R. 1912 Cr.

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out the order of that Court passed on his application of the 25th February as to the deposit of the money and would thus secure the cancellation of the auction sale. That this representation was untrue appears to be clear from the subsequent conduct of the respondent. He not only did not appear in Court on the 22nd March, but he was absent on the 23rd March also, and he took no steps to have the sum of Rs. 81-4 deposited in the Court in compliance with the order of the 25th February. The sale being confirmed on the 23rd March, the mortgage of the house in favour of Musammât Radhi was obviously ineffectual, and no rights of any kind in the house passed to her. Subsequently, on the 17th August 1910, the respondent applied to the executing Court for payment to him of the sale-proceeds of the house and the money, Rs. 1,560, was paid to him accordingly. In the said application he stated that he had paid the decree-holder out of his own pocket and made no mention whatever of his having raised the money by a mortgage of the house; and after Rs. 1,560 was paid to him he never made a proper offer to the mortgagee of the amount, principal and interest, due to her on the footing of the mortgage.

In considering the question whether the respondent is guilty of the offence of cheating or not, the Court has to take into consideration the cumulative force and effect of all these circumstances above referred to, bearing in mind the principle laid down in *Khoda Bux v. Bakeya Mundari* (2) that to constitute the offence of cheating it is not necessary that the deception should be by express words, but that it may be by conduct or implied in the nature of the transaction itself. It seems to me that the Magistrate has not fully considered the facts established in this case in the light of the above principle; and I accordingly set aside the order of discharge and send the case back with a direction that the respondent be re-tried.

Revision allowed.

(2) 32 C. 941; 9 C. W. N. 1006; 2 Cr. L. J. 764.

CALCUTTA HIGH COURT.

CRIMINAL REFERENCE NO. 2 OF 1914.

November 25, 1914

Present:—Mr. Justice Fletcher and

Mr. Justice Beachcroft.

THE CORPORATION OF CALCUTTA

—COMPLAINANT

versus

PROMOTHO NATH MULLICK—

OPPOSITE PARTY.

Calcutta Municipal Act (III of 1899 B. C.), ss. 589, 341, 102, 63 (3).—Notices issued on behalf of General Committee, whether to be signed and if so, by whom—Special rule of evidence contained in s. 589, applicability of—Proceedings of Committee how to be proved when not signed by Chairman—Irregularity—Evidence Act (I of 1872), s. 78.

There being no express provision in the Calcutta Municipal Act requiring that notices issued under the Act on behalf of the General Committee should be signed at all, section 589 of the Act does not stand in the way of the Secretary to the Corporation, who is also the Secretary to the General Committee, signing such notices. But unless a notice purports to have been signed by the Chairman of the Corporation, the special rule of evidence contained in the section would not apply. That is to say, if a notice purports to have been signed by the Chairman, it would not have to be proved that a meeting was held or that it was regularly held. Where, however, the special rule contained in section 589 cannot apply, proceedings of the General Committee can be proved under the general law of evidence. [p. 644, col. 1; p. 645, col. 1.]

But printed proceedings themselves would not be sufficient legal proof unless they answer the description of a printed book purported to be published by the authority of the Committee as required by section 78 of the Evidence Act. [p. 644, col. 2; p. 645, col. 1.]

The mere fact that the Secretary has signed a notice instead of the Chairman does not affect the merits, inasmuch as it is a defect or irregularity which is cured by section 102 of the Municipal Act. [p. 645, cols. 1 & 2.]

Babus Mohendra Nath Ray and Baranasi-bassi Mukherjee, for the Complainant.

Babus Mammotho Nath Mukherjee and Satindru Nath Mukherjee, for the Opposite Party.

JUDGMENT.

FLETCHER, J.—This case comes before us on a reference made by the Municipal Magistrate of Calcutta in his capacity as a Presidency Magistrate under section 432 of the Code of Criminal Procedure. Certain proceedings had been taken against Promotho Nath Mullick, the opposite party in this case, under section 450 (3) of the Calcutta Municipal Act, III (B. C.) of 1899, for his failure to comply with a notice served

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under the Act, the offence being under section 341 (1) for not having removed or altered a fixture within the period prescribed by the notice served under the Act.

The points which have been referred to us are as follows:—

(1). Whether section 589 of the Act stands in the way of the Secretary to the Corporation, who is also Secretary to the General Committee, signing a notice under section 341 of the Act. Section 589 obviously does not. Section 589 is a special rule of evidence applying to all proceedings under the Act and when the notice is signed as mentioned in section 589, it proves the regularity of all proceedings taken under the Act. There is nothing in the section which limits the general law of evidence as applicable to proceedings under the Act. So far as the Secretary is concerned, there seems to be no reason why he should not sign the notice on behalf of the General Committee. The Secretary under the terms of the Act is not only the Secretary to the Corporation but he is also by the terms of section 63 (3) appointed Secretary to the General Committee. It could never be in the contemplation of the Legislature that every notice going under the Act should be signed by all the members of the General Committee and that any notice which did not contain the signatures of the members of the General Committee should be invalid. As a matter of fact, there is no express provision in the Act requiring signature to these notices at all, and it seems not unreasonable that the Municipal Officer who holds the office of the Secretary to the Corporation and the General Committee should sign, as part of his ordinary duty, the notices that are issued on behalf of the General Committee, the only difference being that the special rule of evidence contained in section 589 does not apply when the notice does not purport to have been signed by the Chairman. But subject to that, of course, there is no reason why the notices should not be signed by the Secretary. In my opinion, we ought to answer the first question by stating that section 589 does not stand in the way of the Secretary signing a notice under section 341 of the Act.

The *second* question is—whether Exhibit I, which is a copy of the printed proceedings of the General Committee's meeting and which contains their sanction under section 341 in this case, is sufficient legal proof of the sanction. That, again, depends on section 589. If the notice had been signed by the Chairman, it would not have to be proved that there had been a meeting or that it had been regularly held. But that does not prevent the general law of evidence from being applicable and those proceedings can be proved either by the production of a copy of proceedings certified by the legal keeper or by a printed book purporting to be published under the authority of the General Committee. In what manner the Corporation should think fit to prove the meeting and the passing of the resolution is not for us to determine at present. The copy, if produced, must be certified by the legal keeper. Presumably, Mr. Wyness is not the legal keeper. But, apparently, the keeper of the proceedings of the General Committee would be the Secretary who is appointed by the Act to be the Secretary to the General Committee. I think, therefore, that the printed proceedings themselves would not be sufficient legal proof unless they answer the description given in section 78 of the Evidence Act, namely, being a printed book purporting to be published by the authority of such body.

The *third* question is—whether the order of the Chairman delegating to the Secretary to the Corporation of Calcutta and Secretary to the General Committee of the Corporation of Calcutta the powers to sign all written documents referred to and described in section 589 of the Act is legal. That question does not arise. But I may mention in passing, in order that the Corporation may have the benefit of the special rule of evidence under section 589 and to avoid further difficulties, that the notices issued should bear the signature or a fac simile of the signature of the Chairman, because whether the signature by the Secretary, the Secretary purporting to sign under the general power of delegation, would make applicable the special rule of evidence laid down by section 589, I am not at present prepared to say. All we need say is that

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this third question does not arise in this reference.

The *next* question is—whether in the event of Exhibit I and notice under section 341 being held illegal, these irregularities are cured by section 102 of the Act. Section 102 is in these terms: "No proceeding taken under this Act shall be questioned on the ground merely of any defect or irregularity not affecting the merits of the case." If these are the only defects or irregularities, nobody could say that the mere fact that the Secretary has signed the notice instead of the Chairman in any way affects the merits. The second sub-section may be of importance, if the case proceeds, namely, as to the proof that the meeting of the General Committee was duly convened and the resolution was free from all defects or irregularities.

These are all the questions pleaded before us by the Municipal Magistrate and there seems to be very little substance in them and we answer the reference in the above way.

BEACHCROFT, J.—The answer to the *first* question propounded by the learned Magistrate is obviously in the negative. Section 589 merely provides a method of proof of consent, etc., of the Corporation, General Committee, Chairman or Municipal Officers where the consent of those bodies or individuals is required under the Act. It has nothing whatever to do with the signing of notices though doubtless if a notice purports to set forth the consent referred to in the section, signature of the notice by the Chairman would be sufficient evidence of the consent of the Corporation, General Committee or Chairman. There is no provision in the Act for the signing of the notices nor are the duties of the Secretary defined, and there seems to be no reason why the signing of notices, if they require signature at all, should not be included in the ordinary duties of the Secretary.

The *second* question is—"whether the printed proceedings of the General Committee's meeting, which, *inter alia*, contains their sanction under section 341, is sufficient legal proof of the sanction under section 589 of the Act." The answer to this is also obviously in the negative, for Mr. Wyness, who signed it, is not the

Chairman. It was suggested that section 78 (5) of the Evidence Act would make the copy of the proceedings sufficient proof. But the copy produced does not appear to have been certified by the legal keeper, nor is it contained in a printed book purporting to be published by the authority of the Corporation.

I express no opinion on the *third* question which does not appear to arise properly on the facts stated.

The *fourth* question is—"whether in the event of the Hon'ble Judges holding that Exhibit I, the printed proceeding of the General Committee purporting to be signed by Mr. Wyness is not legal proof of the sanction of the General Committee under the provisions of section 589, or that the notice under section 341 should have been signed by the Chairman, and not by the Secretary, is either of these irregularities cured by the provisions of section 102 of Act III (B. C.) of 1899?" In view of the answer previously given that the Secretary is competent to sign notices, this question in so far as signature by him is assumed to be an irregularity requires no answer, though the section doubtless would cure an irregularity of such a nature.

But I am at a loss to understand how the learned Magistrate treats the state of things contemplated in the first part of the question as an irregularity. I imagine the Magistrate must have been in some doubt as to whether Mr. Wyness could legally sign the proceedings. If he was the President of the next ensuing meeting, it was obviously his duty to sign the proceedings under section 97. But that is not the question put by the learned Magistrate. His question is in effect this: "assuming that a certain document is not legal proof of a certain fact, does section 102 (which is merely a validating section), make it proof of that fact," in other words, "does section 102 amend the law of evidence?" When the question is presented in this form, the answer is so obviously in the negative that discussion becomes unnecessary.

Reference answered.

SURAT SINGH v. AHMAD BEG.

PUNJAB CHIEF COURT.

CRIMINAL REVISION PETITION No. 1038 OF 1914.

January 16, 1915.

Present:—Mr. Justice Scott-Smith.

SURAT SINGH AND OTHERS—ACCUSED—
PETITIONERS

versus

AHMAD BEG AND ANOTHER—COMPLAINANTS—
RESPONDENTS.

Compromise—Discharge—Revival of case—Case really one of civil nature—Criminal proceedings initiated—Abuse of process of Criminal Courts—Criminal Procedure Code (Act V of 1898), s. 435.

Once a criminal case is compromised and the accused are discharged in accordance with the compromise, the complainant is not entitled to have the case revived on the ground that some of the accused have gone back upon the compromise. [p. 646, col. 2.]

Where the complainant in a case declines to produce any evidence and the Court discharges the accused, the order of discharge is neither perverse nor foolish, and, therefore, is not liable to be set aside. [p. 647, col. 2.]

To initiate criminal proceedings in a case which is really one of a civil nature, with the object of keeping those proceedings hanging till the civil dispute is settled to the satisfaction of the complainant is an abuse of the Criminal Courts. [p. 647, col. 1.]

Petition, under sections 439 and 526, Criminal Procedure Code, for revision of the order of the District Magistrate, Gurgaon, dated the 24th January 1914, ordering fresh warrant to be issued against all the petitioners.

Lala Balwant Rai, for the Petitioners.

Mr. Badr-ud-Din Kureshi, for the Respondents.

JUDGMENT.—This is an application for revision of the order of the District Magistrate of Gurgaon setting aside his own order of discharge in a criminal case and ordering fresh proceedings against all the accused persons. The case is one between Hindus and Muhammadans of Bahura Kalan in the Tahsil and District of Gurgaon.

The complainants are Muhammadans and the accused petitioners are Hindus. The complaint is briefly to the effect that the accused had demolished a *kacha* mosque with a *chkappar* appertaining thereto belonging to the Muhammadans under sections 436/295, Indian Penal Code.

The complaint was lodged on the 10th May 1913, and the occurrence is said to have taken place on the 6th April preceding.

After an inquiry by the Police and a summary inquiry by a Magistrate the latter dismissed the complaint under section 203, Criminal Procedure Code, on the 2nd August 1913. The Sessions Judge in revision set aside the order of dismissal and directed a further inquiry into the truth of the complaint. The case then came before the District Magistrate who, on the 18th December 1913, recorded the following order: "Complainants do not wish to produce any evidence, and as I understand they have come to an amicable settlement, I dismiss the case and discharge all the accused." On the 14th January 1914 the complainants applied to the District Magistrate that his order of the 18th December should be set aside on the ground that no settlement had actually been arrived at. Upon this the same District Magistrate passed the order now complained of, remarking that the case had not been settled as he had been assured by the Pleaders of the parties that it had. From a copy of another order produced by Mr. Kureshi on behalf of the Muhammadans it appears that a *razinama* was actually written out, but that subsequent to the order of discharge some of the accused refused to sign it. Since the present application was put in to this Court, it appears from papers submitted by the District Magistrate that further negotiations for settlement of the dispute have been going on. The Hindus have consented that a *kacha* mosque and *chkappar* may be built so long as the Muhammadans do not practise cow-killing.

Under all the circumstances of the present case, I think that the order of discharge of the 18th December 1913 should not have been set aside and that there should have been no further inquiry into the original complaint, which was instituted twenty months ago. It appears quite clear that the parties did come to a compromise and in accordance therewith the complainants said that they did not wish to produce any evidence. In accordance therewith the accused petitioners were discharged. It appears that subsequently some of the accused refused to ratify the compromise, but this does not, in my opinion, give the complainants any right to have the criminal proceedings revived. It is a general rule that an order of discharge should not be set aside unless it is manifestly perverse or foolish or is based

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upon a record of evidence which is obviously incomplete: *Emperor v. Kiru* (1). In the present case the order of discharge was not either perverse or foolish. It followed as a natural consequence from the fact that the complainants declined to produce any evidence. The case appears to me to be really one of a civil nature and the complainants do not wish at all to go on with the criminal proceedings so long as the civil dispute is settled to their satisfaction. They would like the criminal proceedings to go on if the dispute is not settled to their satisfaction. The Criminal Courts are not intended to be used in this way. The complainants have had more than one chance of proving their case in the Criminal Courts and they finally gave up the remedy when they declined to produce evidence on the 18th December 1913. A civil case is also now pending and the dispute will be settled one way or the other. On every ground it is inexpedient that there should be any further inquiry in the Criminal Court into an occurrence which took place so long ago as April 1913.

I accept the revision and set aside the order of the District Magistrate of the 24th January 1914, cancelling his previous order of discharge.

Revision accepted.

(1) 11 Ind. Cas. 132; 205 P. L. R. 1911; 10 P. R. 1911 Cr. (F.B.); 24 P. W. R. 1911 Cr.; 12 Cr. L. J. 364.

ALLAHABAD HIGH COURT.

CRIMINAL APPEAL NO. 399 OF 1915.

June 25, 1915.

Present:—Mr. Justice Tudball.

EWAZ ALI AND OTHERS—APPELLANTS

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), ss 366, 373—Minor girl voluntarily leaving her guardian—Kidnapping—Selling minor for purpose of prostitution

A *chamar* girl between the age of 13 and 14 voluntarily left the house of her husband and parents, met *E* on a public road and stayed with him for a month. Afterwards *E* made over the girl to certain other persons who bored her nose and made her appear a *Jat* girl. Subsequently the girl passed several hands until she was made over to a person to be married with his brother;

Held, that *E* was neither guilty of the offence of taking or enticing the girl out of the keeping of her lawful guardian nor of the offence of selling the minor with the intent that she might be employed or used for the purpose of prostitution. [p. 648, col. 2.]

Criminal appeal from an order of the Additional Sessions Judge of Muttra.

Mr. Lalit Mohan Banerji, for the Crown.

Mr. Kena Ram Mukerji, *Amicus Curie*, for the Accused.

JUDGMENT.—The five appellants have been convicted by the learned Sessions Judge on the following facts as found by the Court below. *Musammât Jamni* is a *Chamar* girl between the age of 13 or 14 years. She was married and she lived with her husband and his parents. For reasons best known to herself she ran away apparently more than once from her home, and on the present occasion she got clean away, and was making her way along the public road to Agra when she was met by the appellant, *Ewaz Ali*, who was a road *chaukidar*. He stopped her and at first decided to take her to the Police Station. Subsequently, however, after questioning her he agreed to take her into his house and she stayed with him for about a month. At the end of that month he made her over to the three appellants, *Hira Lal*, *Shankaria* and *Musammât Surja*. Apparently these persons were well aware of the circumstances of the girl. They bored her nose and made her, as far as possible, appear to be a *Jat* female. They then passed her off as *Musammât Surja's* niece and made her over to *Ghure Jat* on payment of Rs. 80, to be married to *Sukhdeo*. The deception was subsequently discovered, the girl was returned to these three persons and the money demanded back. Apparently it was returned. The girl was then made over to the fifth appellant, *Tota* who is related to *Musammât Surja*. *Tota* kept the girl and then finally sold her for a sum of Rs. 70, representing her to be his niece. She was sold to *Kallu* and *Samai Singh* for the purpose of being married to the brother of *Kallu*, for whom a wife was being sought. While *Kallu* and *Samai Singh* were taking the girl away to *Kallu's* village, they were stopped by the *Chaukidar* *Sohna Ram* and the

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whole matter was brought to light. Upon these facts the Court below convicted Ewaz Ali of an offence under section 366 of the Indian Penal Code and sentenced him to six months' rigorous imprisonment and a fine of Rs. 40. Hira Lal, Tota, Musammat Surja and Shankaria have been convicted of cheating and have been sentenced, Hira Lal, Tota, and Shankaria to one year's rigorous imprisonment each plus a fine, and Musammat Surja to six months' rigorous imprisonment. They have all appealed. No exception has been taken to the trial of all these persons together, at one and at the same trial. In regard to Hira Lal, Tota, Musammat Surja and Shankaria, there can be very little doubt as to their guilt, nor do the sentences imposed upon them call for interference. The case of Ewaz Ali is one of doubt. It is quite clear that when he met Musammat Jamni, the girl had got clean away out of the hands of her husband and his parents. The question is whether he can be said to have taken or enticed the girl out of the keeping of her lawful guardian. In the case of *Emperor v. Jetha Nathoo* (1), two Judges of the Bombay High Court pointed out the difference between the English Law on the subject and the Indian Law and the difference in meaning between the word "keeping" and the word "possession". One will have very little difficulty in fully agreeing with the decision in that case in view of the actual facts therein. There a girl under 16 years of age went out in search of work. She was induced by a deceitful promise of obtaining work to go to a certain house. There can be no doubt that in that case the offence of kidnapping was committed. In the present case the girl had voluntarily left the keeping of her guardian with the intention to remain out of that keeping and the accused Ewaz Ali, probably with full knowledge of the circumstances, gave her a home and finally transferred her to the keeping of Hira Lal, Shankaria and Musammat Surja on receipt of the sum of Rs. 40. It is very difficult under these circumstances to say that he either took or enticed away the minor out of the keeping of the lawful guardian. The case is very much akin to

that of *Emperor v. Ramchander* (2). In that case also a girl under 16 years of age left the guardianship of her husband and father-in-law of her own free will and not for the first time, and then subsequently stayed with the accused quite voluntarily and without any force having been exercised upon her. The Judges before whom that case came for decision held that the act did not amount to taking or enticing the girl out of the keeping of her lawful guardian. In the judgment it was remarked as follows:—"On the admitted facts the leaving and the removal out of the keeping of the lawful guardian was the act of the girl herself long before she met the accused." In view of the above remarks in that case, it seems to me that the conviction of Ewaz Ali under section 363 cannot possibly stand. The question arises whether Ewaz Ali could or could not be convicted of an offence under section 372, that is, selling a minor with intent that such minor shall be employed or used for the purpose of prostitution or for any unlawful and immoral purpose, or knowing it to be likely that such minor will be employed or used for any such purpose. No doubt Ewaz Ali was well aware of what was about to happen to the girl. She was to be made to resemble as far as possible a *Jat* female, and to be used for the purpose of cheating other persons and obtaining money. That no doubt was unlawful, but for the purposes of the section the object must also be immoral. The point is covered by the decision of the Full Bench of this Court in *Empress of India v. Sri Lal* (3). There again a low caste girl, as in the present case, was falsely represented by certain persons as being a member of a higher caste, and another member of such higher caste was induced thereby to take her in marriage and to pay money for her in the full belief that such representation was true. It was held by the Full Bench that the accused could not be convicted on these facts of offences under sections 372 and 373 of the Indian Penal Code. The decision covers the facts of the present case and I am bound to hold that Ewaz Ali committed no offence

(2) 23 Ind. Cas 473; 12 A. L. J. 265; 15 Cr. L. J. 265.

(3) 2 A. 694.

(1) 6 Bom. L. R. 785; 1 Cr. L. J. 931.

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under section 372 or 373 of the Indian Penal Code. It is clear that he did not attempt to cheat Hira Lal, Shankaria and Musmmat Surja.

Under these circumstances, I must allow the appeal of Ewaz Ali. I set aside his conviction and sentence and direct that he be forthwith released. The appeals of the other appellants are all dismissed.

BOMBAY HIGH COURT.

CRIMINAL APPEAL NO. 222 OF 1915.

July 14, 1915.

Present:—Mr. Justice Batchelor and
Mr. Justice Hayward.

SILAS MOSES—ACCUSED—APPELLANT
versus

EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), ss. 403, 24—Criminal breach of trust—Dishonest act—Evidence Act (I of 1872), s. 114—Intention—Presumption as to one's own acts.

A motor car was entrusted to the appellant under a hire-purchase agreement providing, *inter alia*, that the appellant "shall not, during the hiring, assign, underlet or part with the possession of the same in any way whatsoever." In violation of the agreement the appellant mortgaged the car for different sums to three different persons who were given, under their respective mortgages, either the right to recover possession of the car or to recover their moneys by its sale:

Held, (1) that the mortgage transactions amounted to assignments within the meaning of the hire-purchase agreement; [p. 650, col. 2; p. 651, col. 2.]

(2) that the appellant was guilty of the offence of criminal breach of trust, inasmuch as he caused wrongful gain to himself by obtaining moneys on the security of the motor car contrary to a legal agreement prohibiting him from assigning any interest in that car, and he caused wrongful loss to the owners by putting in their way difficulties in recovering the moneys due from him to them and by subjecting their car to the risks of attachment and litigation. [p. 650, cols. 1 & 2; p. 651, col. 1.]

Every one must be presumed under section 114, Evidence Act, to intend the natural and probable consequences of his acts. [p. 650, col. 2; p. 651, col. 1.]

Criminal appeal from conviction and sentence passed by the Second Presidency Magistrate, Bombay

Messrs. P. N. Godinho and B. G. Kher, for the Accused.

Mr. S. S. Patkar (Government Pleader), for the Crown.

Mr. R. D. Wadia (with him Mr. B. N. Athavale), for the Complainant.

JUDGMENT.

BATCHELOR, J.—This is an appeal from a conviction and sentence passed under section 406 of the Indian Penal Code on a charge of criminal breach of trust in respect of a motor car of the value of about Rs. 7,246.

When the appeal was admitted, my learned brother, Mr. Justice Beaman, took occasion to express certain doubts * which, upon the arguments and the materials then before the Court, occurred to him as to the propriety of this conviction, and I desire to say in deference to that expression of doubt that full weight has been given to the circumstances to which the learned Judge made allusion. But we have now had the advantage of a full argument on both sides together with a study of various exhibits and documents which were not before the Bench when this appeal was admitted. In the light cast upon the conviction by these fuller materials I am of opinion that the conviction is good and must be sustained.

The appellant was the hirer of a Charron Motor Car from the Company, and the case for the prosecution is that he dishonestly disposed of that car in violation of the terms of his legal contract with the Company, so that he was guilty of the offence of criminal breach of trust was defined in section 405 of the Indian Penal Code. Mr. Godinho, on behalf of the appellant, made some attempt to suggest that the real transaction between the appellant and the Company was an out-and-out sale and that the hire-purchase agreement, which is Exhibit A in the case, was merely extorted, or cajoled out of the

* Beaman, J.'s remarks were as follows:—In admitting this appeal I should like to say for myself that I am extremely doubtful whether the two (so-called) mortgage transactions would really constitute the criminal offence of which the accused has been found guilty. They certainly could not in any way have injured the complainant, nor do they appear to contravene the terms of the hire-purchase note. It seems to me that the learned Magistrate did not believe the third transaction which, if conclusively proved, might support the conviction and sentence. I place these observations on record, because it is unlikely that the appeal would be heard before me.

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appellant by way of being held *in terrorem* over him. After some little discussion, however, Mr. Godinho, as I understood him, was fain to concede that no such line of defence was fairly open to him, but that his client must be regarded as bound by the written contract which he accepted and executed, that is, the contract of hire-purchase embodied in Exhibit A. Now that being so, clause 5 of the contract provided that until the hirer, that is, the appellant, exercised his option to purchase in the manner prescribed and by the date prescribed, which would be the 11th October 1914, the car was to remain the absolute property of the Company, and the clause continues that "the hirer shall not, during the hiring, assign, underlet or part with the possession of the same in any way whatsoever, nor shall have any right or interest in the same other than that of the hirer under this agreement." Those, then, were the rights secured by the contract to the appellant; yet, on the 1st of April 1914 and on the 15th of November 1914 and on the 9th of March 1915, he mortgaged the car to three other persons for the respective sums of Rs. 500, Rs. 300 and Rs. 1,500. In describing all these transfers as mortgages, I am putting the case most favourably to the appellant. For it is very susceptible of argument that the last transaction of March 1915 was an out-and-out sale. This, however, there is no need to press against the appellant, and I am content to regard all the transactions as being mortgages. The argument that they cannot amount to mortgages but must be regarded as mere pledges or hypothecations seems to me inconsistent with the record, and I am satisfied that the transactions were mortgages of this motor car and that such mortgages are allowed in India as shown by the decision in the case of *Dumodar v. Atmaram* (1). Having regard to the general terms of the contract and especially to the terms of clause 5 which I have quoted, it is, I think, certain that the mortgaging of this car by the appellant was, in the language of section 405 of the Indian Penal Code, a violation of the legal contract made by the appellant in regard to the hire of this car.

The only question, therefore, which would remain is, whether such violation is shown to

have been dishonest on the part of the appellant. That term is defined in section 24 of the Indian Penal Code, which provides that "whoever does anything with the intention of causing wrongful gain to one person, or wrongful loss to another person, is said to do that thing 'dishonestly.'"

Now, in my opinion, the natural and probable consequence of the mortgaging by the appellant was wrongful gain to the appellant and wrongful loss to the Company. And since every one must be taken to intend the natural and probable consequences of his own acts, I must infer that this wrongful loss to the Company or wrongful gain to the appellant was intended by the appellant. That inference is supported by the recitals made in the mortgage-deeds and by the oral representations made to the mortgagees that the car was the absolute property of the appellant free from any incumbrance. It is impossible, in my mind, to reconcile such a representation by the appellant with any honest belief of his. Moreover, in the first of the mortgage-deeds an interest in the mortgaged car is conveyed to the mortgagee, inasmuch as he is empowered to recover his debt from the sale-proceeds of the car. In the second of the mortgage-deeds the appellant promised to deliver possession to the mortgagee if the appellant's payments should fall short. It appears to me that this conduct of the appellant convicts him of dishonesty, having regard to the plain terms of the contract which he had executed in English and which, I feel no doubt, he thoroughly understood.

These were the only points that were taken on the appellant's behalf in this argument, and for the reasons that I have stated I think they fail. Therefore, in my judgment, the appeal must be dismissed and the conviction and sentence confirmed.

With reference to Mr. Wadia's application as to the disposal of the motor car, we observe that an order has already been made by the learned Magistrate under section 517, and inasmuch as the present appeal from his judgment is dismissed, the order under section 517 will stand. That order makes provision for the disposal of the car after the period of the appeal has expired or after the disposal of the appeal. It is consequently

(1) 8 Bom. L. R. 344.

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unnecessary for us to make any fresh order under section 520 of the Code.

HAYWARD, J.—I concur. The appellant has been convicted of criminal breach of trust in respect of a motor car entrusted to him under a hire-purchase agreement. The appellant has not been able to dispute that agreement, nor the clause therein binding him not to assign, underlet or part with the possession of that motor car during the hire-purchase agreement. He has also had to admit the execution by him of two mortgages and one transaction purporting to be a sale of that motor car during the period of the hire-purchase agreement. But it has been urged on behalf of the appellant that he had no intent to cause wrongful loss to the owners and, therefore, did not act dishonestly in entering into those mortgage and sale transactions; and it has also been contended on his behalf that those transactions did not amount to assignments within the meaning of the hire-purchase agreement.

With regard to the *first* contention, whoever does anything with intent to cause wrongful gain to one person or wrongful loss to another is said to act dishonestly under section 24 of the Indian Penal Code, and it must be presumed that a person intends the natural consequences of his acts under section 114 of the Indian Evidence Act. Now there can, in my opinion, be no reasonable doubt that the appellant did, by entering into these transactions, both cause wrongful gain to himself and wrongful loss to the owners of the motor car. He caused wrongful gain to himself by obtaining moneys on the security of the motor car contrary to a legal agreement prohibiting him from assigning any interest in that car, and he caused wrongful loss to the owners by putting in their way difficulties in recovering the moneys due from him to them and by subjecting their motor car to the risks of attachment and litigation.

With regard to the *second* contention, the first mortgage contained a provision that the mortgagee should be entitled in default of payment to take possession of the car and to recover any moneys due by sale of the car. The second mortgage contained a provision entitling the mortgagee to recover possession, and the third mortgage was in the form of a sale passing absolute

ownership of the car. Now there can be no reasonable doubt, in my opinion, that these transactions did assign a valuable interest in that motor car, *viz.*, either the possession or the right to recover money by the sale of the car, and that such assignments were clearly contrary to the express agreement in the hire-purchase agreement.

That being so, it appears to me to follow that the appellant, being entrusted with the motor car, dishonestly disposed of it in violation of a legal contract which he had made touching the discharge of the trust of that car. In other words, he committed criminal breach of trust in respect of that car within the meaning of section 405 and has been rightly convicted of that offence under section 405 of the Indian Penal Code.

In my opinion, therefore, this appeal must be dismissed.

Appeal dismissed.

ALLAHABAD HIGH COURT.
CRIMINAL REVISION PETITION NO. 177 OF 1915.
August 3, 1915.

Present:—Justice Sir George Knox, Kt.
DURGA PRASAD AND ANOTHER —
APPLICANTS

versus

EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), s. 195—Persuading witnesses to make statements, if offence.

Where it appeared from the Police papers that the applicants got at one Mussamat Putia and persuaded her to make a statement to the effect that she had seen certain persons whom she mentioned by name in the act of committing dacoity on her premises and that they apparently persuaded other persons to the same effect:

Held, that this was not sufficient to convict the applicants for an offence under section 195 of the Penal Code. [p. 652, col. 1.]

Emperor v. Tabarak Zaman Khan, A. W. N. (1907) 288; 4 A. L. J. 790; 30 A. 52; 6 Cr. L. J. 396, referred to.

Petition for revision against an order of the District Magistrate of Banda.

Messrs. M. Malaviya and R. Malaviya, for the Applicants.

The Assistant Government Advocate, for the Crown.

MALLAPA MALLAPA TAVARGI v. EMPEROR.

JUDGMENT.—The District Magistrate of Banda in this case appears to have seen Police papers of some kind and then and there to have instituted a case under section 195 of the Indian Penal Code against two persons, Durga Prasad and Mohiuddin. The utmost that appears from the record is that apparently in the eyes of the Police, Durga Prasad and Mohiuddin "got at" one *Musammât* Putia, and persuaded her to make a statement to the effect that she had seen certain persons whom she mentions by name, in the act of committing dacoity on her premises, that they apparently persuaded other persons to make statements to the same effect. Assuming for the moment that this is an accurate statement of what did take place, it would not still amount to an offence under section 195 of the Indian Penal Code. There was no giving of false evidence at that time before the learned District Magistrate. There was no fabricating of false evidence as defined in section 192 of the Indian Penal Code. The order for the prosecution of these persons was evidently hastily given without due consideration as to whether there was any basis for the charge. I laid down in *Emperor v. Tabarak Zaman Khan* (1) that in cases of this kind the safer and more proper course is undoubtedly to let the informant bring his witnesses to the Court, hear them out, and then pass an order, if the case is considered to be a false one, to the effect that the informer be tried for having instituted a false case. That would have been the proper procedure. In the present case I need not go into the question whether the Magistrate who does not observe this procedure is acting without jurisdiction. I am satisfied that the learned Magistrate had before him no basis on which he could pass the order he did.

I, therefore, set aside that order in its entirety. Durga Prasad and Mohiuddin if on bail, the bail bonds will be discharged.

Order set aside.

(1) A. W. N. (1907) 288; 4 A. L. J. 790; 30 A. 52; 6 Cr. L. J. 396.

BOMBAY HIGH COURT.
CRIMINAL REVISION APPLICATION No. 98
OF 1915.

June 18, 1915.

Present:—Mr. Justice Batchelor and
Mr. Justice Hayward.

MALLAPA MALLAPA TAVARGI—
ACCUSED—APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), s. 188—Operation of section—Injunction—Disobedience—Offence.

Operation of section 188, Indian Penal Code, is limited to the promulgation by public servants of public orders relating to the safety, the health or the convenience of the public. Therefore, the disobedience of an injunction directing a guardian not to marry a minor girl in his charge cannot fall within the purview of the section. [p. 653, col. 1.]

Criminal application for revision from an order passed by the District Judge of Dharwar.

Mr. G. S. Mulgaonkar, for the Applicant
Mr. S. S. Patkar (Government Pleader),
for the Crown.

JUDGMENT.—This is an appeal against an order made by the learned District Judge of Dharwar, directing that the appellant should be prosecuted for disobedience of the District Court's order made under the Guardians and Wards Act.

It appears that a temporary injunction was issued against the present appellant directing him not to marry the two minor girls, Hanmava and Basava, but that thereafter he handed over the minors to his sister, Baslingava, and she brought about the marriage of the infants. It is stated by Mr. Mulgaonkar, on behalf of the appellant, that the temporary injunction issued against the present appellant was never carried further, but was merged in the ultimate order of the Court which vested the guardianship of the minors in one Hanmantgavda. It may be that these circumstances would throw difficulty in the way of the execution of the order under appeal. But, however that may be, it seems to us that the order is unsustainable upon another ground. The learned Judge, though he directs the prosecution, does not specify under what section of the Indian Penal Code the prosecution should be instituted. It is, however, agreed between the learned Pleaders that the only section

BATESHAR V. EMPEROR

of the Code which could be used for such a prosecution would be section 188, and it seems clear from the wording of that section that its operation is limited to the promulgation by public servants of public orders relating to the safety, the health or the convenience of the public. That, as we say, is the view which appears upon the wording of the section, and that is the interpretation which was placed upon the section by a Bench of this Court, *viz.*, Mr. Justice Aston and Mr. Justice Heaton in *Imperator v. Hanmant* (1). Following that ruling we must hold that the order made by the District Judge is invalid.

The Rule, therefore, must be made absolute and the order must be discharged.

Rule made absolute.

(1) Criminal Revision No. 157 of 1906 (unreported.)

ALLAHABAD HIGH COURT.

CRIMINAL REVISION PETITION NO. 341 OF 1915.

June 29, 1915.

Present:—Sir Henry Richards, Kt., Chief Justice, and Mr. Justice Piggott.

BATESHAR AND OTHERS—APPLICANTS

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 537—Irregularity in procedure—Sufficient cause to set aside conviction—Accumulative sentences, legality of.

A complaint was made before a Magistrate. The Magistrate without at once examining the complainant, sent for the papers of the Police investigation and summoned the accused and fixed a date asking the complainant to proceed with the case independently on that date. On the date so fixed, the accused appeared, but the complainant did not. The Magistrate discharged the accused. Subsequently on the same date the complainant appeared and explained the cause of his delay. The Magistrate again without examining the complainant fixed another date giving the complainant opportunity to examine his witnesses. On the date so fixed the complainant and his witnesses were examined and a process was issued against the accused. Subsequently the accused were convicted of the offences complained of:

Held, that there was no sufficient cause to set aside the conviction on the ground of irregularity. [p. 654, col. 1.]

Where different persons are injured, grievous hurt is caused in one case and simple hurt in others, the Magistrate is competent to pass accumulative sentences. [p. 654, col. 2.]

Criminal revision from an order of the Sessions Judge of Cawnpore.

Mr. W. Wallach, for the Applicant.

Mr. R. Malcomson (Assistant Government Advocate), for the Crown.

JUDGMENT.—This is an application in revision. The facts are briefly as follows:—A complaint was made to the Police in which the complainant complained that he and certain other persons had been beaten by the present applicants, and that one of them had suffered injuries amounting to grievous hurt. The Police do not appear to have been very anxious to initiate proceedings. The result was that the complainant came before Mr. Williamson, a Magistrate of the first Class, with what amounted to a "complaint" though no doubt it was to a certain extent also a complaint against the Police for not moving in the matter. This was on the 8th of February. The Magistrate made an order in the following terms: "Papers of the Police investigation to be produced before me on February the 16th. The complainants, if they wish to prosecute their case independently of the Police, should produce evidence on that date and also summon the accused." This order was not regular. There was no objection, of course, to the Magistrate sending for the Police papers. On the contrary it was a very correct thing for him to do, but under section 200 of the Code of Criminal Procedure he ought *at once*, and before he summoned the accused, to have examined the complainant on oath. On the 16th of February for some reason or other the complainants did not turn up. The accused were in Court and the Magistrate made an order of discharge under section 259 of the Code of Criminal Procedure. The very same day the complainants turned up and evidently explained to the learned Magistrate how it was that they were unable to be present in Court. Thereupon the Magistrate made the following order:—"The applicants appeared after the rising of the Court, having arrived by a late train. In view of the Police report and the departure of the accused it will be sufficient to allow applicants so much grace as to give them an opportunity of showing, under section 202 of the Code of Criminal Procedure, whether they can support their case by evidence. To February the 23rd for this purpose."

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This order is dated the 17th, although the corresponding vernacular order in the order sheet is dated the 16th. On the 23rd of February the complainant and four witnesses were examined and process was ordered to issue for the accused. The proceedings against them began on the 8th of March. The Magistrate again, on the 16th or 17th of February, in a lesser degree made the same mistake as he had made in the previous order. He did not *at once* examine the complainants on oath. It is contended in revision that the conduct of the Magistrate amounts to such an illegality that it vitiates the entire proceedings. It is admitted, however, that according to the rulings and practice of this Court, an order of discharge is no bar to the Court taking cognizance of the case upon a fresh complaint or a fresh Police report, notwithstanding that the complaint or Police report refers to the very same offence in respect of which the accused had previously been discharged. It follows from this that if the Court had never made the order dated the 17th of February, and that on the 23rd of February the complainant had come to the Magistrate, explained to him why it was he had been unable to attend on the 16th, and had then made an oral complaint to the Magistrate, the proceedings which led to the issue of process and the subsequent trial would all have been regular. It seems to us that the irregularity in the previous orders cannot, under the circumstances of the present case, be said to vitiate the proceedings. At the same time we wish very strongly to impress upon the learned Magistrate that the provisions of the Code as to procedure ought to be strictly complied with. Non-observance of the provisions of the Code leads to much confusion and waste of public time, not to speak of involving the parties in unnecessary expense. Under the circumstances of this case we see no sufficient ground for setting aside the conviction on the ground of the irregularity in the issuing of process to the accused.

The *second* point raised in the application is that cumulative sentences were illegal. It seems to us that there is no

force in this contention. Different persons were injured, grievous hurt was caused in one case and simple hurt in others. Therefore, it was competent for the Court to impose separate and accumulative sentences.

The only *other* matter is a question of severity of sentence. The injuries in most of the cases were simple. In one case there was a broken finger and the infliction on the head of a wound which laid bare the bone. No doubt these injuries were of a serious nature. There are, however, some circumstances connected with the case in which it is unnecessary to go in detail but we have considered these circumstances, and we think that the ends of justice will be met by making the sentences passed run concurrently. We order that the sentences of imprisonment passed on Bateshar and Mathura shall run concurrently instead of consecutively. In all other respects we dismiss the application. The applicants must surrender to their bail.

Order modified

LOWER BURMA CHIEF COURT.
CRIMINAL REVISION NO. 191A OF 1915.

July 29, 1915.

Present: Mr. Justice Parlett.

EMPEROR—PROSECUTOR

versus

NGA E MOUNG—RESPONDENT.

Lunatic—Criminal Procedure Code (Act V of 1898), ss. 471 (1), 423, 427, 439—Lunacy Act (IV of 1912), s. 24—(Act X of 191)—Court's power to direct reception of criminal lunatic into asylum—Warrant of arrest—Order, if prejudicial.

Under Lunacy Act IV of 1912 and Act X of 1914 the Magistrates or Courts are no longer required to report cases under section 471 (1), Criminal Procedure Code, for the order of the Local Government but are themselves competent to direct the reception of a criminal lunatic into any asylum which is prescribed for the reception of criminal lunatics. [p. 655, col. 2.]

A warrant of arrest is not an order to the prejudice of the accused within the meaning of section 439 (2), Criminal Procedure Code and can, therefore, be issued without previous notice to him. [p. 655, col. 2.]

An order under section 471 (1), Criminal Procedure Code, is clearly an order which the acquitting Court, whether Original or Appellate, not only has power to make but is bound to make under section 423 (d). [p. 656, col. 1.]

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Mehi Singh v. Mangal Khanda, 12 Ind. Cas. 297; 39 C. 157; 14 C. L. J. 437; 16 C. W. N. 10; 12 Cr. L. J. 529, referred to and followed.

Review of the order of the first Additional Magistrate of Einme, dated the 22nd April 1915, passed in Criminal Trial No. 68 of 1915.

JUDGMENT.—Nga E MOUNG was sent for trial before the Additional Magistrate of Einme under section 452, Indian Penal Code. A charge was formed against him under that section and a defence of insanity was set up, which the Magistrate held proved. He acquitted the accused and released him, completely ignoring the imperative provisions of section 471 (1) of the Criminal Procedure Code. Nga E MOUNG has been called upon in revision to show cause why the provisions should not now be given effect to, and has shown cause through an Advocate.

The allegation made against Nga E MOUNG was that at about 7 A.M. on 21st March he entered the house of Mg. Po Thaik while the latter was dressing and approached him and stabbed him on the left forearm with a clasp knife. Nga E MOUNG stabbed him again, but Mg. Po Thaik caught his hand in which the knife was and sustained only a slight wound on the chest. He held Nga E MOUNG till other persons came and disarmed him.

The case was carelessly tried by the Magistrate in several respects. Thus Mg. Po Thaik's evidence might be read as implying that he avoided entirely the blow aimed at his arm, and that it did not take effect at all; one of the witnesses, Mg. Kala, who came on the scene at once also refers to Po Thaik as showing people his wound; the Sub-Assistant Surgeon was allowed to leave the witness-box after deposing to the nature of only one wound on Mg. Po Thaik, that on his chest; he was, however, re-called, and made it plain that he had also a wound on the forearm, though all he said as to its nature was that it was not the result of great force. That, however, and his evidence make it perfectly clear that Po Thaik had two wounds, one in the arm and one on the chest.

The Magistrate appears to have found that had Nga E MOUNG been sane he would have been guilty of an offence under

section 452, Indian Penal Code, but it is not clear whether he held that he committed any act besides entering Po Thaik's house armed with a clasp knife. He has expressly found that Nga E MOUNG did not inflict the wound on Po Thaik's chest, but throughout his rambling memorandum on the charge and his judgment I nowhere find any decision as to whether the accused inflicted the wound on Po Thaik's forearm. On the evidence the finding should have been that he did.

Cause is shown by Nga E MOUNG's Advocate on three grounds:—*First*, that it is unnecessary to report the case for the orders of the Local Government, as it is open to the Local Government to act without any such report. As to this point it overlooked the change in the law effected by Act IV of 1912 and Act X of 1914. Magistrates and Courts are no longer required to report cases under section 471, Criminal Procedure Code, for the orders of the Local Government, but are themselves competent under section 24 of Act IV of 1912 to direct the reception of a criminal lunatic into any asylum which is prescribed for the reception of criminal lunatics. The case will, therefore, not be reported for the orders of the Local Government.

The *next* ground is that a warrant for Nga E MOUNG's arrest under section 427, Criminal Procedure Code, should not have been issued without previous notice to him under section 439 (2). In my opinion a warrant of arrest is not an order to the prejudice of the accused within the meaning of section 439 (2). To hold that, it would, I consider, render useless the conferment on the High Court as a Court of Revision the powers of an Appellate Court under section 427, Criminal Procedure Code.

The *third* ground is that an order under section 471 (1), Criminal Procedure Code, is not an amendment or consequential or incidental order within the meaning of section 423 (d), Criminal Procedure Code. The case of *Mehi Singh v. Mangal Khanda* (1) was relied on. That appears to me an authority against the contention put for-

(1) 12 Ind. Cas. 297; 39 C. 157; 14 C. L. J. 437; 16 C. W. N. 10; 12 Cr. L. J. 529.

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ward. It was there held that an order is not "consequential or incidental to an order of discharge or acquittal unless the discharging or acquitting Court has, *aliunde*, power to make it." An order under section 471 (1) is clearly an order which the acquitting Court, whether Original or Appellate, not only has power to make, but is bound to make. It falls in fact in the class of orders which the Calcutta case quoted regards as indubitably coming under section 423(d), namely, "Order which follows as a matter of course, being the necessary complement to the main order passed, without which the latter would be incomplete or ineffective."

The provisions of section 471 (1) are plain and imperative and I feel no doubt that if a Subordinate Court disregards them, this Court has power to remedy the power in revision. In this case I consider this will best be done by recording the finding which the Magistrate should have recorded under section 470 and passing the order which he should have passed under section 471 (1).

The finding is that at 7 A.M. on 21st March 1915 Nga E Moung, son of Mg. Tun U, of Einme entered the house of Mg. Po Thaik of Einme carrying a clasp knife, wherewith he stabbed Mg. Po Thaik in the left forearm. But for Nga E Moung having been found to be, at the time by reason of unsoundness of mind, incapable of knowing the nature of the acts committed or that they were wrong or contrary to law, they would have constituted an offence.

Under section 471 (1), Criminal Procedure Code, read with section 24 of Act IV of 1912, Nga E Moung will be committed to the Rangoon Lunatic Asylum under a warrant in Criminal Form 121A.

Order accordingly.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 183 of 1915.

CRIMINAL REVISION PETITION No. 147
of 1915.

September 2, 1915.

Present:—Mr. Justice Ayling.

In re UPPALA KOTAYYA NAGARAM—

ACCUSED—PETITIONER.

Penal Code (Act XLV of 1860), s. 224, appeal from conviction for offence under—Appellant pleading illegality of confinement in stocks owing to his respectability—Appellate Court, duty of.

Where in an appeal from a conviction for an offence under section 224 of the Penal Code, the appellant pleads illegality of the confinement in stocks on account of his respectability, the Appellate Magistrate should deal with that point before disposing of the appeal.

Petition, under sections 438 and 439 of the Code of Criminal Procedure, praying the High Court to revise the judgment of the Court of the Sub-Divisional Magistrate of Tenali, in Criminal Appeal No. 72 of 1914, preferred against that of the Court of the Taluq 2nd Class Magistrate of Repalli, in Calendar Case No. 4 of 1914.

Mr. V. S. Narasimhachariar, for the Petitioner.

The Public Prosecutor, for the Government.

ORDER.—The Sub-Divisional Magistrate remarks that accused was "not a *pariah*, but a *govandla ryot* owning some lands to whom imprisonment in stocks is a great disgrace;" and on this account has reduced the sentence. He does not appear, however, to have considered whether in view of these circumstances accused was liable to the punishment of confinement in the stocks. If on this ground the sentence of confinement in the stocks was illegal, accused cannot be convicted of an offence under section 224, Indian Penal Code, in escaping from it.

The order of the Sub-Divisional Magistrate is set aside: and he is directed to restore the appeal to file and dispose of it according to law in the light of the above remarks and of the decision in *Queen v. Nabi Saheb* (1).

Petition allowed.

(1) 6 M. 247; 1 Weir 927.

LIQUIDATORS OF THE MARWAR BANK, LTD. v. KANSHI NATH.

RISAL SINGH v. BALWANT SINGH.

PUNJAB CHIEF COURT.

CIVIL REVISION APPLICATION No. 12 OF 1914.

May 10, 1915.

Present:—Mr. Justice Shadi Lal.THE LIQUIDATORS OF THE MARWAR
BANK, LTD.—PETITIONERS*versus*

KANSHI NATH, MINOR, THROUGH

AMAR NATH AND OTHERS—RESPONDENTS.

Companies Act (VII of 1913), s. 215—Winding-up—Proceedings in Courts against Company in liquidation, when may be stayed.

The passing of resolutions for a voluntary winding-up does not, like an order for winding up by or under the supervision of the Court, stay any proceedings or invalidate executions or distresses, or prevent actions or other proceedings being brought or continued against the Company without the leave of the Court. However, on an application being made the Court has jurisdiction to stay any action, proceeding, attachment, distress or execution against the Company, or its estate or effects upon such terms as it thinks fit. Until a stay is granted a creditor may commence or continue any action or proceedings or put in force any attachment, distress, execution or analogous proceeding and, therefore, a Liquidator may obtain a supervision order to protect him against actions which are threatened and so save the expense of applying for the stay or restraint of proceedings against the Company.

Application under section 215, Indian Companies Act, VII of 1913.

Mehta Bahadur Chaud, for the Petitioners.

Rai Bahadur Pandit Sheo Narain, for the Respondents.

JUDGMENT.—This application under section 215 of the Indian Companies Act, VII of 1913, must fail on the short ground that as recently decided by a Division Bench in Civil Miscellaneous Appeal No. 2318 of 1914, the Court has no jurisdiction to recover by a summary process the money which the creditor of the Bank had realized by a regular suit. The judgment in the above case is directly applicable and I am bound to follow it.

Further, the applicants have not established their contention that the mere passing of the resolution for voluntary winding-up invalidates proceedings in execution against the Company. The law on the subject is correctly stated in Halsbury's Laws of England, Volume 5, page 583, in the following terms:—

"The passing of resolutions for voluntary winding up does not, like an order for winding up by or under supervision of the Court, stay any proceedings, or invalidate executions

or distresses, or prevent actions or other proceedings being brought or continued against the Company without the leave of the Court. On application, however, the Court has jurisdiction to stay any action, proceeding, attachment, distress or execution against the Company, or its estate or effects, upon such terms as it thinks fit. Until the stay is granted, a creditor may commence or continue any action or proceeding, or put in force any attachment, distress, execution or analogous proceeding; and, therefore, a Liquidator may obtain a supervision order to protect him against actions which are threatened, and so save the expense of applying for the stay or restraint of proceedings against the Company."

For the aforesaid reasons I dismiss this application, but leave the parties to bear their own costs in the Court.

Appeal dismissed.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL No. 144 OF 1914.

March 29, 1915.

Present:—Sir Henry Richards, Kt., Chief Justice, and Justice Sir P. C. Banerjee, Kt., and Mr. Justice Chamier.RISAL SINGH AND ANOTHER—PLAINTIFFS—
APPELLANTS*versus*

BALWANT SINGH AND OTHERS—

DEFENDANTS—RESPONDENTS.

Res judicata—Hindu widow, suit by, to set aside adoption—Suit dismissed on ground of estoppel—No oral evidence taken—Privy Council deciding on merits—Second suit by reversioner, if barred—Civil Procedure Code (Act V of 1908), s. 11.

A Hindu widow sued her alleged adopted son for a declaration that she had not adopted him and even if she had adopted, the adoption was invalid, as she had no authority from her husband. The Court of first instance dismissed the suit finding that the defendant had been adopted and the widow was estopped from questioning the validity of the adoption without trying other issues or recording oral evidence in regard to them. The High Court affirmed the decision. The Privy Council agreed with the High Court as to the factum of adoption but found on a consideration of the documentary evidence that the authority to adopt had been proved. After the widow's death a reversioner sued the defendant for possession on the same grounds as the widow had sued:

Held, per Banerji and Chamier, JJ., (Richards, C. J., dissenting) that the previous suit was a bar to the

RISAL SINGH v. BALWANT SINGH.

present suit inasmuch as a decree fairly and properly obtained against a widow in possession of her deceased husband's estate is, in the absence of fraud and collusion, binding on the reversionary heirs unless the decree relates to a matter personal to her. [p. 661, col. 2; p. 665, col. 2.]

Per *Chamier, J.*—A Court may refuse to summon witnesses or admit evidence, and, when its decision is subsequently relied upon as constituting a question *res judicata*, the Court trying the subsequent case cannot disregard the decision because it thinks that the Court trying the earlier case ought to have summoned the witnesses or admitted further evidence. [p. 664, col. 2.]

Per *Richards, C. J.*—It is very dangerous to place too much reliance on expressions used in giving judgments in other cases where the facts and circumstances were different. [p. 660, col. 1.]

First appeal from a decree of the Subordinate Judge of Saharanpur.

Mr. W. Wallach (with him Mr. Peary Lal Benerji), for the Appellants.

Dr. Satish Chandra Banerji (with him Messrs. Lalit Mohan Banerji, Surendro Nath Sen, Ramakant Malaviya and Yatish Chandra Ray), for the Respondents.

JUDGMENT.

RICHARDS, C. J.—This appeal arises out of a suit in which the plaintiffs claimed property known as the Landhaura Estate. One Raghbir Singh was the last owner. He died leaving a widow, Rani Dharam Kunwar, who gave birth to a posthumous son named Jagat Prakash Singh. This boy died shortly after his birth and the Rani purported to adopt a number of boys, one after the other, all of whom died in infancy. Finally she is alleged to have adopted the defendant, Balwant Singh. The Rani died on the 12th of November 1912 and the plaintiff No. 1 claims to be the reversioner and entitled to the estate on the death of the Rani. The second plaintiff is an assignee of a portion of the estate from plaintiff No. 1 and is probably the financier of the present litigation.

The allegation of the plaintiffs is that Raghbir Singh never gave authority to his widow to adopt a son. The Court below has dismissed the plaintiffs' suit holding that a previous litigation between Rani Dharam Kunwar and Balwant Singh operates as *res judicata*. The Court did not receive any evidence on the question whether or not the plaintiff No. 1 is what he claims to be, namely, the reversioner and heir to the property, nor on the question whether or not the Rani was authorised by her husband to adopt. The sole question which we have to decide in the

present appeal is whether the previous litigation operates as *res judicata*.

It seems to me that we are bound to deal with the appeal on the assumption that the plaintiffs might possibly have been able to adduce evidence which would satisfy the Court, *first*, that the plaintiff No. 1 is the reversioner and *second*, that Raghbir Singh never authorised his wife to adopt a son. If the Court below was correct in holding that the previous litigation operated as *res judicata*, it was quite unnecessary to go into the evidence on either of these two points. If, on the other hand, the previous litigation does not operate as *res judicata*, then clearly the Court ought to have heard the evidence and it is our duty to remand the case for that purpose.

There can be no doubt (whether the Rani had the authority to adopt or not) that a ceremony of adoption was in fact gone through in the most public manner possible. Prior to or simultaneously with the alleged adoption the Rani had obtained an agreement from the father of Balwant Singh that notwithstanding the adoption she should be allowed to remain in possession of the estate during her life. Immediately after the alleged adoption disputes arose between the Rani and Balwant Singh; the latter wished to repudiate the agreement and go into possession of the estate, a course of action which was strongly resented by the Rani. The result was that she instituted a suit in the year 1905 alleging that she had no power to adopt Balwant Singh and that she had not adopted him. This was the commencement of the litigation which the Court below has found to operate as *res judicata*.

The Court of first instance (in that suit) declined to go into any evidence on the question of the Rani's authority to adopt holding that whether or not the Rani had authority, she was estopped by her conduct from denying her authority and dismissed the suit. The Rani appealed to the High Court. The High Court confirmed the decision of the Court below and dismissed the plaintiff's suit. It will thus be seen that the Courts in India decided the case on a ground entirely personal to the Rani and without having considered or even received the evidence on the question as to whether or not authority to adopt had been conferred on the Rani.

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The law of *res judicata* is set forth in section 11 of the Code of Civil Procedure. It provides that "No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court." The plaintiff in the present suit was, of course, no party to the previous litigation, nor does he "claim under" the Rani. He claims as reversioner or heir of the last male owner. No doubt the doctrine of *res judicata* has been extended by the Courts to cases in which it can fairly be said that the widow represents the estate. A common case of this kind is where a widow in possession or entitled to possession of her husband's estate brings a suit to recover possession of property which she claims to belong to that estate, against a third party. If that litigation is fairly and honestly conducted, the reversioner is not allowed to re-open the question after the widow's death. The principle established being, as it seems to me, that in the majority of cases the widow can and does represent the estate and that in all such cases the reversioners are bound. The principle is most reasonable and it is to be regretted that it is not expressly enacted in the Code so as to make the latter complete.

We have now to see whether in the previous litigation to which I have referred the Rani can be said to have represented the estate. It seems to me that upto the time of the decree of the High Court dismissing the appeal, she most certainly did not represent the estate. The Courts did not allow her to "represent" the estate; they excluded evidence which she should have given if she was "representing" the estate. The case was decided both by the trial Court and the High Court on a ground personal to the Rani herself. These Courts had held that evidence as to authority to adopt having been conferred on her was immaterial and irrelevant inasmuch as, even if the Rani had no authority, she ought not to be allowed to say so as against the defendant, Balwant Singh. The issue of the authority of the widow to adopt was not "heard or finally decided." On the

contrary, the Court, declined even to receive evidence on the issue. The Rani, however, was not satisfied with the decision of the High Court and appealed to His Majesty in Council.* Their Lordships affirmed the decree of the High Court and dismissed the appeal of the Rani. In the course of judgment their Lordships said: "Their Lordships, in reviewing the facts of the case, are of opinion that the question may well be decided as one of fact on the Rani's own statements without recourse to the doctrine of estoppel. In their view she was speaking the truth in Baldeo Singh's action when she was pleading as to her authority. Their Lordships, however, do not differ from the Courts below in the view they have taken as to the applicability of the doctrine of estoppel in this case. Of course the estoppel pleaded against the Rani must be taken as purely personal. It does not bind any one who claims by an independent title, but, in view of the decision now given, that the respondent was, in fact, duly adopted, further litigation on the point may be taken as happily out of the question". Notwithstanding that the Rani had by her conduct rendered it extremely difficult for her to fairly "represent" the estate in her litigation with the defendant, it may perhaps be conceded that the finding of their Lordships would have operated as *res judicata* had the evidence been admitted and recorded. It seems to me, however, quite clear that had their Lordships' attention been called to the fact that the trial Court had declined to receive evidence they would never have decided the case as a question of fact so as to bind the estate without at least directing evidence on the issue to be recorded and considered. The Rani was not a very truthful person, and in a previous suit by one Baldeo, claiming to be the reversioner and challenging (*inter alia*) the alleged authority to adopt, the Court found that Baldeo had failed to establish that he was the reversioner and that it was, therefore, unnecessary to decide the issue as to authority, but the learned Judge gave it as his opinion that it was highly improbable that any authority

*See *Rani Dharam Kunwar v. Balwant Singh*, 15 Ind. Cas. 673; 16 C. W. N. 676; 9 A. L. J. 730; 14 Bom. L. R. 485; (1912) M. W. N. 641; 12 M. L. T. 95; 16 C. L. J. 60; 34 A. 398; 23 M. L. J. 200.—*Ed.*

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had been conferred. I mention this fact merely as suggesting that no finding on the statement of the Rani could be satisfactory without hearing all material evidence that could be produced. It seems to me that the judgment of their Lordships can no more operate as *res judicata* than the judgment of the trial Court if it had decided an issue after excluding evidence relevant thereto. It is, however, contended that in the absence of fraud all decrees against a Hindu widow bind the reversioners and certain expressions of learned Judges of the Indian Courts and of their Lordships of the Privy Council are quoted in support of the contention. This contention is clearly not correct. Their Lordships themselves evidently felt that if the case was decided on a ground personal to the Rani the reversioner would not be bound. It seems to me that it is very dangerous to place too much reliance on expressions of learned Judges used in giving judgment in other cases where the facts and circumstances were different. The expressions relied on one and all occur in judgments in cases where the Hindu widow could be said to have fairly "represented" not only herself but also the estate. Jessel, M. R., in *Hallett's Estate In re, Knatchbull v. Hallett* (1), speaking of the proper use of authorities, says: "The only use of authorities, or decided cases is the establishment of some principle which the Judge can follow out in deciding the case before him." In *Quinn v. Leatham* (2), Halsbury, L. C. says:—"Now, before discussing the case of *Allen v. Flood* (3) and what was decided therein, there are two observations of a general character which I wish to make, and one is to repeat what I have very often said before, that every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. The other is that a case is only an authority for what it actually decides."

(1) (1879) 13 Ch. D. 696 at p. 712; 49 L. J. Ch. 475; 42 L. T. 421; 28 W. R. 732.

(2) (1901) A. C. 495; 70 L. J. P. C. 76; 85 L. T. 289; 50 W. R. 139; 65 L. P. 704; 17 T. L. R. 749.

(3) (1893) A. C. 1; 77 L. T. 717; 46 W. R. 258; 67 L. J. Q. B. 119; 60 J. P. 795; 14 T. L. R. 125.

In *Kreglinger v. New Patagonia Meat and Cold Storage Co. Ltd* (4) Haldane, L. C., says:—"To follow previous authorities, so far as they lay down principles, is essential if the law is to be preserved from becoming unsettled and vague. In this respect the previous decisions of a Court of co-ordinate jurisdiction are more binding in a system of jurisprudence such as ours than in systems where the paramount authority is that of a Code. But when a previous case has not laid down any new principle but has merely decided that a particular set of facts illustrates an existing rule, there are few more fertile sources of fallacy than to search in it for what is simply resemblance in circumstances, and to erect a previous decision into a governing precedent merely on this account. To look for anything except the principle established or recognised by previous decisions is really to weaken and not to strengthen the importance of precedent."

It seems to me that the principle established or recognised in the decisions, in which the expressions relied on occur, is this, namely, that in many suits brought by or against Hindu widows the widow can and does fairly represent not only herself but the estate, and that the doctrine of *res judicata* should be applied in all such cases where the reversioner seeks to re-open decided questions. The reason and justice for the principle is absent in any case where for any cause the widow did not in truth represent the estate. In my judgment, the Rani in her suit could not and did not represent the Landhaura Estate. The Courts in India and also their Lordships of the Privy Council held that she had estopped herself from denying her authority to adopt the defendant. If she performed a ceremony of adoption without authority it was an act against the estate, yet she was not allowed to prove the true facts. As the result of her conduct the Courts in India refused to admit evidence which she tendered to show that she could not adopt the defendant. Much as I regret the protraction of the present litigation, I think that the suit should be remanded to the Court below.

BANERJEE, J.—This appeal arises out of a suit relating to the Landhaura Raj, which is a large estate of great value. It has unfortunately

(4) (1914) A. C. 25 at p. 39; 83 L. J. Ch. 79; 109 L. T. 802; 58 S. J. 97; 80 T. L. R. 114.

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nately been the subject of considerable litigation, which commenced so far back as the year 1872. The last Raja was Raghubir Singh, who died in 1868 leaving a widow, Rani Dharam Kunwar. A posthumous son was born to him, who died shortly afterwards. The history of the estate and of the previous litigation relating to it is given in the judgment of this Court delivered on the 10th of December 1903 and it is also set forth in the judgment of the Court below. Rani Dharam Kunwar was in possession of the estate after her husband's death till she died on the 12th of November 1912. She made successive adoptions, the last of which is alleged to have been made in January 1899, when she is said to have adopted the defendant, Balwant Singh, the boys previously adopted having died. Disputes, however, arose between her and Balwant Singh and a suit was brought by her on the 9th of January 1905 for a declaration that she had not in fact adopted Balwant Singh, that even if she did adopt him she had no authority from her husband to do so and that for this and other reasons the adoption was invalid. The Court of first instance found that Balwant Singh had in fact been adopted, but it was of opinion that Rani Dharam Kunwar was estopped from questioning the validity of the adoption and accordingly dismissed the suit, without trying other issues or recording oral evidence in regard to them. This decision was affirmed by this Court on appeal. The judgment of this Court is reported as *Dharam Kunwar v. Balwant Singh* (5). From this judgment an appeal was preferred to the Privy Council. Their Lordships agreed with this Court as to the factum of adoption but proceeded to determine the question "whether the Rani had authority from her husband to adopt the defendant." Upon a consideration of the documentary evidence, of which there was a considerable amount on the record, their Lordships came to the conclusion that authority to adopt had been proved. In their opinion the question might "well be decided as one of fact * * * without recourse to the doctrine of estoppel." Their Lordships, however, did not differ from the Courts below in the view they had taken of that doctrine, but they observed as follows: "Of course the estoppel pleaded against the

Rani must be taken as purely personal. It does not bind any one who claims by an independent title, but in view of the decision now given, that the respondent was, in fact, duly adopted, further litigation on the point may be taken as happily out of the question." It is clear from these observations that their Lordships were of opinion that their decision on the question of the validity of the adoption would be binding on reversioners who claimed independently of the Rani.

In spite of this decision of their Lordships the present suit was brought by the first plaintiff, with the help of the second plaintiff, who is apparently a speculator financing the litigation, for possession of the estate on the same grounds as those on which Rani Dharam Kunwar had based her claim, namely, that Balwant Singh had not in fact been adopted and that the Rani had no authority to adopt. The first plaintiff, Risal Singh, alleges himself to be the next reversioner to the estate and he has transferred one-half of his alleged rights to the second plaintiff, Fateh Chand. The title of Risal Singh as reversioner is denied on behalf of the defendants, but the Court below has not tried that question and, on the assumption that he is the reversioner, has dismissed the suit on the ground that he is bound by the decision of their Lordships of the Privy Council in the suit of the Rani. The plaintiffs have preferred this appeal, and the only question argued before us is whether that decision is binding.

I agree with the Court below in holding that the decision of their Lordships in that suit is binding on the reversioners. The law on the subject has, in my opinion, been correctly stated by the learned Subordinate Judge. Where the estate of a deceased Hindu has vested in a female heir, a decree fairly and properly obtained against her in regard to the estate is, in the absence of fraud or collusion, binding on the reversionary heirs. Where, however, the decree relates to a matter personal to her, it is not so binding. The earliest authority on the point is the well-known case of *Katama Natchiar v. Raja of Shivagunga* (6). In dealing with the question whether a decree, obtained in 1847, in the life-time of the widow in possession would have bound those claiming in succession to

(5) 30 A. 549; 5 A. L. J. 568; A. W. N. (1908) 231; 4 M. L. T. 385.

(6) 9 M. I. A. 339; 2 W. R. 31 (P. C.); 1 Suth. P. C. J. 520; 2 Sar. P. C. J. 25; 10 E. R. 843.

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her, their Lordships of the Privy Council held as follows:—"Their Lordships are of opinion that, unless it could be shown that there had not been a fair trial of the right in that suit—or, in other words, unless that decree could have been successfully impeached on some special ground, it would have been an effectual bar to any new suit...by any person claiming in succession to her. For assuming her to be entitled to the *zemindari* at all, the whole estate would for the time be vested in her absolutely for some purposes, though, in some respects, for a qualified interest; and until her death it could not be ascertained who would be entitled to succeed. The same principle which has prevailed in the Courts of this country as to tenants in tail representing the inheritance, would seem to apply to the case of a Hindu widow; and it is obvious that there would be the greatest possible inconvenience in holding that the succeeding heirs were not bound by a decree fairly and properly obtained against the widow" (at page 604). The principle thus enunciated by their Lordships was re-affirmed by them in several subsequent cases. I may refer to *Jugal Kishore v. Jotendro Mohun Tagore* (7), *Partab Narain Singh v. Triloki Nath Singh* (8), *Harinath Chatterjee v. Mothur Mohun Goswami* (9). It has been accepted and acted upon by all the High Courts in this country. The cases on the point are collected on page 910 of Mayne's Hindu Law, 8th Edition and as most of them are set forth in the judgment of the Court below I deem it unnecessary to refer to them. The principle laid down by the Privy Council was thus summarised by Sir Barnes Peacock, C. J., in his judgment in the Full Bench case of *Nobin Chunder Chuckerbutty v. Issur Chunder Chuckerbutty* (10): "In the absence of fraud or collusion, a decision against a widow, with regard to her deceased husband's estate, would be binding upon the reversionary heirs" (at page 507). It is true that the circumstances of all the cases were not identical but in all of them the principle was recognised. As observed by Lord Haldane, L. C., in the recent case of *Kreglinger v. New Patagonia Meat and Cold Storage Co. Ltd.* (4) decided by the House

(7) 10 C. 985; 17 I. A. 66; 8 Ind. Jur. 425; 4 Sar. P. C. J. 553.

(8) 11 C. 186; 11 I. A. 197; 8 Ind. Jur. 697; 4 Sar. P. C. J. 567; Rafique & Jackson's P. C. No. 86.

(9) 21 C. 8 at p. 17; 20 I. A. 183.

(10) 9 W. R. 505.

of Lords, "the binding force of previous decisions, unless the facts are indistinguishable, depends on whether they establish a principle. To follow previous authorities, so far as they lay down principles, is essential if the law is to be preserved from becoming unsettled and vague." The decisions of the Judicial Committee (acted upon as they have been by the Courts in this country), having laid down a principle, it is essential that they should be followed by us so as not to unsettle what has hitherto been understood to be the law on the point.

We have next to consider whether this principle applies to the present case. Rani Dharam Kunwar claimed to be in possession of the Landhaura Estate either as the widow of her deceased husband or as the mother of her son. It is in her capacity as the person who represented the estate that she instituted the suit brought by her against Balwant Singh. He was claiming title to the estate as the validly adopted son of Raja Raghubir Singh and the object of the suit was to protect the estate from that claim. In her plaint in that suit she alleged that upon the death of her son she obtained possession of the whole of the estate as his heir and continued in possession as such. In the fourth ground of her appeal to this Court she stated that "in her character as representing the estate of her son, Jagat Prakas Singh, she was at liberty to repudiate" the alleged adoption of the defendant. Again, in the 23rd ground of her appeal to His Majesty in Council she asserted that she was not "precluded from bringing a suit as representing the estate of her husband." It is manifest from these statements that she brought her suit as representing the estate and not in a personal capacity. She sought to establish that Balwant Singh was not validly adopted and that he had no right to the estate. By asserting a valid adoption he was casting a cloud on the title of the Rani as representative of the estate and on that of the reversioners who were to come after her, and it was to remove this cloud that she instituted her suit. In the plaint in this case the plaintiffs also have stated that she was in possession as a Hindu widow. As she did not set up any right other than that of a

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widow or mother and as her right was thus limited to an estate for life, her suit was in substance a suit for the protection of the interests of the reversioners on whom the property would devolve after her death. The final decision in that suit is, therefore, binding on them, in the absence of fraud or collusion. It has not even been suggested that there was fraud or collusion between the Rani and Balwant Singh. Having regard to the relations which existed between them, to the fact that they were at arm's length, to the earnest manner in which the suit was fought out in this country and before the Judicial Committee, the idea of fraud or collusion is out of the question.

The main ground on which the learned Counsel for the appellants contends that the decree in the former suit is not binding on the appellants, is that in that suit the trial Court did not go into evidence on the question of authority to adopt. That Court, it is true, decided the case on the ground of estoppel and refused to record oral evidence on the issue as to authority. This Court also decided the case on the same ground. Had the matter rested there and had the Rani's suit been finally decided on the ground of estoppel only, the decision would have been on a ground personal to the Rani and would not have been binding on the reversioners. But when the case went before the Privy Council, their Lordships preferred to decide the question of authority and the validity of the adoption as one of fact, "without recourse" as their Lordships observed, "to the doctrine of estoppel." Their Lordships were fully cognizant of the fact that oral evidence had not been recorded on the point, but in spite of this they proceeded to decide the question on the documentary evidence before them. The Rani was represented before their Lordships by eminent Counsel and it must be presumed that they urged every point that could be reasonably put forward. It may be that in view of the length of time which had elapsed since the death of Raja Raghubir Singh their Lordships considered, as also did the learned Counsel who presented the Rani's case before them, that oral evidence would be of little value. To take an extreme view, it may

also be (if I may say so without presumption) that their Lordships decided the case erroneously. The fact, however, remains that their Lordships proceeded to try the question on the merits and decided it in favour of the defendant. It cannot under the circumstances be said that there was not a fair trial. That the possibility of claimants coming forward as reversioners was present to their Lordships' minds is clear from their judgment, and when they said that "in view of the decision now given that the respondent was in fact duly adopted, further litigation on the point may be taken as happily out of the question," they clearly meant that their decision would be binding on reversioners and the validity of Balwant Singh's adoption would be for all time beyond the region of controversy. To hold otherwise would be to render their Lordships' decision wholly nugatory and it would be open to as many claimants as might assert themselves to be reversioners to re-open the question a number of times and to harass the defendant repeatedly. In this connection I may also point out that in the case of *Jugal Kishore v. Jotendro Mohun Tagore* (7), referred to above, the Judicial Committee held a decree, and an auction-sale which followed, to be binding, although the widow against whom it was passed did not appear and the decree was made *ex parte* and this circumstance did not in the opinion of their Lordships render the decree any the less binding.

It may be that the rule of *res judicata* as enacted in section 11 of the Code of Civil Procedure is not strictly applicable, as the plaintiffs were not parties to the previous suit and do not claim under a party to that suit. But in the *Katama Natchiar's* case (6) their Lordships held a decree obtained against the widow in possession to be binding on reversionary heirs on the ground of convenience. The decree being binding on the estate binds all persons who succeed to the estate.

In my judgment, the decree passed by the Privy Council in the suit brought against Balwant Singh by Rani Dharam Kunwar is, on the above grounds, binding on the reversioners and this suit is not maintainable. I would dismiss the appeal.

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[As the learned Judges differed, the case was referred to Chamier, J., who delivered the following]

JUDGMENT.—This appeal was referred to me under section 98 of the Code of Civil Procedure in consequence of a difference of opinion between the learned Chief Justice and Mr. Justice Banerji. The point upon which they differed is, whether the decision of their Lordships of their Privy Council in the suit of Rani Dharam Kunwar against the defendant-respondent, Balwant Singh, to the effect that the Rani duly adopted Balwant Singh under authority given to her by her husband, is binding upon the plaintiff-appellant, Risal Singh, who claims to be the reversionary heir of the husband and entitled to the estate on the death of the Rani which occurred in November 1912, a few months before the present suit was brought.

In the previous suit the Court of first instance declined to take evidence (or rather oral evidence, for the parties were required to put in their documentary evidence) on the question, whether the Rani had authority to adopt Balwant Singh, and dismissed the suit on the ground that the Rani was estopped from disputing her alleged authority to make the adoption, the factum of which is beyond dispute. This Court also decided the case on the question of estoppel confirming the decree of the first Court. The Rani appealed to His Majesty in Council, one of the grounds taken in the application for leave to appeal being that the first Court should have allowed her to give evidence on the question of her authority to make the adoption. A similar ground was taken in her appeal to this Court. Their Lordships of the Privy Council agreed with the Indian Courts that the Rani was estopped from denying that she had authority to adopt Balwant Singh, but they observed that the estoppel was purely personal and would not bind any one who claimed by an independent title. They, however, as I read the judgment, decided and intended to decide that the evidence showed that the Rani had authority to adopt Balwant Singh. I think that this is clear not only from the passages quoted by Mr. Justice Banerji, but also from earlier portions of the judgment, for example the passage in which they say:—
“He gave formal and emphatic directions to

his wife in regard to the adoption of a son. The Rani herself has pledged her word as to the nature and scope of those directions on more than one public and important occasion. She did so particularly in the deed of the 13th January 1899 and in her defence to the action of one Baldeo Singh.” Then later on their Lordships say that “in reviewing the facts of the case, they are of opinion that the question may well be decided as one of fact on the Rani’s own statements without recourse to the doctrine of estoppel. In their view she was speaking the truth in Baldeo Singh’s action when she was pleading as to her authority.” The learned Chief Justice is of opinion that, though in his view the Rani’s conduct rendered it difficult for her to fairly represent the estate, it might perhaps be conceded that the finding of the Privy Council would have operated as *res judicata* had the evidence as to the Rani’s authority to adopt been admitted and recorded. But he thinks it is clear that, if their Lordships’ attention had been called to the fact that the first Court had declined to receive evidence, they would never have decided the case on the question of fact so as to bind the estate. It seems to me that, if there was any misapprehension as to the proceedings of the first Court, that might be a ground for a review of judgment, but is no ground for holding that a clear and definite decision on the question of fact is not binding on the estate. A Court may refuse to summon witnesses or admit evidence, and, when its decision is subsequently relied upon as constituting a question *res judicata*, the Court trying the subsequent case cannot disregard the decision because it thinks that the Court trying the earlier case ought to have summoned the witnesses or admitted further evidence. In my opinion, the Rani in the previous case represented the estate. Upon this I have nothing to add to what Mr. Justice Banerji has said. The Rani wanted to give evidence on the question of her authority, and both in appeal to this Court and in her application for leave to appeal to His Majesty in Council she complained of the action of the Court in refusing to admit that evidence. Therefore, there can be no doubt that she was doing her best to show that there had been no valid adoption, and her action was in the interest of the reversionary heir of her husband. The reports of the case in the Law

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Reports Indian Appeals and in the Indian Law Reports are not as full as in the Allahabad Law Journal and the Calcutta Weekly Notes. The last-mentioned report, Volume 16, page 675,* represents Sir Robert Finlay as having contended that the appeal to their Lordships was confined to the applicability of the doctrine of estoppel and their Lordships as having then intimated that in their opinion there were sufficient materials on the record to decide all questions arising in the suit. Whether Counsel for the appellant acquiesced in this view or not it is impossible to say, but the judgment of their Lordships makes it clear that the question of the Rani's authority to make the adoption was argued. The report in the Calcutta Weekly Notes only makes clear, what one would infer from the other reports, that whether Counsel for the appellants were willing to do so or not their Lordships deliberately decided to take up the question of the Rani's authority to make the adoption. It is impossible to suppose that neither Counsel for the appellant nor their Lordships were aware that the first Court had declined to take oral evidence on the subject. A perusal of the record shows that notwithstanding the order of the Court there was before their Lordships a mass of evidence bearing on the question of the Rani's authority to adopt. What was shut out must have been mainly oral evidence as to the events which had happened many years ago, and it is quite possible that Counsel for the Rani in deference to the opinion of their Lordships did not press the contention that the Rani should be allowed a further opportunity of giving evidence. However that may be, I think it is clear that their Lordships deliberately decided the question, knowing full well that their decision would bind the reversioners and in the hope that their decision would put a stop to further litigation.

I am of opinion that the decision of their Lordships is binding on the plaintiffs in the present suit and justifies the dismissal of the suit without trial on the merits.

Let the record be laid before the Chief Justice.

By THE COURT.—This appeal having now been

*See *Rani Dharam Kunwar v. Balwant Singh*, 15 Ind. Cas. 673.—*Ed.*

disposed of under the provisions of section 98 of the Code of Civil Procedure, the order of the Court is that the appeal be dismissed with costs.

Appeal dismissed.

LOWER BURMA CHIEF COURT.

SPECIAL SECOND CIVIL APPEAL No. 212

OF 1913.

March 23, 1915.

Present:—Mr. Justice Twomey and
Mr. Justice Ormond.

MA PAN NYUN AND OTHERS DEFENDANTS—
APPELLANTS

versus

MA HLA SEIN—PLAINTIFF—RESPONDENT.

Buddhist Law—Shinbyu gifts, validity of—Manu Kyé Book X.

Questions as to the validity of *shinbyu* gifts are questions regarding a religious usage and have, therefore, to be decided according to Buddhist Law under section 13 of the Burma Laws Act of 1898. [p. 666, col. 1.]

A gift of property made publicly by both parents (or by the surviving parent, if one is dead) at the time of the *shinbyu* ceremony constitutes as between the donee and his co-heirs a valid gift although possession of the property was not given but such property remains absolutely at the disposal of the parents or the survivor of them for their life-time or his or her life-time. [p. 667, col. 1.]

Where in such a case the donee dies leaving either of the donors surviving, the gift has no effect and the donee's heirs cannot take benefit of the exception regarding possession obtaining in *shinbyu* gifts. [p. 667, col. 1.]

Appeal against the decree of the Divisional Court of Hanthawaddy, in Civil Appeal No. 6 of 1913, reversing that of the District Court of Tharrawaddy, in Suit No. 18 of 1913.

Mr. *May Oung*, for the Appellants.

Mr. *D. N. Palit*, for the Respondent.

JUDGMENT.

TWOMEY, J.—The plaintiff, Ma Hla Sein sued for the recovery of a piece of paddy land measuring 27.96 acres, which has been inherited by her from her late husband, Maung Tha Ku, and which had been given to him by his father, Maung Paw Tin, at Tha Ku's *shinbyu* ceremony in the year 1902. Tha Ku died in 1912 four months before the death of his father, Paw Tin. The defendants were (1) Tha Ku's step-mother, Ma Lon Gale, who as Paw Tin's widow was in possession of the land, (2) a Chetty to whom the land

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was mortgaged in 1909 and (3) and (4) two other children of Paw Tin. Possession of the land was admittedly never given to Tha Ku, but about a year after the *shinbyu* ceremony Tha Ku's name was substituted as holder of the land in the revenue maps and registers, and from 1903-04 to 1909-10 Tha Ku's name alone appeared. In 1910-11 for some reason which is not explained the name of the father, Paw Tin, was restored as holding the land jointly with Tha Ku. There is nothing in the Revenue Register to show that the land was given to Tha Ku as a *shinbyu* gift. It is stated in an entry in the remarks' column of the register for 1903-04 that Tha Ku's name was substituted as he had "acquired by way of inheritance."

The District Court in which the suit was tried found that the plaintiff failed to prove her allegation that there was such a public gift of the land at the *shinbyu* ceremony as under the Buddhist Law would render the delivery of possession unnecessary for the validity of the gift. On appeal the Divisional Court, while admitting that the direct evidence of a public gift was not strong, decided in the plaintiff's favour because he held that the direct evidence was strongly corroborated by certain circumstantial evidence. A decree was, therefore, granted to the plaintiff.

The defendants appealed to this Court under section 30 of the Lower Burma Courts Act. The 1st defendant, Ma Lon Gale, has since died and her legal representatives have been substituted. Questions as to the validity of *shinbyu* gift are questions regarding a religious usage and have, therefore, to be decided according to the Buddhist Law under section 13, Burma Laws Act.

The leading case on the subject is *Nga Pan U v. Mi Kyu* (1); which was decided by the learned Judicial Commissioner Mr. Sandford in 1874. He cited the following passage from Richardson's translation of the Manu Kye, Book X:—

"If the parents at the time of any of their children entering the priesthood shall with joy and exultations say, 'we have obtained the inheritance of the most

excellent gods,' and in their joy shall publicly, either by verbal promise or written engagement, give property to this child, though it come not into the possession of the priest, but remain, as before it was given, with the parents, it was given with a view to benefits in a future state: it is his *theng-thee*. The other children shall not object that it has never come into his possession; let the priest have the whole. If the parents shall make use of it, let them have the right to do so. If after the death of the parents it shall still be forthcoming, let the priest obtain it, and though the relatives plead that it has never been out of the possession of their parents, they shall have no share. Why is this?—because the priest is a child who has closed the gates of hell for his parents, and pointed out the way to the abodes of the Nats, the reward of good works. Thus the Lord Hermit said." [Richardson, pages 316, 317.]

On this authority he held that a gift made by parents at the time of *shinbyu* is valid although unaccompanied by delivery of possession, but observed that the condition permitting the parents to use the property after giving it is inconsistent with absolute and exclusive ownership by the donee, and that the furthest the Courts could go was to declare the title of the plaintiff to the possession of the property on the death of the parents. In that particular case, as the parents were still alive, the Judicial Commissioner declared the title of the plaintiff to possession of the property (consisting entirely of moveables) on the death of his parents. I venture to think that the correctness of this decision is open to question, and that the suit against the parents was altogether premature. According to the text cited above, it appears that parents who make a gift at the time of *shinbyu* without delivering possession, retain an absolute power of disposal over the property during their life-time, and it is only if any of the property should remain intact when they have both died, that the donee's claim can be enforced. This view is supported by the extracts (or, more correctly, *abstracts from other Dhammathats*) given in section 124 of the Digest prepared by the Hon'ble U Gaung (*ex-Kin Wun Mingyi* in

(1) L. B. R. (1872-92), 30.

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the Courts of the Burmese Kings, Mindon and Thebaw). Rajabala says distinctly that "the donees shall not claim restitution on the death of parents if the property has been expended by them." The Dhamma text is equally clear. "The parents are at liberty to utilize animate and inanimate property given to their son at the time of the latter's entering the order either as a novice or as a monk. But after the death of the parents, the co-heirs of the donee shall not obtain any portion left unexpended by the parents" (that is to say, the donee will get such portion and such portion only for himself). One text, the Davajja, no doubt says that the donors "shall not revoke" such a gift, but the effect of this prohibition is nugatory as it is clear from the other texts (including the Manu Kye which is recognized by the Privy Council as the chief authority) that the parents may dispose of the property completely leaving nothing for the prospective donee. Indeed it may be gathered from the texts cited in section 124 that the rule as to *shinbyu* gifts is a rule which was intended only to operate as between the donee and his co-heirs. In other words it is a matter only affecting the partition of the estate on the parents' death. I would deduce from the text page 77, (a) that a gift of property made publicly by both the parents (or by the surviving parent if one is dead) at the time of the *shinbyu* ceremony constitutes as between the donee and his co-heirs a valid gift although possession of the property was not given; but (b) that property so given remains absolutely at the disposal of the parents or the survivor of them for their life-time or his or her life-time.

I think it is clear also (c) that if the donee dies leaving either of the donors surviving, the gift has no effect. For the Manu Kye lays down that the donee is to get the property only after the death of the parents and if it has not already been disposed of by them (literally, if it has not been destroyed). The rule as to *shinbyu* gifts is an exception to the ordinary principle of the Buddhist Law, by which a gift to be valid has to be completed by delivery of possession. It may also be recorded as an exception to the well-recognized principle that a Burmese Buddhist cannot dispose of his property

by Will, for by declaring that a certain part of his property is to belong after his death to a particular son, the father virtually bequeaths it to that son. Looking to the exceptional character of the rule, I think, the Courts are bound to construe it strictly and to see that the conditions are exactly fulfilled. The texts, in my opinion, contemplate that the donee himself survives both parents and we should not be justified in extending the benefit of the exception to the donee's heirs in cases where the donee has predeceased his parents.

Our attention has been directed to section 342 of the Digest which gives an extract (or abstract) from the Davajja, the same Dhammathat mentioned above as prohibiting the revocation of a *shinbyu* gift. This text is as follows:—"Rishi Manu says that parents cannot, on the death of their son, resume from his surviving wife a gift made publicly at the time of his becoming a novice in the holy order."

I think this can apply only to gifts accompanied by possession, a class of gifts which is probably very rare (except perhaps in the case of jewelry and other moveable property), for Burmese parents, as Mr. Burgess remarked in *Maung Shwe Thae v. Ma Sain* (2), are loth to part with their property, at any rate while their children are young, as in the case of *shinbyu* gifts. The ordinary rule of Buddhist Law (section 97 of the Digest) permitted parents to revoke gifts even when accompanied by possession and the text in section 242 makes an exception in favour of *shinbyu* gifts. But it may be noted that the ordinary rule as to revocation has not been enforced by our Courts [see *Mra Do Aung v. Shwe U* (3) and *Maung At Gyi v. Ma U Me* (4)]. The exception made by the Davajja in favour of *shinbyu* gifts cannot, in my opinion, apply to cases where possession was not given, for as already remarked the texts contemplate the survival of the donee himself beyond the life-time of both his parents.

If the views expressed above are adopted, it follows that the plaintiff's claim in this case must fail. Even if Tha Ku survived

(2) U. B. R. (1897-1901), II, 59.

(3) L. B. R. (1872-92.) 22.

(4) U. B. R. (1892-96) II, 400.

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his father, Paw Tin, he could not obtain the land during the life-time of his step-mother, Ma Lon Gale. (She was married to Paw Tin in 1898 or four years before the *shinbyu* ceremony). But Tha Ku died before either of his parents. His right to obtain possession of the land remained a mere contingent right up to the time of his death and he had no vested interest in the property which could pass to his heirs.

These findings are sufficient to dispose of the case apart altogether from the question of publicity on which the lower Courts differed. But on the issue as to publicity also, I think the view taken by the District Court is well founded. Out of seventeen witnesses who stated that they attended the *shinbyu* ceremony, only three gave direct evidence about the gift and there are substantial grounds for distrusting the veracity of at least two of the three. Even if these witnesses are believed, their statements only go to show that the gift (or more correctly speaking, the dedication of the property) to Tha Ku's use after the death of his parents was made, not at the time of the *shinbyu* celebration which took place according to custom in a *manlap* at Paw Tin's house, but next at the Pongyi Kyaung. In the evening at the end of the feast the boy was robed and went to the Kyaung. Nothing was said about a gift up to then and not till next day when the guests had dispersed. It is argued that this is sufficiently near in point of time to justify the Court in regarding the gift as made at the time of making the boy a novice. But if the next day is near enough, it might be contended that the next week or even the next month would not be too late. I think we should insist on strict compliance with the terms of this exceptional provision and require the gift to be made *coram populo* during the actual celebration. The circumstantial evidence which the learned Divisional Judge relied upon as corroborating the direct evidence of a gift at the *shinbyu* ceremony falls under three heads, the mutation of the names in the Revenue Register, certain admissions made by Paw Tin at Tha Ku's wedding in 1909, and the entry of Tha Ku's name as the owner of the land in the mortgage to the Chetty in 1909. The mutation of names shows certainly that Paw Tin intended to make a gift of this land to

Tha Ku, and if possession had been given the gift would hold good, for the provisions of the Transfer of Property Act were not yet in force in 1902. But as possession was not given, the gift could take effect only if it was a *shinbyu* gift, and there is nothing in the entry in the Revenue Register to indicate that it was such a gift. The entry indicates that the land was allotted to Tha Ku as his share of the family inheritance and this is borne out by the evidence of the plaintiff's witnesses, Maung Aung Kin (P. W. No. 7) and Ma Min Nu (P. W. No. 8). Mere mutation of names in the Revenue Register would, of course, be insufficient, without delivery of possession, to give Tha Ku any right in the property as against his parents or on their death against the general body of co-heirs. On this point the ruling in *Maung Ni v. Nga Po Min* (5) may be referred to.

Similarly as regards the admissions made by Paw Tin at the wedding in 1909, they show that Paw Tin intended to give this land to Tha Ku but they do not touch the question whether the gift was a *shinbyu* gift.

Lastly, it was contended that Paw Tin having led Tha Ku to believe that Tha Ku was owner of the land and having got him to execute the mortgage of 1909 in that capacity, Paw Tin's widow was estopped from afterwards denying that the land belonged to Tha Ku. There can be no doubt, as the District Judge pointed out, that Tha Ku executed the mortgage instrument because his name appeared in the Revenue Register as holder of the land and it was necessary for him to sign in order to satisfy the Chetty. A case of estoppel would arise only if Paw Tin had made some representation to Tha Ku and if Tha Ku was thereby induced to sign to his detriment whereas he would not have signed if no such representation had been made to him. It is suggested that Paw Tin said to him: "This land is yours and you alone are able to give a good title." But it is just as likely that he said: "I have put this land in your name and you are to get it if you survive me. As it stands in your name, your signature is necessary to the mortgage instrument." Such a representation would probably be sufficient to induce Tha Ku to sign. In any case Tha Ku did not act to his detriment in executing the mort-

(5) L. B. R. (1872-92), 44.

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gage. His right in the property was purely contingent and under the Buddhist Law it was open to his father to sell the land outright at any time without reference to him. I think it is clear that there was no estoppel.

On all these grounds I would set aside the decree of the lower Appellate Court and restore that of the Court of first instance, and would direct that the appellants' costs in the Divisional Court and in this Court shall be borne by the respondent.

ORMOND, J.—I agree with my learned colleague in holding that under Buddhist Law the gift is invalid and it cannot be valid under any other law. It is unnecessary in this appeal to decide whether a question as to the validity of a gift of land by Burmese parents to their son on the occasion of his taking the yellow robe—a frequent though not a necessary incident of a *shinbyu* ceremony—is or is not a question of religious usage or institution; and I prefer not to express an opinion on the point. I concur in the order suggested by my learned colleague.

Decree set aside.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL NO. 1045 OF 1907.

August 5, 1915.

Present:—Mr. Justice Ayling and
Mr. Justice Tyabji.

MURUGA CHETTY AND OTHERS—

PLAINTIFFS NOS. 1 TO 6 AND 8 TO 12

—APPELLANTS

versus

RAJASWAMY AND OTHERS—DEFENDANTS

NOS. 1 TO 4, 6, 7, 11, 12, 15, 17, 21, 24 TO 27, 5
AND LEGAL REPRESENTATIVE OF DEFENDANT

NO. 2.—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXII, r. 9 (2)—Abatement set aside by one Division Bench—Order passed ex parte—Another Bench, if can re-open the same—Practice—Procedure—Jurisdiction—Community, property belonging to—Some members allowed to act as trustees—Gift by such persons in favour of third person—Possession of third person, whether permissive or adverse—Declaratory suit based on denial of title—Cause of action when arises—Knowledge of some members, if affects rights of others.

An order made by a Division Bench of the High Court setting aside the abatement of a second appeal under Order XXII, rule 9 (2), Civil Procedure Code, cannot be questioned by a different Bench, even though the order may be *ex parte* as the order does not require the issue of a notice. The only proper way of setting it aside is by way of review. [p. 670, col. 2; p. 672, col. 1.]

Tekait Ajant Singh v. Sundar Mal, 16 Ind. Cas. 567;

17 C. W. N. 862 and *Ganeshwar Singh v. Ganesh Das*, 10 C. W. N. 964; 4 C. L. J. 177; 16 M. L. J. 365; 8 Bom. L. R. 719; 3 A. L. J. 698; 1 M. L. T. 303; 33 C. 1178 at p. 1182; 33 I. A. 134, followed.

Tripura Sundari Debi v. Dakshina Mohun Roy, 5 C. L. J. 310; 1 C. W. N. 698, distinguished.

If persons purporting to act as trustees on behalf of a community and allowed so to act by it, give possession of a land belonging to the community to a third person, the possession of the latter is at its inception only permissive and not adverse to the community. [p. 674, col. 1.]

The cause of action for a declaratory suit, based on denial of title, does not arise until the plaintiff has knowledge of the denial. [p. 674, col. 2.]

Thirumala Rao v. Kadekar Durgi Shettethi, 22 Ind. Cas. 883; (1914) M. W. N. 197; 1 L. W. 134, followed.

In such a case knowledge on the part of some of the members of the community does not affect the right of the others. [p. 674, col. 2.]

Second appeal against the decree of the District Court of South Arcot in Appeal nit No. 355 of 1906, preferred against that of the Court of the District Munsif of Chidambaram, in Original Suit No. 1014 of 1905.

FACTS.—The properties in suit originally formed certain *nandavanams* (flower gardens) attached to the temple of Devaraja Pillayar Swami in Chidambaram belonging to the Vedamba Chetty community of that place. One Chidambaram Chetty having claimed them as his private property, certain members of the said Vedamba Chetty community presented a petition to the Sub-Collector objecting to their registration in Chidambaram's name and praying that the name of the idol of the temple might be substituted for that of one Muthuveerappa Chetty. The Sub-Collector, however, transferred the *putta* in the names of Chidambaram, Appasami and Subraya. In 1893, the nephew of Chidambaram and the son of Appasami sold the said gardens to one Ponnambalaswami, who improved the property by spending a large sum of money. The plaintiffs brought the present suit as the representatives of the Vedamba Chetty community, for a declaration that the suit properties were trust properties and that the alienation of the same in favour of Ponnambalaswami was not valid and binding on the community and for recovery of their possession after demolishing certain buildings erected thereon by Ponnambalaswami's representative-in-interest. The defendants pleaded *inter alia* that the property was private property, that they purchased the same *bona fide* and for valuable consideration without notice of the trust and that they had been in possession for over 12 years and had consequently

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acquired title by adverse possession. The District Munsif dismissed the suit, after recording findings on all the issues in the case. On appeal the District Judge dismissed the suit as barred by limitation. The plaintiffs thereupon preferred this second appeal.

Mr. T. V. Seshagiri Aiyar, for Respondent No. 2, raised a preliminary objection that the appeal must be taken to have abated as against the 2nd respondent, as no legal representative had been brought in within the six months allowed by the law and that the order of the Division Bench setting aside the abatement was passed *ex parte* and was liable to be set aside by this Bench as no sufficient cause had been shown for the failure to apply within time and for the delay of about two months and further even if there had been sufficient cause for one of the appellants, there was nothing to preclude the other appellant from making the necessary application. Reliance was placed on *Kichilappa Naickar v. Ramanujam Pillai* (1), *Tripura Sundari Debi v. Dakshina Mohun Roy* (2) and *Tekait Ajant Singh v. Sundar Mall* (3).

Mr. T. Rangachariar, for the Appellants, contended that this Bench had no jurisdiction to re-open an order setting aside an abatement passed by another Division Bench; that the only proper method to set aside that order was by review and that had not been done; and that the order was, therefore, final. He referred to *Ganeshwar Singh v. Ganesh Das* (4). He distinguished the case of *Tripura Sundari Debi v. Dakshina Mohun Roy* (2) and argued that the petition was not strictly one to bring on record a legal representative, because the successor-in-office of the 2nd defendant was not his legal representative within the meaning of the definition in section 2 (11), Civil Procedure Code.

JUDGMENT.

AYLING, J.—The preliminary objection is raised that in consequence of appellants' failure to apply within six months of the death of the original 2nd defendant (which took place on 11th June 1911) to bring his legal representative on record, the appeal

must be held to have abated as regards that party.

An application to set aside the abatement was made on 16th December 1912 and on this an order as prayed for was passed *ex parte* by Benson and Sundara Aiyar, JJ., on 6th February 1913.

Mr. Seshagiri Aiyar argues that this order being passed *ex parte* is not conclusive; and that he is entitled to ask us to re-consider the matter of the abatement in the light of the further affidavits since filed.

In my opinion this contention cannot be accepted and the order, dated 6th February 1913, is final subject only to review. Order XXII, rule 9 (2), Civil Procedure Code, does not require the issue of notice: and it cannot be said that on this account the order of a competent Bench of two Judges is illegal; or that the subject-matter of it can be re-considered by a different Bench. It is open to any party who conceives himself to be injuriously affected by the order to apply for a review under Order XLVII: but no such application has been made in the present case, and we must, therefore, treat the order as final.

This view appears to me to be strictly in accord with that taken in two of the cases quoted to us [*Tekait Ajant Singh v. Sundar Mall* (3) and *Ganeshwar Singh v. Ganesh Das* (4)]. In the remaining case, which is reported as *Tripura Sundari Debi v. Dakshina Mohun Roy* (2), an *ex parte* order of a single Judge bringing a legal representative on record was held not to preclude the Bench before which the appeal came for disposal from considering the question of whether the application was within time and if not whether the abatement should be set aside. That case is, however, easily distinguishable. Apart from the fact that it was not an order setting aside an abatement and was passed by a single Judge, there is the important distinction that it appears to have been passed in ignorance of the fact that the application for substitution of the legal representative was made after the prescribed time and that the appeal was liable to be abated, that is to say the question which the Bench was asked to decide had not been considered before at all.

In my opinion the preliminary objection must be set aside, and the appeal disposed of on its merits.

(1) 25 M. 166 (F. B.).

(2) 5 C. L. J. 310; 11 C. W. N. 698.

(3) 16 Ind. Cas. 567; 17 C. W. N. 862.

(4) 33 C. 1178 at p. 1182; 10 C. W. N. 969; 4 C. L. J. 177; 16 M. L. J. 365; 8 Bom. L. R. 719; 3 A. L. J. 698; 1 M. L. T. 308; 33 I. A. 134.

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TYABJI, J.—A preliminary objection is taken before us that the appeal must be taken to have abated as against the original 2nd defendant, or rather that the setting aside of the abatement, to which I shall presently refer, was invalid, or otherwise of no effect as against the present 2nd defendant.

The 2nd defendant (Veerappa Ganana Desikaswamigal) died in June 1911. The appeal against him, therefore, abated in December 1911. An application was made to the High Court on behalf of the appellants for setting aside the abatement and for causing the legal representative of the deceased to be made a party to the proceedings, on the 16th of December 1912. The application was supported by an affidavit in which it was stated that the applicant did not know of the death of the 2nd defendant till October 1912. It was heard by a Bench of the High Court consisting of Benson and Sundara Aiyar, JJ. We are informed by the learned Pleader for the appellants that an explanation of the delay between October 1912 and the 16th of December 1912 was asked, and that, on certain letters being read to the Court, the explanation was accepted; and on the 6th of February 1913, it was ordered "that the abatement be set aside and that the name of Annamalai-swami be entered in the record of the second appeal and in the register of this Court as the legal representative of Veerappa Ganana Desikaswamigal, the said deceased 2nd respondent in Second Appeal No. 1045 of 1907."

It is argued on behalf of the legal representative of the 2nd defendant that, as a matter of fact, there was no sufficient cause within the meaning of Order XX, rule 9, Civil Procedure Code, preventing the appellant from continuing the appeal and that, therefore, the order setting aside the abatement was wrongly made and that we should now consider the appeal as having abated. It is said that we have power to cancel or otherwise to disregard the order setting aside the abatement, because that order was made to the prejudice of the 2nd defendant in proceedings to which he was not a party. The order is said to be wrongly made, because from the affidavit filed by the appellants it is clear that there was a delay of about two months, for which it is argued that no proper explanation is forthcoming, and because, even if there was any sufficient cause prevent-

ing one of the appellants, there was none as regards the other.

Order XXII, rule 9 is imperative in this sense that, provided that "it is proved that he (the applicant) was prevented by any sufficient cause from continuing the suit", there is no option left to the Court, for it is laid down that in that event "the Court shall set aside the abatement." There is no appeal from an order setting aside the abatement, though there is one from refusal to do so: Order XLIII, rule 1 (k); nor can we in this case assume to ourselves the powers which a Court of Appeal may have under the ruling of *Kichilappa Nuickar v. Ramanujam Pillai* (1). It, therefore, remains to consider whether we have inherent jurisdiction to reconsider the question whether the abatement should have been set aside on the 27th of February 1913. It is argued that we have this jurisdiction because the respondent's rights have been prejudiced by the order setting aside the abatement and the argument was supported by the following words which were used by the Privy Council in *Ganeshwar Singh v. Ganesh Das* (4):—

"Their Lordships entirely agree with the learned Judges of the High Court that it is an elementary principle, which is binding on all persons, who exercise judicial or quasi-judicial powers, that an order should not be made against a man's interest without there being given to him an opportunity of being heard."

In that case the question was whether the plaintiff could obtain possession of certain property from the defendant and this depended upon whether an execution sale was rightly set aside by the Commissioner of Patna, and whether the absence of the purchaser at the time when the order setting it aside was made was sufficient to invalidate that order as against the purchaser. Their Lordships' after making the remark cited by me, say:—

"But, however this may be, it seems to their Lordships that the proper remedy of the purchaser, if aggrieved by this order having been made in his absence, was to apply to the Revenue Authorities for a re-hearing, and that it is now too late to ask for a remand on that ground."

This is, in effect, a re-statement of the penultimate paragraph of the judgment of Trevelyan and Banerjee, JJ., whose judgment

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was under appeal. They are reported to have said in *Gunessar Singh v. Gonesh Das* (5):—

"A similar reasoning would prevent our entertaining any objection to the Commissioner's order on the ground that he had not heard the purchaser. If the purchaser was aggrieved on this account, there is no doubt that he could have found an appropriate remedy in the procedure of the Revenue Court; but whether that be so or not, we cannot treat as invalid an order made by the Tribunal to which the Legislature has entrusted the power of making such order. We have no power to enquire into the circumstances under which the order was made or into the propriety of the order."

It is, therefore, clear that their Lordships of the Privy Council approved of the decision of the High Court that the High Court had no power to "treat as invalid an order made by the Tribunal to which the Legislature has entrusted the power of making that order"; and this notwithstanding that that Tribunal, in making the order in question, had in the opinion of the High Court "violated an elementary principle which is binding on all persons who exercise judicial or quasi-judicial powers".

It cannot be questioned in the case now before us that the order setting aside the abatement was made by the Tribunal empowered to make it; and, even if it is permissible to us to assume, for the purposes of argument, that on the materials then before the Court, the order ought not to have been made, it cannot be contended that there was any irregularity vitiating the proceedings; for it is admitted that the application under Order XXII, rule 9, may be made *ex parte*, and that in the usual course it would be made *ex parte*.

There is, it is obvious, one distinction between the case just cited and the present one. In that case, the order sought to be set aside was that of a Revenue Court. Here it is an order of the High Court in these very proceedings. But, sitting in the Court in which we do, we have no power to interfere with the order passed by Benson and Sandara Aiyar, JJ., and there have been no proceedings for getting a review of that order. Indeed when it is considered how inapplicable any method of

procedure either of review or of appeal would be for interference by us with the order in question, it seems to me to be clear that the Legislature intended such an order to be final so far as this Court is concerned.

I must now refer to two decisions on which reliance was placed. The first is *Tripura Sundari Debi v. Dakshina Mohun Roy* (2). In that case there never was any order setting aside the abatement. The legal representative of the 4th defendant Tripura, who was the appellant, applied to be put on record when six months had elapsed after the death of the deceased appellant, and was put on record without the abatement having been set aside; nor was the attention of the Judge called to the fact that the appeal had abated when the appellant's representative was put on the record. Then, at the hearing of the appeal, for the first time the question was considered whether the abatement that had taken place on the expiry of the six months should be set aside. The Court permitted affidavits and counter-affidavits to be filed, considered them, and came to the conclusion that there was no reason why the abatement should be set aside. The case is no doubt authority for the proposition that, if after the appeal has abated the legal representative is wrongly brought on the record without the abatement being set aside, then the question whether or not the abatement should be set aside has still to be considered by the Court to whose notice that fact is brought for the first time. It has no bearing, as it appears to me, on the point whether we have power to set aside or disregard the setting aside of the abatement in the present case.

The other case relied upon before us is that of *Tekait Ajant Singh v. Sundur Mall* (1). That case seems to be distinguishable in this respect that there the question which the Subordinate Judge had to consider was one necessarily affecting the merits of the subject-matter of the suit; it affected the original plaintiff because he was made a *pro forma* defendant instead of plaintiff, on the ground that he had assigned his rights to the applicant, and that the rights on the basis of which he had come to the Court were no more vested in him; it affected the defendants because the scope of the suit was enlarged so as to include the rights not only of the original plaintiff, but also of a stranger to the suit

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whose assignee the applicant claimed to be. It was admitted there that the further hearing of the suit on the merits could not proceed without those questions being determined; but the Subordinate Judge thought that a fresh suit was necessary for their determination.

In the appeal now before us the question whether the order setting aside the abatement was made rightly or wrongly will not affect the merits of the appeal in any way. The question depends merely upon whether the appellant was prevented by sufficient cause from making his application earlier. The causes preventing the appellant from making the application were quite independent of and did not affect the rights of the deceased respondent and his legal representative.

My conclusion is, therefore, that the order of Benson and Sundara Aiyar, JJ., setting aside the abatement was made by a Court perfectly competent to do so; that we have no power to question the correctness of that decision and that without doing so we cannot now consider that the appeal has abated.

It is unnecessary in this view to consider the other points argued by Mr. Rangachariar, and to determine whether the successor-in-office of the 2nd defendant is his legal representative within the terms of the Civil Procedure Code, section 2 (11), and whether Article 177 or Article 181 of the Limitation Act was applicable.

I agree for these reasons that the appeal must proceed on the basis that its abatement has been set aside.

[The appeal was then heard on the merits].

Mr. T. Rangachariar, for the Appellants:—The District Judge has decided the case only on the ground of limitation mistakenly treating the suit as one in ejectment. He has not considered the other points raised in the case and decided in the Court of first instance. Nor has he found when the possession became adverse. His judgment cannot be supported.

Mr. M. O. Parthasarathy Aiyangar (with him Mr. T. R. Ramachandra Aiyar), for the Respondents argued *contra*:

JUDGMENT.—This second appeal arises out of a suit for a declaration that the properties referred to in the plaint are trust proper-

ties, for the removal of certain buildings erected on the land and for delivery possession of the land to the plaintiffs on behalf of the community, to which the plaintiffs allege that they and the defendants Nos. 4 to 27 belong. The claim was resisted on several grounds which seem to have been sufficiently raised in the issues framed in the suit.

The District Munsif somewhat reluctantly recorded findings on all the issues. He felt himself constrained to do so by the state of the pleadings. The District Judge has not considered all the issues. He seems to have overlooked the fact that the suit was not one merely for ejectment as he states in the beginning of his judgment. The pleadings in the suit are by no means perfect. But it seems that the real points on which the parties were at issue were, whether the property was private property or was to be held in trust for the community of the plaintiffs; and *secondly*, whether the rights of the community (if any) had been lost by a valid gift, or by adverse possession or by purchase in good faith for consideration without notice of the trust. As a subsidiary point it may also have had to be decided whether though the community may have the rights that they claim, they can now, on the facts as stated in the plaint, ask for immediate possession of the land. The subsidiary point does not affect the question whether the plaintiffs can claim the declaration above referred to. But we wish to record that the plaintiffs by their Pleader had to concede at the hearing that the last sentence of paragraph 2 of the District Judge's judgment cannot be attacked by the plaintiffs. That sentence is as follows:—

"On the plaint allegations the suit for ejectment is clearly not sustainable, for 1st defendant has not left Chidambaram and he is certainly not dead".

The District Judge has ultimately decided the case apparently on the sole ground that the suit is barred by limitation. He seems to have misunderstood the nature of the suit which he has treated as one for ejectment only, overlooking the other points on which the parties were really at issue. His finding on the question of limitation cannot, therefore, be accepted. For the purpose of his finding on the question of limitation he seems to have assumed that the community was originally

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the owner of the land. In that case, if persons purporting to act as trustees on behalf of the community, and allowed so to act by the community, give possession of the land to a third person, that person's possession cannot initially be adverse to the community. The question that has to be decided in such a case is whether the possession which was originally permissive ever became adverse and, if so, at what time and whether it continued adverse for the period required either for creating rights under section 28 of the Indian Limitation Act or for preventing under Article 142 or Article 144 of the first Schedule to that Act the rightful owner from asserting his rights by suit.

On the points which arise, therefore, the District Judge has not expressed any opinion. We must consequently ask the District Judge to record findings on all the issues in the case on the evidence on record. We have felt it necessary to indicate why we consider it desirable to ask for findings, but in so far as our remarks proceed on assumptions of fact we do not wish to restrict the District Judge in his consideration of the evidence. The plaintiffs will, however, be bound by the concession which their Pleader was forced to make and there cannot in any case be a decree for immediate possession.

The findings should be submitted within six weeks from this date and seven days will be allowed for filing objections.

* * * * *

[In compliance with the order contained in the above judgment, the District Judge of South Arcot submitted a finding on all points in favour of the plaintiffs, except that he found that the plaintiffs could not maintain the suit as they had not asked for the appointment of trustees as a consequential relief.]

Mr. T. R. Ramachandra Aiyar, for the 3rd Respondent:—The claim for a declaration is barred under Article 120, Limitation Act, as the cause of action therefor arose in 1893, on the date of sale.

Mr. G. S. Ramachandra Aiyar, for the 7th Appellant:—There is no question of limitation, as there is no evidence to show that the 7th appellant was aware of the sale within six years of suit. The cause of action arose only when this appellant had knowledge of the

denial of title. *Thirumala Rao v. Kadekar Durgi Shettethi* (6).

Mr. T. R. Ramachandra Aiyar, in reply:—Want of knowledge on the part of the 7th appellant is not sufficient. Other members of the community were aware of the sale and their knowledge was enough to bar the right of the community. Further, declaration being only a discretionary relief, this was a case in which it ought to be refused.

JUDGMENT.—We accept the findings. The 1st appellant states that he does not press the appeal. The 7th appellant, however, claims that on the findings accepted by us, there ought to be a declaration that the properties referred to in the plaint are trust properties belonging to the Vedamba Chetty community, subject to the right of the 1st defendant to be in possession thereof so long as he lives in Chidambaram.

Mr. T. R. Ramachandra Aiyar, for the 3rd defendant, argues that the claim for a declaration is barred under Article 120 of the Limitation Act as it accrued at the date of the sale in 1893. The 7th plaintiff denies that he had any knowledge of this sale-deed within six years of the date of the suit. Following *Thirumala Rao v. Kadekar Durgi Shettethi* (6), to which one of us was a party, we hold that the cause of action for a declaratory suit based on a denial of title does not arise until the plaintiff has knowledge of the denial. Mr. T. R. Ramachandra Aiyar argues, however, that some of the members of the community had knowledge at the date of the sale-deed, as they were parties to it. In our opinion, the knowledge of some of the members cannot affect the right of the others.

It is then argued that in our discretion we ought not to make the declaration. When the majority of the co-owners are proved to have had knowledge of the denial of title, it may, no doubt, be a reason for declining to grant a declaration in favour of one of the other co-owners who asserts that he had no knowledge. In the present case, however, it seems to us that it is necessary for the declaration to be made, as otherwise the whole of this litigation will have been fruitless, though the defendant set up a false deed of gift and a collusive sale. The plaintiffs, however, claimed to be entitled to

(6) 22 Ind. Cas. 883; 1 L. W. 134; (1914) M. W. N. 197.

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possession to which they were not entitled. We think, therefore, that the declaration should be given but without costs. Each party will bear his costs throughout.

Appeal allowed.

LOWER BURMA CHIEF COURT.
CIVIL REVISION PETITION No. 1 of 1915.

March 29, 1915.

Present:—Sir Charles Fox, Kt., Chief Judge.
BANSILAL ABHOYCHAND—DEFENDANT
No. 3—APPLICANT

versus

MAHOMED EBRAHIM MULLA—

PLAINTIFF—RESPONDENT.

Mortgage—Stock mortgaged—Rent of shop—Mortgagee, if liable to pay rent—Want of privity of contract between landlord and mortgagee.

Where the mortgagee of the stock in trade of a shop, who took possession of the stock and who received the incomings and paid the outgoings of the business carried on by the mortgagors, was sued by the landlord of the shop-premises for rent:

Held, that the mortgagee could not be held liable for any rent of the premises since there was no contract between the landlord and the mortgagee regarding payment of rent and since the mortgage being of goods only and not of the lease or tenancy of the rooms, the mortgagee did not acquire any interest in the rooms.

Petition against the judgment and decree of the Judge of Small Cause Court, Rangoon, dated the 10th December 1914, in Civil Suit No. 6545 of 19 4.

Mr. J. R. Das, for the Applicant.

Mr. Doctor, for the Respondent.

JUDGMENT.—The suit was for rent of two rooms, which the plaintiff had let to the 1st and 2nd defendants in which they carried on trade. They mortgaged their stock in trade to the 3rd defendant who took possession of it. The mortgagors continued to carry on the business, but the 3rd defendant-mortgagee received the incomings and paid outgoings.

The plaintiff sued him as well as the 1st and 2nd defendants for the rent of the rooms and a decree has been given against all three defendants. The 3rd defendant (mortgagee) applies for revision on the ground that the decree as against him is contrary to law.

This is the case. The mortgage was of the goods only and not of the lease or tenancy of the rooms. There was no contract between the plaintiff and the 3rd defendant

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for him to pay the rent, and the latter did not acquire any interest in the rooms. He was not a transferee of any interest in immoveable property and the cases referred to by the learned Judge did not apply. The law applicable was that stated in *Madhub-money Dassee v. Nando Lall Gupta* (1)

The decree against the 3rd defendant is set aside and the suit is dismissed with costs as against him only.

The plaintiff must pay the 3rd defendant's costs of this application, two gold *mohurs* allowed as Advocate's fees.

Appeal allowed.

(1) 26 C. 338.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1010 of 1913.

August 5, 1915.

Present:—Mr. Justice Ayling, and
Mr. Justice Tyabji.

MUTHUSWAMI NADAN AND ANOTHER—
PLAINTIFFS—APPELLANTS

versus

A. A. K. SANKARALINGAM CHETTY—
DEFENDANT No. 2—RESPONDENT.

Contract Act (IX of 1872), ss. 251, 263—Partnership—Dissolution—One partner authorised to collect outstandings and pay debts—Extent of authority, whether includes power to acknowledge debts—Acknowledgment.

In the absence of express evidence of authority, an acknowledgment of a partnership debt by an *ex-partner*, after the dissolution of partnership, is not binding on any *ex-partner* other than the one making it. Where, however, an *ex-partner* is authorised to collect the outstandings and pay all the debts of the partnership, such authority includes the lesser power of acknowledging debts. [p. 676, col. 2; p. 678, col. 2.]

Second appeal against the decree of the Court of the Subordinate Judge of Ramnad in Appeal Suit No. 527 of 1912, preferred against that of the Court of the District Munsif of Satur in Original Suit No. 1308 of 1911.

FACTS.—A partnership, consisting of two individuals (the 1st and 2nd defendants), was dissolved in 1906. As the assets and liabilities could not be divided then and there, one of the *ex-partners* (1st defendant) was authorised by the other (the 2nd defendant) to collect the outstandings and pay all the debts. On 27th May 1909 the 1st defendant acknowledged a debt due by the partnership in favour of the plaintiffs. The present dispute is whether such acknowledgment by the

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1st defendant is binding on the 2nd defendant.

This second appeal first came on for hearing before Ayling and Hannay, JJ.

Mr. B. Sitarama Rau, for the Appellants:—The acknowledgment is binding on the 2nd defendant, because it was made in the course of winding-up of the partnership. The evidence of the 2nd defendant himself shows that the 1st defendant was authorised to acknowledge the debt (evidence referred to). The authority to adjust an account of business, necessarily implies one to acknowledge a debt. See Story on Agency, paragraph 138, and *Kondamodalu Linga Reddi v. Alluri Sarvarayudu* (1).

Messrs. C. V. Ananthakrishna Aiyar and P. S. Vaidyanatha Aiyar, for the Respondent:—Even in the case of going concerns, an express authority to acknowledge liability is required. See *Valasubramania Pillai v. Ramanathan Chettiar* (2) and *Sheik Mohideen Sahib v. Official Assignee of Madras* (3). A fortiori, in the case of a dissolved partnership express authorisation is essential. The evidence pointed out by the other side does not show any such authorisation. The 2nd defendant expressly says that he did not so authorise. The Subordinate Judge has found that there was no express authority. The acknowledgment is, therefore, not binding on the 2nd defendant.

Mr. B. Sitarama Rau, in reply:—*Valasubramania Pillai v. Ramanathan Chettiar* (2) and *Sheikh Mohideen Sahib v. Official Assignee of Madras* (3) are doubted in *K. R. V. Firm v. Sathayavada Sitharama Swami* (4).

This second appeal coming on for hearing the 8th of September 1914, and having stood over for consideration till the 16th September 1914, the Court (Ayling and Hannay, JJ.) delivered the following

JUDGMENT.—The only question for decision in this appeal is, whether the acknowledgment of liability by the 1st defendant on 27th May 1909 is binding on the 2nd defendant. The original liability was admittedly incurred on account of a partnership between the 1st and the 2nd defendants; but this partnership had ceased in 1906. It has

been held in two cases in this Court, *Valasubramania Pillai v. Ramanathan Chettiar* (2) and *Sheik Mohideen Sahib v. Official Assignee of Madras* (3), that a part-payment or acknowledgment by one partner of a going concern will not bind another partner (so as to save limitation) in the absence of evidence of authorisation. Mere proof of the partnership would not be sufficient. In a more recent case, *K. R. V. Firm v. Sathayavada Sitharama Swami* (4), Wallis, J., expresses doubts of the correctness of these rulings, and appears to hold that authorisation might be presumed from the ordinary course of partnership business. But, however this may be, such a presumption could hardly be drawn in the case of an acknowledgment made after the dissolution of partnership. In such a case, it seems to us clear that express evidence of authority must be forthcoming, if the acknowledgment is to be held binding on any ex-partner, except the one who made it. The presumption which Wallis, J., would draw in the case of existing partnerships could not be applied to a case like the present.

It was argued before us that such evidence was forthcoming in the deposition of the 2nd defendant himself. This runs as follows:—

"After we separated, I did not authorise the 1st defendant to sign promissory notes for settlement of accounts on behalf of me also....."

"Cross-examination:—.....The 1st defendant said that the assets and liabilities could not be divided then and there, that he would himself collect outstandings and pay off liabilities and that we may divide the balance. I agreed to this....."

"Re-examination:—.....I then allowed the 1st defendant to collect outstandings and pay off creditors but did not authorise him to renew liabilities."

Regarding this evidence, the Subordinate Judge simply remarks that no authorisation to acknowledge debts is to be found in it. We must understand him to mean that although he does not disbelieve the evidence in so far as it favours the plaintiffs (which he could hardly do, seeing it is that of the 2nd defendant himself), he does not find anything in it which, if accepted, would amount to an authority to acknowledge liability. The

(1) 6 Ind. Cas. 407; 34 M. 221; 8 M. L. T. 105; (1910) M. W. N. 453; 20 M. L. J. 808.

(2) 2 Ind. Cas. 309; 32 M. 421; 5 M. L. T. 102.

(3) 11 Ind. Cas. 332; 35 M. 142; (1911) 1 M. W. N. 347; 9 M. L. T. 473.

(4) 21 Ind. Cas. 684; 37 M. 146; 25 M. L. J. 501.

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appellants' Vakil argues that he has overlooked the principle enunciated in Story on Agency, paragraph 138, and quoted with approval in *Kondamodali Linga Reddi v. Alluri Sarvarayudu* (1), that "where an agent is authorised to pay money for work done for his principal, or where he is referred to, to settle and adjust any account or business, his admissions of the existence of the debt, and of its validity, will be sufficient to take the case out of the Statute of Limitations."

We do not think the Subordinate Judge has weighed the evidence from this point of view and we feel constrained to call for a finding on the following

Issue :—

"Was the 1st defendant expressly or impliedly authorised by the 2nd defendant at the time of dissolution of partnership, or afterwards, to acknowledge liability for the outstanding debts of the firm?"

The findings should be submitted within six weeks from this date and seven days will be allowed for filing objections.

In compliance with the order contained in the above judgment, the Subordinate Judge of Ramnad submitted the following

FINDING.—In this appeal I am called upon to submit a finding upon the following issue :—

"Was the 1st defendant expressly or impliedly authorised by the 2nd defendant at the time of the dissolution of partnership, or afterwards, to acknowledge liability for the outstanding debts of the firm?"

2. The burden of proving this issue lies on plaintiffs, and the only evidence upon which reliance is placed is that of 2nd defendant. In the judgment of the High Court in which a finding is called for, it is stated that in the case of an acknowledgment made by one partner after dissolution of partnership, "*express evidence of authority* must be forthcoming, if the acknowledgment is to be held binding on any *ex-partner*, except the one who made it." Reading the evidence of the 2nd defendant, I do not find in it any *express authority* given by him to first defendant to acknowledge debts. In his examination-in-chief he clearly says that he did not authorise the 1st defendant to sign pro-notes or settlement of accounts on behalf of him also. In cross-examination, he says that he agreed to 1st defendant's proposal to collect

outstandings and pay off liabilities. Even here he does not appear to have been asked, and certainly does not say, that 1st defendant wanted authority to acknowledge debts and that he agreed to his doing so. And in re-examination he expressly says that he did not authorise him to renew liabilities.

3. There is, therefore, to use the words of their Lordships found in the judgment calling for a finding, no "*express evidence of authority.*"

4. I am called upon to weigh the evidence from the point of view laid down in the following passage: "Where an agent is authorised to pay money for work done for his principal or where he is referred to to settle and adjust any account or business, his admissions of the existence of the debt, and of its validity, will be sufficient to take the case out of the Statute of Limitation."

5. I understand this passage to mean that authority to settle and adjust any account or business implies an authority to acknowledge debts. Even if such be the case, such an authority cannot be implied from 2nd defendant's statement in cross-examination to the effect that he agreed to 1st defendant's proposal that he should "himself collect outstandings and pay off liabilities." The 2nd defendant never agreed to 1st defendant *settling and adjusting any account or business*; he simply agreed to his collecting outstandings and paying off liabilities. And from an authority to collect outstandings and pay off liabilities, a power to acknowledge liabilities cannot be implied. It may be otherwise if a general power to settle and adjust a business is given, but such is not the case here. I may also state that no case of agency was set out in the plaint, and that 2nd defendant was sought to be bound by 1st defendant's acknowledgment, as they were partners.

6. That 2nd defendant would not have given 1st defendant a general authority to settle and adjust accounts is apparent from the fact that under the award, Exhibit II, both the partners are to collect the outstandings and pay off the debts.

7. I, therefore, find the issue in the negative.

[The second appeal came on for final hearing after the return of the finding on 5th August 1915.]

HOE HIN v. BALTHAZAR.

Mr. B. Sitarama Rau, for the Appellants:—The Subordinate Judge has misunderstood the order calling for the finding. The authority to collect outstandings and pay debts does really include one to acknowledge debts. See *Kondamodalu Linga Reddi v. Alluri Sarvarayudu* (1) and Story on Agency, paragraph 138. Further, he does not reject the evidence of the 2nd defendant. The finding cannot, therefore, be supported.

Messrs. C. V. Ananthakrishna Aiyar and P. S. Vaidyanatha Aiyar, for the Respondent:—The Subordinate Judge has found that the authority to pay debts is limited to the amount actually collected.

JUDGMENT.—We cannot accept the finding of the Subordinate Judge, who does not appear to have properly appreciated the remarks in our order calling for it.

He does not reject the evidence to the effect that the 1st defendant was authorised to pay outstanding debts of the firm: and we can find no support for Mr. Ananthakrishna Aiyar's suggestion that he found this authority to be limited by the amount of collections. There is nothing to indicate that this aggregate of debts paid and acknowledged exceeded the aggregate of collections of assets.

We must, therefore, take it as proved that the 1st defendant was authorised to pay all debts; and from this, the lesser power of acknowledging debts is to be inferred.

We modify the decree of the lower Appellate Court by declaring the 2nd defendant also liable for the decree amount. The 2nd defendant will bear the plaintiffs' (appellants') costs in this second appeal.

Decree modified.

LOWER BURMA CHIEF COURT.
CIVIL REVISION PETITION NO. 153 OF 1914.
March 4, 1915.

Present:—Mr. Justice Hartnoll.

HOE HIN—DEFENDANT—APPLICANT
versus

S. BALTHAZAR AND OTHERS—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XL, r. 1—Receivers—Powers, specification of.

Where Receivers were appointed but no mention of the powers conferred upon them was made in the order of appointment:

Held, that it could not be assumed by implication that they were appointed with all the powers allowed by Order XL, rule 1.

Application against the judgment and decree of the Small Cause Court Judge of Rangoon, dated the 31st August 1914 in Civil Regular No. 5631 of 1914.

Mr. Bagram, for the Applicant.

Mr. Gregory, for the Respondents.

JUDGMENT.—The objection that the Receivers could not sue without the leave of the Court must, I think, prevail. The order appointing Mr. S. Balthazar Receiver merely appointed him Receiver and did not specify any power for him. It cannot be assumed by implication that he was appointed with all the powers allowed by Order XL, rule 1. The order appointing Mr. M. Joachim and Mr. B. C. Balthazar to act jointly with Mr. S. Balthazar is to the same effect as the order appointing the latter. The order, therefore, gives no specific power to any of the respondents to sue. It could have done so as Order XL, rule 1 (1) (d), allows such power to be conferred on a Receiver. As regards the cases cited by the learned Small Cause Court Judge, that of *Jugat Tarini Dasi v. Naba Gopal Chaki* (1) was concerned with a Receiver appointed with full powers. In the other two cases quoted by him the Receiver was appointed to let and sell and exercise other powers.

Here he was given no powers at all except to receive.

The decree passed by the learned Judge is modified and instead thereof a decree for Rs. 66 is passed against applicant. As regards costs I order that respondents do pay applicant's costs in both Courts.

Decree modified.

(1) 34 C. 305 at p. 312; 5 C.L.J. 270.

In re ARUNACHALAM CHETTIAR.

MADRAS HIGH COURT.

SECOND CIVIL APPEALS NOS. 1553 TO 1597
OF 1915.

September 1, 1915.

Present:—Mr. Justice Sadasiva Aiyar and
Mr. Justice Napier.

In re A. L. A. R. R. M. ARUNACHALAM
CHETTIAR, Zemindar of DEVAKOTTAH,
THROUGH HIS AGENT, D. MINAKSHI-
SUNDARAM AIYAR—PLAINTIFF—

APPELLANT.

Landlord and tenant - Dry area left waste without tenant's negligence—Tenant if liable to pay rent therefor—Madras Estates Land Act (1 of 1908), s. 4, if disentitles tenant to claim exemption from payment—Practice—Procedure—Suit against dead man—Amendment of plaint into one as against legal representative, if allowable.

Section 4 of the Madras Estates Land Act does not debar a tenant from claiming that by agreement and custom he is not liable to pay rent for the portion of his holding left fallow.

Segu Rowthen v. Alagappa Chetty, 22 Ind. Cas. 884; 26 M. L. J. 269; (1914) M. W. N. 340, followed.

A Court has no jurisdiction to allow the amendment of a plaint directed against a dead man into one against his legal representative and decide the suit as brought against the latter instead of the dead man.

Veerappa Chetty v. Tindal Ponnem, 31 M. 86; 17 M. L. J. 551; 3 M. L. T. 12, followed.

Second appeals against the decrees of the District Court of Ramnad at Madura, in Appeal Suits Nos. 109, 108, 110, 159, 112, 113, 116 to 119, 121 to 123, 160, 124, 126, 128 to 131, 133 to 139, 161, 140, 162, 141, 163, 142 to 145, 147 to 151, 158, 152, 155 to 157, 172 and 174 to 177 of 1914, preferred against the decrees of the Court of the Deputy Collector of Devakotta in Summary Suits Nos. 4, 3, 5, 7, 8, 12 to 15, 18, 21 to 23, 51, 57, 408, 410, 412, 420 to 422, 427, 429, 430, 447 to 449, 452 to 455, 457 to 460, 492, 502, 505, 506, 518, 19, 25, 423, 424 and 428 of 1912, respectively.

FACTS of the case appear from the judgment.

Mr. A. Krishnaswami Aiyar, for the Appellants:—The landlord is entitled to levy rent on a portion of the holding allowed to remain fallow. This right cannot be deprived by custom or contract. *Vide* section 4, Madras Estates Land Act, 1 of 1908.

JUDGMENT.—Two questions are common to most of these second appeals and they are:

(1) Whether the zemindar (appellant) is

entitled to charge 12 fanams per kurukkam on dry lands as rent or only to 10 fanams?

(2) Whether he is entitled to levy rent on the dry area left waste without the tenant's negligence?

The first question has been decided as a question of fact by the District Judge and we can see no grounds for interference on second appeal with that finding, which has been based on a consideration of the whole evidence.

On the second question the appellant's learned Vakil (Mr. A. Krishnaswami Aiyar) relied on section 4 of the Estates Land Act for his contention that neither custom nor contract could deprive the zemindar of his right to charge rent on the area left uncultivated. But the case reported as *Segu Rowthen v. Alagappa Chetty* (1) and the decisions in Second Appeals Nos. 1244 and 1245 of 1913 of this Court have held that agreements and customs entitling the tenants to claim non-liability for rent on the area left fallow can be successfully set up notwithstanding section 4 of the Estates Land Act.

In one of the second appeals before us the question is whether, when the plaint was directed against a dead man and the plaint was afterwards amended as a plaint against his living legal representative, the Court had jurisdiction to treat the suit as one brought against the legal representative and decide it on that footing. *Veerappa Chetty v. Tindal Ponnem* (2) is clear authority against the appellant and we follow it.

There are additional questions involved in those second appeals which have been filed against the decisions in Appeal Suits Nos. 128, 146, 158, 159 to 163 and 118 of 1914 on the file of the District Court. But those questions are questions of fact, namely, whether the tenants had raised second crops on their lands, whether certain lands are dry or wet, and what is the proper rate for plan-tain cultivation. They have all been decided on admissible evidence against the appellant.

We, therefore, dismiss the second appeals.

(1) 22 Ind. Cas. 884; 26 M. L. J. 269; (1914) M. W. N. 340.

(2) 31 M. 86; 3 M. L. T. 12; 17 M. L. J. 551.

ASHA BIBI v. NURUDDIN.

LOWER BURMA CHIEF COURT.
SECOND CIVIL APPEAL No. 194 OF 1914.

June 8, 1915.

Present:—Mr. Justice Young.

ASHA BIBI, BY HER AGENT, AGA SYED
ISMAIL SHERAZEE—DEFENDANT
—APPELLICANT—APPELLANT

versus

NURUDDIN *alias* MG. GYI—PLAINTIFF—
RESPONDENT.

*Civil Procedure Code (Act V of 1908), s. 144—
Restitution—Costs and mesne profits—Restitution,
application for, nature of.*

An application under section 144 of the Code of Civil Procedure (Act V of 1908), for restitution is not in the nature of an application to execute any decree and, therefore, Article 181 of Schedule I of the Limitation Act applies to such an application. [p. 681, col. 1.]

Appeal against the judgment and decree of the Divisional Judge of Hanthawaddy, dated the 11th March 1914, in Civil Appeal No. 5 of 1914, confirming that of the Sub-Divisional Court of Kyauktan.

Mr. P. N. Chari, for the Applicant.

Mr. Munshi, for the Respondent.

JUDGMENT.—In Suit No. 55 of 1906 the respondent sued the applicants for specific performance of a contract to sell and for delivery of certain immoveable property.

His suit was dismissed, but the decree was reversed in first appeal and plaintiff-respondent went into possession. The applicant then appealed to the Chief Court with the result that the original decree was restored.

This was on the 12th December 1907.

On 31st January 1910, applicant filed an application for execution of his decree as regards costs and on 22nd January 1912 filed a suit for mesne profits enjoyed by the respondent while in possession.

This was dismissed by virtue of section 144 of the Code of Civil Procedure, and he then on 7th April 1913 applied under the same section for an order granting the same relief.

The question is, whether this application is an application for which no period of limitation is provided elsewhere in Schedule I of the Limitation Act and falls under Article 181 of that Schedule in which case it would admittedly be barred, or whether it is an application for the execution of a decree within the meaning of Article 182 of the Schedule to the Limitation Act in which case the prior application for execution would admittedly save it.

Various cases were cited by Counsel on the point, which was a vexed one even under section 583 of the old Code, but this is an application under section 144 of the present Code, and the alterations introduced by the Legislature have been so great that unless we are to consider them meaningless and objectless which is impossible, *cf.*, *Ram Kanai Ghosh v. Raja Sri Sri Hari Narayan Singh* (1). These older authorities are only useful as pointing out the divergencies of opinion, to put an end to which it may be assumed was one of the reasons for the change of language. In the first place the position of the section is altered. In the old Code the section relating to these applications found place in Chapter XLI, which deals with appeals from original decrees. Its corresponding place in the new Code should, therefore, have been in Part VII, but as a matter of fact it is placed in Part XI which deals with miscellaneous matters. Its connection, therefore, with the reversing decree is not so obviously close as it was under the former Code, and in proportion as its connection weakens or vanishes, the argument that it is an execution of that decree weakens or falls. Then, too, section 583 of the old Code was the section that provided how Appellate Court decrees should be executed. Now we have sections 37 and 38 providing how appellate decrees are to be executed and placed within the appropriate Chapter dealing with execution. There is not a word about execution in section 144, all reference is studiously omitted. Section 583 dealt chiefly with execution and referred to persons entitled "under a decree" to any benefit—words that seem to me to lend colour to the argument that the section only applied when the relief applied for was expressly granted by the decree. In the new section those words are also studiously omitted. The changes cannot, in my opinion, have been unintentional and the combined result, I think, is that where, as here, the decree does not expressly order restitution or other relief, but such is the necessary *sequela* of the decree, any person entitled—no longer a party only—as under the former Code may make a miscellaneous application on which the Court may pass such orders as it may think fit, and

(1) 2 C. L. J. 546 at p. 553.

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that this is not an application to execute the decree.

The present application would, therefore, fall under Article 181 of the Schedule of Limitation Act and be out of time. Consequently the appeal is dismissed. I make no order as to costs.

Appeal dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM ORDER No. 16 OF 1915.

April 28, 1915.

Present:—Sir Lawrence Jenkins, Kt., Chief Justice, Mr. Justice Woodroffe and Justice Sir Asutosh Mookerjee, Kt.

CHAITRAM RAMBILAS—RESPONDENTS

—APPELLANTS

versus

BRIDHICHAND KESRICHAND—

PETITIONERS—RESPONDENTS.

Arbitration—Contract—Party agreeing to submit to arbitration of Bengal Chamber of Commerce—Rules of Chamber, if imported into contract—Party, if bound by rules.

Where a party to a contract agrees to submit to an arbitration of the Bengal Chamber of Commerce, the rules of the Chamber are imported into the contract and that party is bound by those rules. [p. 681, col. 2.]

Appeal against the order of the Hon'ble Mr. Justice Imam sitting on the Original Side of the High Court, dated the 8th March 1915.

FACTS appear from the following judgment of

IMAM, J.—This is an application by a firm of merchants, Bridhichand Kesrichand, asking the Court to set aside on the ground of misconduct an award, dated the 29th August 1914, purporting to have been made by the Bengal Chamber of Commerce, or to speak more accurately by arbitrators nominated by the Chamber. The respondents are also merchants carrying on business under the name and style of Chaitram Rambilas.

On the 2nd October 1913 by a contract bearing No. 1/121, the petitioners agreed to sell, and the respondents agreed to purchase, 500 bales of Damukdia Jute weighing $3\frac{1}{2}$ maunds each (or $1\frac{1}{2}$ maunds optional) guaranteed to yield after cutting 40 per cent. good sacking warp, shipment within

one month from date, at 12 per maund delivered at the *ghat* of the buyers' mills. The contract provided an arbitration clause that runs thus:—

"Any dispute arising out of this contract shall be referred to the arbitration of the Bengal Chamber of Commerce, whose decision shall be accepted as final and binding on both parties to this contract."

On the 11th and 13th October 1913 in fulfilment of the contract the petitioners delivered to the respondents 1,200 half bales in two lots of 551 and 649 at the Central Jute Mills and received 90 per cent. of the price in cash. Thereafter a dispute arose between the parties as to the quality of the jute supplied. In April 1914 the respondents under the arbitration clause of the contract referred the dispute to the arbitration of the Bengal Chamber of Commerce. The reference having been made, the Registrar of the Bengal Chamber of Commerce Tribunal of Arbitration called upon the petitioners to submit a statement of their case. After some correspondence that passed between the petitioners' Attorneys, Messrs. Pugh & Co., and the Registrar, the petitioners wrote a letter to the latter on the 4th May 1914 of which the portion material to the question before me runs thus:—"We regret to say with all respect to your Tribunal that this matter should be heard by Court, as the matter involves point of law and is one in which evidence has to be taken. The jute in question was sold by us under the above contract as 40 warp, but we are informed that the same was sold and delivered as 60 warp to Messrs. Andrew Yule & Co." In reply to that letter the Registrar on the 13th May 1914 wrote to the petitioners that the dispute must proceed to arbitration in accordance with the provisions of the contract. On the 14th May 1914 the petitioners proceeded to state their case, at the same time mentioning that they had no objection to put forward their claim before the Tribunal as long as evidence was taken which was, according to their contention, most necessary. The arbitrators appointed by the Chamber then proceeded to adjudicate upon the case. The petitioners' complaint is that the arbitrators refused to allow them to adduce evidence to establish their contentions

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and proceeded with the arbitration according to the Rules of the Tribunal of Arbitration established by the Bengal Chamber of Commerce, and not according to the law under the Indian Arbitration Act. The petitioners' contention is that the arbitration clause in the contract is merely an agreement to abide by the decision of the Chamber without accepting to be governed by the wide powers of that body as expressed in their rules. On behalf of the respondents the authority of Mr. Justice Harington's decision in *Ganges Manufacturing Co. Ltd. v. Indra Chand* (1) is cited. In that case the contract provided a similar arbitration clause and that learned Judge dealing with it said :

"They chose to propose that their disputes should be disposed of by the Bengal Chamber of Commerce. They chose this Association. It is one of the duties of this Association to dispose of such disputes by arbitration according to its rules. Having offered to be bound by decision of this Association, they cannot now be heard to say that they are not bound by the rules of the Tribunal of their choice."

While according to that decision all due weight and respect, I am not prepared to agree with it on this point. In the arbitration clause no mention of the rules has been made and no assent to be governed by any procedure that the Chamber might choose to adopt has been signified. The Rules of the Chamber empower the Tribunal to deal with a case unfettered as they think best, and no obligation has been cast upon them to examine witnesses, even if the parties wish it, or to conform to the ordinary methods of arbitration. Under the agreement the parties chose to have the Chamber to arbitrate on any dispute between them, but they nowhere said that they consented to the exercise of such a provision in the agreement. The Chamber cannot be credited with any higher powers than any other arbitrator. The decision of Mr. Justice Harington was cited before Mr. Justice Chaudhuri in *Nabin Chandra Saha v. Sinclair Murray & Co.* (2) in support of a contention similar to the one pressed by the present respondents, and that learned Judge expressed his disagreement with the proposition. The refusal of

the Tribunal to allow the petitioners to adduce evidence vitiates the award, and I accordingly set it aside. The respondents will pay the costs of this application.

Messrs. N. Sircar and H. C. Mozumdar, for the Appellants.

Messrs L. Pugh and C. C. Ghose, for the Respondents.

JUDGMENT.

JENKINS, C. J.—This is an appeal from an order of Mr. Justice Imam made apparently under section 4 of the Indian Arbitration Act. There was an arbitration followed by an award. But it is alleged that there was misconduct on the part of the arbitrators; and it is on the ground of this misconduct that the application was made to the Court and succeeded before the learned Judge. The misconduct suggested was the failure to hear evidence. Whether there was that failure or not is a matter in dispute.

But the way in which the case was presented to the learned Judge and in which he understood it appears from this passage in the judgment: "The petitioners' complaint is that the arbitrators refused to allow them to adduce evidence to establish their contentions and proceeded with the arbitration according to the Rules of the Tribunal of Arbitration established by the Bengal Chamber of Commerce, and not according to the law under the Indian Arbitration Act. The petitioners' contention is that the arbitration clause in the contract is merely an agreement to abide by the decision of the Chamber without accepting to be governed by the wide powers of that body as expressed in their rules." It is apparent, therefore, from this that it was admitted that the misconduct depended upon the alleged non-applicability of the rules governing an arbitration by the Bengal Chamber of Commerce. I cannot attribute any other meaning to the words of the judgment which I have just quoted.

The first question, therefore, which we have to consider is whether these rules were imported into the contract. Even without the assistance of any authority it appears to me that these rules were imported into the contract, and that without such importation the contract would be insensible so far as it related to arbitration. For it would involve the ridiculous position that every

(1) 33 C. 1169.

(2) 25 Ind. Cas. 951.

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member of the Chamber of Commerce would have to sit on the arbitration. So that on the contract itself I should have felt no doubt. But apart from that there is a very careful judgment of Mr. Justice Harington in *Ganges Manufacturing Co. Ltd. v. India Chand* (1) delivered as far back as the 5th June 1906, where the contract was in the same terms as that with which we are now concerned. The learned Judge came to the conclusion which I have indicated as a correct view of the contract. That decision was certainly binding on the learned Judge, and according to my opinion should have been followed by him. It may not be binding on us in the strict sense. But I think it is entitled to every respect and it agrees with the view I entertain on the subject.

Therefore, it appears to me that on the basis on which this case was argued and conducted before Mr. Justice Imam there was no misconduct because the rules of the Chamber of Commerce were applicable.

It appears to us unnecessary to consider other matters. But I cannot refrain from pointing to the fact that the application, verified and supported in the way it is, forms a most unsatisfactory basis on which to claim relief under section 14 of the Indian Arbitration Act. It is so unsatisfactory that I do not think that there should be a remand.

In my opinion the appeal should be allowed and the application dismissed. The respondents should pay the costs of the hearing before Mr. Justice Imam and before this Court.

WOODROFFE, J.—I agree that the appeal should be decreed. The fact that the Chamber of Commerce has framed rules for its arbitration is, I should have thought, well known to every trader in Calcutta, particularly to those accepting contracts stipulating for arbitration by the Chamber of Commerce. However this may be, I entirely agree with the judgment of Mr. Justice Harington in the case referred to by the Chief Justice that if a party to a contract has agreed to submit to an arbitration of the Bengal Chamber of Commerce, he must be held to be bound by the rules of that Chamber.

MOOKERJEE, J.—I agree with the Chief Justice.

Appeal allowed.

MADRAS HIGH COURT.

CITY CIVIL COURT APPEAL NO. 1 OF 1914.

April 15, 1915.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Napier.

THE CORPORATION OF MADRAS—
DEFENDANT—APPELLANT

versus

MOHAN LAL SOWCAR AND OTHERS—

PLAINTIFFS—RESPONDENTS.

Madras City Municipalities Act (III of 1904), ss. 3 cl. (27), 248 (1)—Erection of sunshade overhanging drain—Drain, if part of "public street"—Powers of President.

Under the term, "public street" as defined in section 3 clause 27 of the Madras City Municipalities Act (III of 1904), the space covered by a drain is included and is vested in the Municipality even if it be private property. [p. 683, col. 2.]

Mothe Achayya Garu v. Municipal Council of Ellore, 4 Ind. Cas. 828; 7 M. L. T. 66; 19 M. L. J. 757, followed. Where a sunshade overhangs such drain, the President can, under section 248 (1) of the Act, treat it as a "projection" and remove it after notice to the owner. To exercise his powers under that section, it is not necessary for the President to prove that the sunshade interferes "with the repairing and proper management of the drain." [p. 684, col. 1.]

Appeal against the decree of the Court of the City Civil Judge of Madras, in Original Suit No. 473 of 1911.

Mr. P. Doraiswami Aiyangar, for the Appellant.

Messrs. T. Ethiraja Mudaliar and Muhammad Ibrahim Sahib, for the Respondents.

JUDGMENT.—The finding of the lower Court that the plaintiff land (Exhibit DD) belongs to the plaintiff subject to certain rights in the Municipality, cannot and is not seriously attacked by the appellant's learned Vakil. Under the definition of "public street" in section 3, clause 27, of the Presidency Municipalities Act, the space covered by the drains is included in the public street vested in the Municipality. The sunshade of the plaintiff's house overhangs this drain space forming part of the public street. Section 248 (1) of the Act empowers the President to give notice to the owner of any building "to remove any projection made against or in front of such building in any public street." Assuming without deciding the phrase "in any public street" in the section qualifies the word "building" and not the word "projection" [see *Mothe Achayya Garu v. Municipal Council of Ellore* (1)], we think that the word

(1) 4 Ind. Cas. 828; 19 M. L. J. 757; 7 M. L. T. 66.

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projection" itself and the context imply that the thing which is indicated by that word must project into or over the space covered by the public street. The sunshade in question admittedly does project over the drain space and hence it is a "projection" which the President is entitled to remove after notice. We are unable to accept the view of the learned City Civil Judge that if the sunshade does not interfere with "the repairing and proper management of the" drain, the President is not empowered to have it removed. The words of section 248 (1) do not fetter the President's powers in this respect and only require that the thing ordered to be removed should be a "projection" as construed above.

We, therefore, modify the decree of the learned City Civil Judge by directing the deletion of the following words from that decree, (a) from the words "either to direct" up to "plan or", (b) the words "or the sunshade" and (c) the paragraph beginning "and it is ordered and decreed". The parties will bear their respective costs in this appeal.

Appeal partly allowed. Decree modified.

CALCUTTA HIGH COURT.

CIVIL RULE NO. 431 OF 1914.

May 25, 1914.

Present:—Mr. Justice Woodroffe, and

Mr. Justice D. Chatterjee.

ADHAR CHANDRA GOPE—PETITIONER
versus

PULIN CHANDRA SHAHA—OPPOSITE
PARTY.

Civil Procedure Code (Act V of 1908), ss. 104 (h), 42, 145, 47—Surety—Arrest—Appeal.

A decree of a Small Cause Court was sent for execution to the Court of a Munsif. In execution of that decree the judgment-debtor was arrested and detained in the civil prison, but he was released on the petitioner standing his surety. On his failure, however, to satisfy the condition of his release, the petitioner, his surety, was arrested in execution of the decree and directed to be detained in the civil prison. The petitioner's appeal was rejected by the District Judge as forbidden by section 104, clause (h), Civil Procedure Code:

Held, that although an order directing the arrest of a person in execution was excepted from appeal

by clause (h) of section 104, Civil Procedure Code, sections 42, 47 and 145 of the Code gave the petitioner a right of appeal. [p. 684, col. 2.]

Rule against the order of the District Judge of Dacca, dated the 2nd April 1914, affirming that of the Munsif of Dacca, dated the 11th February 1914.

Babu *Rajendra Chandra Guha*, for the Petitioner.

Babu *Gopal Chandra Das*, for the Opposite Party.

JUDGMENT.

WOODROFFE J.—The first question which we have to decide in this case is whether or not there was an appeal from the Munsif to the District Judge. The latter has held that there is not.

We cannot go into the merits of this case as all the facts are not before us. Therefore, I limit my observations to the question whether the applicant was entitled to be heard before the District Judge.

I think he has made out his right of appeal to the District Judge, because although section 104¹ clause (h), excepts from appeal an order directing the arrest of a person in execution of a decree, we must also look at the other sections of the Code. Under section 42, the Court executing a decree sent to it has the same power in executing such decree as if it had been passed by itself, and the order in executing such decree is subject to the same rules in respect of appeal as if the decree had been passed by itself. In the present case, the decree of the Small Cause Court was sent for execution to the Court of the Munsif. Now there would have been an appeal from the order of the Munsif. Then, according to section 42, there would be an appeal from his order as a Court executing a decree. Further, under the provisions of section 145 of the Code, a surety is for the purposes of appeal to be deemed a party within the meaning of section 47 and an order under section 47 is an appealable decree.

Therefore, I think that the Rule must be made absolute, in so far as the order of the District Judge refusing to hear the appeal is hereby set aside, and the matter must be re-heard by him.

Pending the hearing of the appeal before the lower Appellate Court the petitioner will

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be released on the same security as before.

The applicant is entitled to his costs, one gold *mohur*.

D. CHATTERJEE, J.—I agree.

Rule made absolute.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 2859 OF 1913.

August 31, 1915.

Present:—Mr. Justice Ayling and
Mr. Justice Tyabji.

MANIKA MUDALI AND ANOTHER—
DEFENDANTS NOS. 2 AND 3—APPELLANTS

versus

MUTHACHI KAVANDAN *alias*
NALLAMA KAVUNDAN—PLAINTIFF—
RESPONDENT.

Hindu Law—Gift to wife—Presumption—Life-estate—Use of words sarva swathanthrathudan, effect of.

In the absence of a specific provision for alienation gifts by a husband to a wife of immoveable property even though accompanied by express words of inheritance, are not alienable. Even the use of such words as '*sarva swathanthrathudan*' does not give her an enlarged right. [p. 685, col. 2.]

Per Tyabji, J.—The use of such words as '*malik*' and "in the same way as I am the owner" indicates intention to confer an absolute estate. [p. 686, col. 1.]

Koonjbehari Dhur v. Premchand Dutt, 5 C. 684; 5 C. L. R. 561; *Seshayya v. Narasamma*, 22 M. 357 at p. 359; *Bhujanga Rau v. Ramayamma*, 7 M. 387; 8 Ind. Jur. 238; *Jogeswar Narain Deo v. Ram Chandra Dutt*, 23 C. 670; 23 I. A. 37; *Hanilal Pramlal v. Bai Reva*, 21 B. 376, referred to.

Second appeal against the decree of the Court of the Subordinate Judge of Trichinopoly, in Appeal Suit No. 55 of 1913, preferred against that of the Court of the District Munsif of Nainakkal, in Original Suit No. 777 of 1911.

Mr. S. Krishnamachari, for the Appellants.

Messrs. T. V. Gopalaswami Mudaliar and A. Ganesa Aiyar, for the Respondent.

JUDGMENT.

AYLING, J.—In this case, both the lower Courts after careful consideration have construed the gift-deed, Exhibit I, as conveying to the donee (the wife of the donor) only a limited interest in the property. I do not feel justified in coming to a different conclusion. The general rule of construction is undoubtedly in favour of the

view of the learned Subordinate Judge. As Mr. Mayne puts it, "gifts by a husband to a wife of immoveable property, even though accompanied by express words of inheritance, are not alienable unless distinctly declared to be so." In this case, there is no specific provision for alienation, and the special clause relied on by the appellants is simply the words '*sarva swathanthrathudan*'; and I am not satisfied that they are sufficiently clear and specific to outweigh the usual presumption and present the donee with a full title. I have considered the numerous reported cases quoted by both sides in which various documents of different wording have been interpreted by Courts. The only case in which this phrase occurs is an unreported case, Appeal No. 26 of 1896, in which they were re-inforced by another clause, "without any one else having any right to the property." The learned Judges also commented on the improbability of the testator employing so much verbiage to confer no larger an estate than would have come to the beneficiary if he had died intestate. I do not think the interpretation of the words in that case is of much help now.

I would dismiss this second appeal with costs.

TYABJI, J.—The ordinary rule of law is that "unless a different intention is expressed or necessarily implied, a transfer of property passes forthwith to the transferee all the interest which the transferor is then capable of passing in the property, and in the legal incidents thereof." (Section 8 of the Transfer of Property Act, paragraph 1. See also section 82 of the Indian Succession Act.) The authorities are clear that ordinarily a gift to a Hindu lady implies a different intention, *viz.*, that the lady takes not a full estate with power of alienation, etc., but merely a woman's limited estate, and so when all that appears is that there is a transfer and it is in favour of a Hindu lady, she takes a limited estate. When, however, there are words showing that a larger estate was intended to be given, that intention is given effect to.

There are numerous cases in which similar points have come up for decision. Thus where the power to adopt was given and where together with immoveable property moveable property was also given and the

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rights to the latter were expressly limited, the limitation has been attached to the immoveable property also [*Koongbehari Dhur v. Premchand Dutt* (1) and *Seshayya v. v. Narasamma* (2)]: similarly, where the wife and adopted son are jointly given the property [*Bhujanga Rau v. Ramayamma* (3)], without express words that the wife has powers of alienation, etc. [*Jogeswar Narain Deo v. Ram Chandra Dutt* (4)].

On the other hand, when the word "malik" which means (full) owner was used, the Privy Council held that that implied that the full estate was intended to be conveyed and was sufficient to displace the inference from the ordinary wishes of a Hindu. The strongest case in favour of the respondent cited to us seems to me to be *Harilal Pramlal v. Bai Rewa* (5). There the Judges were very doubtful, the words being: "Just as I am the owner of the property at present, in the same way after my death my wife Ujam is the owner," but the decision proceeded at least in part on the fact that the other circumstances made those words ambiguous, and in the lower Courts all that was suggested that they meant was that the wife was to be kept in joint possession, and not that the wife took the full interest. The Court did not consider itself justified in reversing the decision of the lower Courts. In the present case, we have the express words "you and your heirs (offspring) should enjoy the lands with all rights." The operative part of the deed is very short: "As I have married you, I have given you this day as a matter of favour all the dry and wet lands belonging to me and worth Rs. 400. You must yourself pay the principal and interest on the mortgage deed for Rs. 100 in respect thereof executed by me in favour of Unniyur Veerappa Udayan and you and your heirs should enjoy the lands with all rights." I see great difficulty in interpreting the reference to the offspring and to the enjoyment and to "all rights" if the donee is to have only the limited right of a Hindu female, as has been held by the lower Courts.

I find, however, that both the lower Courts presided over by Hindu Judges have in very careful judgments arrived at a conclusion different from that which I am inclined to take and my learned brother also agrees with their view. I am, therefore, not prepared to hold that that conclusion is wrong and with some hesitation I agree that the second appeal be dismissed with costs.

Appeal dismissed.

CALCUTTA HIGH COURT.

FIRST CIVIL APPEAL No 56 OF 1914.

February 3, 1915.

Present:—Sir Lawrence Jenkins, Kt., Chief Justice, and Mr. Justice Woodroffe.

RAM CHARAN LAW—PLAINTIFF—
APPELLANT

versus

Shahebzadee FATIMA BEGUM AND OTHERS
—DEFENDANTS—RESPONDENTS.

Muhammadian Law—Wakf—Property conveyed on trust—Gift—Condition.

The recital to a deed purporting to be a deed of wakf, said that the executant was desirous of dedicating a certain "estate to the service of Imam Hassan and Imam Hosain and for religious purposes in the manner hereinafter mentioned" and the deed conveyed the estate to certain persons, their heirs, representatives and assigns "upon trust" with the direction that after paying the collection charges and the expenses of repairs etc., the surplus should be applied "in the due and proper observance of the annual Muhammadian festivals of the Muhurram" with the condition that they should not encumber the estate or any part thereof:

Held, that the object of the gift was plain, that the trustees were not donees, that the gift was not vitiated by the condition, that a valid wakf was legally constituted, and that the employment of trustees for the purpose of carrying into effect in no way prejudiced the dedication. [p 687, col. 2.]

Appeal against the judgment of Mr. Justice Imam sitting on the Original Side of the High Court, dated June 15, 1914.

FACTS of the case appear from the judgment of Imam, J., reported in 27 Ind. Cas. 442.

Messrs. B. Chakravarti, B. Lahiri and N. N. Ghattak, for the Appellant.

Messrs. A. Rasul, Zakir Ali and Ashraf Ali, for the Respondents.

JUDGMENT.

JENKINS, C. J.—The question involved in this appeal is whether a Muhammadian lady, Shahebzadee Fatima Begum, had a saleable

(1) 5 C. 684; 5 C. L. R. 561.

(2) 22 M. 357 at p. 359.

(3) 7 M. 387; 8 Ind. Jur. 238.

(4) 23 C. 670 (P. C.); 23 I. A. 37.

(5) 21 B. 376.

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interest in a moiety of premises known as No. 63, Dhurumtolla Street, which the plaintiff claims to have bought in execution of a mortgage-decree in Suit No. 527 of 1908. The suit has been dismissed by Imam, J., and from his judgment the plaintiff has appealed.

The decision of this suit depends upon whether or not this property has been validly dedicated as *wakf* or not. If it has, then the suit must fail. The dedication is said to have been effected by a document of the 16th July 1864. It is in the form of an English indenture and is engrossed to be a conveyance to Fatima Begum and Fyezuddin, their heirs, representatives and assigns, of the entirety of the premises now in suit, upon trust that they, the said Fatima Begum and Fyezuddin, their heirs or representatives or other trustees or trustee for the time being should, from time to time, demise the said hereditaments and premises to such persons or person on such terms and at such rent as they should think fit, and should from time to time appoint such person or persons to act as *sircars* or a *sircar* in the collection of the said rents as they should think fit with full power to discharge such *sircars* or *sircar* and to appoint others or another in his place, and should apply the rents and profits of the said hereditaments and premises, *first*, in payment of the expenses of the collections of the said rents and profits and of the management of the salary of the said *sircars* or *sircar* and otherwise and of the execution of the trust and *next*, in payment of the expenses of the repairs of the said hereditaments and premises and should apply the surplus of the said rents and profits after making the payments aforesaid in the due and proper observance of the annual Muhammadan festival of the Muhurrum. Fatima Begum is the defendant of that name. Fyezuddin is dead, and the other defendants are his representatives. On the 20th of October 1907, Fatima Begum executed a document by which there was expressed to be mortgaged to the plaintiff the half share now in suit, it being recited that she was absolutely seized and possessed of or otherwise well entitled to that half share. It was on the basis of this mortgage that the decree was passed, in execution of which the plaintiff claims to have pur-

chased this half share. Fatima Begum has appeared in the suit and put in a written statement alleging the *wakf* character of the property. She has, however, taken no part in the discussion before Imam, J., or this Court. The other defendants have appeared and contested the plaintiff's claim, contending that the property is *wakf*, or that at any rate what they describe as their moiety is unaffected by the mortgage and consequent sale. It is unnecessary to discuss any technical defect there may be in the form of the suit: the substantial question is, whether there has been a valid dedication or not, and it is on these bases that the case has been fought before us.

The plaintiff has urged many objections to the validity of the *wakf*. The *first* point made is that the gift was to Fatima Begum and Fyezuddin on a condition, and that is inoperative because the Muhammadan Law does not permit a condition to be attached to a gift. The recital to the deed, however, makes clear the executant's purpose, for it runs in these terms: "whereas the said Prince Mahomed Syeduddin is seized of or entitled to the hereditaments and premises hereinafter described for an absolute estate of inheritance and he is desirous of dedicating the same to the service of Imam Hassan and Imam Hossain and for religious purposes in the manner hereinafter mentioned." The object of the gift is plain, and the introduction of trustees is merely the employment of machinery whereby the gift is carried into effect. The trustees are not donees, and it would be far too narrow a view to hold that the gift is vitiated by a condition. Mr. Chakravarti would go the length of contending that all gifts through the instrumentality of trust are bad. It would be difficult to reconcile that view with the language of the High Court and the Privy Council in *Bishen Chand Basawat v. Nadir Hossein* (1). In my opinion, this objection fails, and I hold that the provision in favour of the due and proper observance of the annual Muhammadan festival is not invalidated by the introduction of trustees as part of the machinery for carrying it into effect.

(1) 15 C. 329; 15 I. A. 1; 12 Ind. Jur. 170; 5 Sar. P. C. J. 113.

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But, *then*, it is contended that the disposition does not constitute a *wakf*, and Mr. Chakravarti has relied on the decision of *Delroos Banoo Begum v. Nawab Syad Ashgar Ally Khan* (2) as conclusive in his favour. But this argument appears to me to rest on a misreading of the judgments of the High Court and the Privy Council in that case. The defendant there dedicated the whole of her property in perpetuity and provided that the income derived from the endowment, after the payment of the Government Revenue, should be divided into twenty-eight parts, fifteen parts whereof should be applied to the expenses of the Fatiha of Mahomed and the Imams as well as to those of the first ten days of the Muhurram and of the holy days and the repairs of the *imambara* and the tomb; seven parts should be received by the *amlahs* and servants, whose names should be inserted at the foot of the document in question or any other document bearing the defendant's seal and signature, and which the said servants might have in their possession, some from generation to generation and others as long as they retain service; and the remaining six parts should be received by the *mutwallis*, *i. e.*, the defendant and her co-*mutwalli*. The plaintiffs as members of the Muhammadan community (in the above case) sued the defendant as the *mutwalli* of the endowment for her removal from that office, on the ground only of misfeasance with the *wakf* estate. Leave to institute the suit was obtained under Act XX of 1863. It was objected that there was no jurisdiction to grant leave as the alleged endowment did not come within the scope of the Act, that there was no intention of creating an absolute *wakf*, and that the defendant was not aware of the contents and legal effect of the deed at the time of its execution. The other defences need not be mentioned. In the Court of first instance the plaintiff's suit was decreed. In the High Court this decree was reversed and the suit was dismissed, on the ground that the appropriation was not of a public character and that Act XX of 1863 did not apply to it. It followed that the Judge had no authority to give the plaintiff leave to sue and that his decision was *ultra vires*. But while the learned Judges determined that there

had been no grant of land for public purposes within the meaning of the Act, read in the light of Regulation XIX of 1810, they by no means decided that the dedication did not constitute a *wakf*. On the contrary, the Court *agreed* in thinking that so far as words went, it was a *wakf* which could have bound the appropriator, but held, in view of the dedicator's position as an illiterate and prejudiced woman with no professional assistance, that the dedication was not binding. This is made abundantly clear by the concluding words of the judgment, where it is said—"As to the objections raised by the defendant that the *wakf* was indefinite and void, I think it enough to say that it, in my judgment, fully answered all the requirements of the Imameea Law, and that if it had been really and knowingly executed, it would have bound Delroos Banoo Begum without the power of revocation." The case was taken on appeal to the Privy Council and the judgment was affirmed,* on the ground that the dedicator was not bound by the deed, as the precautions required in the case of *pardanashin* executants were not observed. There is, however, no trace of any suggestion that, apart from this, a *wakf* was not legally constituted; rather does the judgment indicate that its validity, apart from the executant's incapacity, was unquestioned. I, therefore, see nothing in this case that tells against the validity of the endowment now in question, and, if anything, it is an authority in its favour. And in support of the view that a *wakf* was legally constituted, reference may be made to *Phul Chand v. Akbar Yar Khan* (3), *Biba Jan v. Kalb Husain* (4) and *Mazhar Husain Khan v. Abdul Hadi Khan* (5).

Nor do I think that it is made out that the deed of the 15th July 1864 was a colourable transaction; indeed, the plaintiff cannot well contend that it was fictitious or had no operation, for his suit is one for partition, and it is only by virtue of this deed that any of the defendants acquired any interest in the property that would support a suit for partition. Equally futile is any

(3) 19 A. 211; A. W. W. (1897) 49.

(4) 1 Ind. Cas. 763; 31 A. 136; 6 A. L. J. 115.

(5) 9 Ind. Cas. 753; 33 A. 400; 8 A. L. J. 162.

*See 3 C. 324; 3 Sar. P. C. J. 749; 3 Suth. P. C. J. 444; 2 Ind. Jur. 601.—*Ed.*

(2) 15 B. L. R. 167; 23 W. R. 453.

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argument which depends on the contention that the earlier release is open to attack.

The result then is that, in my opinion, a valid *wakf* was legally constituted and that the employment of trustees for the purpose of carrying it into effect in no way prejudiced the dedication.

I, therefore, hold that the suit was rightly dismissed, and that this appeal, too, must be dismissed with costs.

WOODROFFE, J.—I agree.

Appeal dismissed.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 857 OF 1914.

August 20, 1915.

Present:—Mr. Justice Seshagiri Aiyar.

Musammam DEVUPALLI AMMANNA,
WIDOW OF DALAYYA OF KATHULAPETA
—PETITIONER

versus

PEDIREDLA NARAYANASAMI NAIDU
OF JAGANNADASUPETA AND ANOTHER
—COUNTER-PETITIONERS—RESPONDENTS.

*Pauper suit—Application to sue in forma pauperis—
Plaint showing prima facie case and cause of action—
Court, duty of—Plea of limitation, if can be raised on
mere surmises—Procedure, proper.*

Where, in an application to sue in *forma pauperis* the allegations in the plaint suggest a *prima facie* case and show a cause of action, it is not open to a Judge to dismiss it on surmises which are not based on any evidence or on the pleadings filed in the case. The proper course is to frame an issue and decide it on evidence taken upon that issue.

Nawab Bahadur of Murshidabad v. Harish Chandra Acharjee, 11 Ind. Cas. 55; 13 C. L. J. 593, followed.

Petition, under section 115 of Act V of 1908, praying the High Court to revise the order of the Court of the Temporary Subordinate Judge of Vizagapatam, in Original Petition No. 88 of 1914.

Mr. V. Ramesam, for the Petitioner.

Mr. B. N. Sarma, for the Respondents.

JUDGMENT.—I think the Subordinate Judge acted in the exercise of his jurisdiction with material irregularity in dealing with the petitioner's pauper application. The petitioner stated that her husband died in January 1902, and that the 2nd defendant disposed of the property in April 1903. Her case was that the cause of action for this suit arose in April 1903. According to that

statement in the plaint the suit is in time. The Subordinate Judge considered it very likely that the husband died before the 30th January 1902 and that as the plaint was presented on the 30th January 1914, the suit was barred by limitation. He is not justified in assuming, without any proof in that behalf, that the husband died before the 30th January 1902 and from the allegations made in the petition there is nothing to suggest that the suit was not in time. Moreover, in this case before the judgment was delivered by the Subordinate Judge, an affidavit was put in by the pauper applicant alleging that she was in possession of the lands till 1903 and that in paragraph 5 of her petition she intended to allege and did allege though not in clear terms that the property was in her possession till that date. If the Sub-Judge entertained any doubt regarding the question of limitation he might have raised a preliminary issue and taken evidence upon it and come to a conclusion before disposing of the application. If the allegations in the plaint suggest a *prima facie* case and show a cause of action, it is not open to the Judge to dismiss it on surmises which are not based upon any evidence or on the pleadings filed in the case. In *Nawab Bahadur of Murshidabad v. Harish Chandra Acharjee* (1) the learned Judges examined the plaint to see whether the lower Court was right in its conclusion that the plaint did disclose a cause of action. In a very recent case* decided by this Court the learned Judges held that evidence may be taken upon a preliminary point before deciding the question of poverty or the question of there being a subsisting cause of action for the suit. Under these circumstances I cannot but regard the procedure adopted by the Subordinate Judge as being irregular. I must, therefore, set aside his order and direct him to take the petition on his file and dispose of it according to law. Costs will abide the result.

Petition allowed.

(1) 11 Ind. Cas. 55; 13 C. L. J. 593.

*The case appears to be *Subramania Chetty v. Kula-yappan*, 26 Ind. Cas. 90; 1 L. W. 618.—Ed.

HABIRAM DAS v. HEM NATH SARMA.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 3256

OF 1912.

May 13, 1915.

Present:—Justice Sir Asutosh Mookerjee, Kt.,
and Mr. Justice Roe.

HABIRAM DAS AND OTHERS—DEFENDANTS

—APPELLANTS

versus

HEM NATH SARMA AND OTHERS—

PLAINTIFFS—RESPONDENTS.

Assam Land and Revenue Regulation Act (I of 1886), s. 154, cl. (f)—Unrecorded proprietor not heard in partition proceedings—Declaratory suit, whether barred—Evidence Act (I of 1872), ss. 66, 74—Document in possession of defendant—Production of document not sought—Genuineness of document not questioned—Discretion of Court—Certified copy of Letters of Administration, admissibility in evidence of—Public document.

An estate wherein the plaintiff claimed a share was the subject of partition by the Revenue Authorities. The plaintiff was not a recorded proprietor, and, consequently, his application to intervene in the partition proceedings was rejected and he was denied an opportunity to be heard. Before the completion of those proceedings the plaintiff instituted a suit seeking a declaration that the share which had been allotted to his predecessor-in-interest was his property:

Held, that the suit was not barred under the provisions of clause (f) of section 154 of the Assam Land and Revenue Regulation, and that it was open to the Civil Court, at that stage, to make a declaration of title in favour of the plaintiff. [p. 691, col. 1.]

A certified copy of an order of a Probate Court to the effect that Letters of Administration be granted to the person named with a copy of the Will annexed is a public document within the meaning of section 74 of the Indian Evidence Act and is consequently admissible in evidence. It would also be admissible under section 66 of the Act if the original document is in the possession of the defendant even if no steps are taken to call upon him to produce it in Court, because such steps may be waived at the discretion of the Court specially where no question of genuineness is raised. [p. 691, cols. 1 & 2.]

Appeal from the order of the District Judge, Assam Valley Districts, confirming that of the Munsif, Gauhati, dated the 30th December 1911.

Babu Jadunath Kanjilal, for the Appellants.

Babus Mohini Mohan Chakrabarty and Biraj Mohan Majumdar, for the Respondents.

JUDGMENT.—This is an appeal by the first three defendants in a suit for confirmation of possession of land on declaration of title. The plaintiff seeks relief in respect of an one-fourth share of an estate; the Courts below have made a decree in his

favour to the extent of one-sixth share. Upon this appeal, the decree of the District Judge has been assailed on two grounds, namely, *first*, that the suit was barred under the provisions of clause (f) of section 154 of the Assam Land and Revenue Regulation, 1886; and, *secondly*, that the District Judge has erroneously determined the share of the plaintiff to be one-sixth instead of one-twelfth, by improper exclusion of evidence which was legally admissible. In our opinion, there is no substance in the first contention, but there is no answer to the second objection.

As regards the first ground, we observe that clause (f) of section 154 of the Assam Land and Revenue Regulation provides that no Civil Court shall exercise jurisdiction in the distribution of land or allotment of revenue on partition. The estate wherein the plaintiff seeks a share was the subject of partition by the Revenue Authorities in a proceeding instituted in 1902, and terminated on the 6th October 1910. The plaintiff was not a recorded proprietor, and, consequently, his application to intervene in the partition proceedings was rejected. He, thereupon, instituted this suit on the 30th May 1910 for declaration of his title to a share of the estate and for confirmation of possession therein. The relief sought by the plaintiff plainly does not relate to the distribution of land or allotment of revenue of an estate on partition. The plaintiff seeks a declaration that the share which has been allotted to his predecessor-in-interest is his property. This declaration, if made in favour of the plaintiff, will not disturb the distribution of lands or allotment of the revenue on partition by the Revenue Authorities. The suit is consequently maintainable. This view is in accordance with the decision of *Muhammad Jan v. Sadanand Pande* (1). We are not unmindful that the case mentioned has been criticised in *Khasay v. Jugla* (2), *Muhammad Nasar-ullah Khan v. Muhammad Ishaq Khan* (3), *Debi Saran v. Ramjas* (4) and *Lachman Das v. Hanuman Prasad* (5). There are no doubt expressions

(1) 28 A. 394; A. W. N. (1906) 30; 3 A. L. J. 43.

(2) 23 A. 432; A. W. N. (1906) 79.

(3) 6 Ind. Cas. 533; 32 A. 523; 7 A. L. J. 553.

(4) 2 Ind. Cas. 982; 31 A. 541; 6 A. L. J. 744.

(5) 8 Ind. Cas. 807; 33 A. 169; 7 A. L. J. 1156.

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of wide generality in the judgment in the case of *Muhammad Jan v. Sadanand Pandey* (1), but they are not necessary for the determination of the question raised before us: this much is clear that the suit is maintainable when the plaintiff was denied an opportunity to be heard in the partition proceedings before the Revenue Authorities, *Awadh Bihari Lal v. Ishri Prasad* (6). We have here the additional fact that when the suit was instituted the partition proceedings had not been completed, and consequently it was open to the Civil Court, at that stage, to make a declaration of title in favour of the plaintiff. The first contention consequently fails.

As regards the second ground, we observe that the Courts below have excluded from evidence a certified copy of Letters of Administration granted to two of the defendants, Gurudutt Katki and Chandradutt Katki, in respect of the estate of Kasinath Katki who had made a testamentary disposition of his property before his death. In our opinion, the evidence has been erroneously excluded. The certified copy produced is a copy of the order of the Probate Court to the effect that Letters of Administration be granted to the persons named, with a copy of the Will annexed of the deceased Kasinath Katki. The view may well be maintained that the document of which a certified copy has been produced, is a public document within the meaning of section 74 of the Indian Evidence Act, for it is a document which forms the record of the act of a public Judicial Officer in British India, namely, the act of the Judge of the Probate Court. The certified copy is consequently admissible. This view does not conflict with the decision of *Ponnammal v. Sundaram Pillai* (7), where a copy was tendered of a record in a Ceylon Court, which was not even proved to have been certified as a correct copy. The view may also be maintained that the certified copy is admissible under section 66, inasmuch as the Letter of Administration granted to the administrators was in the possession of some of the defendants who were interested to oppose the claim of the plaintiff. No doubt, the procedure was not strictly regularised as steps were not taken to call upon the persons in possession of the Letters of Admini-

nistration to produce it in Court. But such steps might be waived at the discretion of the Court, specially as no question of genuineness arises here. We are of opinion that the document should have been received in evidence. If it is received in evidence, there is no controversy that the share of the plaintiff is not one-sixth but one-twelfth, because the Will shows that there had been a testamentary disposition of the properties of Kasinath Katki and his share in the estate did not pass to the plaintiff.

The result is that the decree of the District Judge is varied to this extent, namely, the share of the plaintiff will be declared to be one-twelfth and not one-sixth. The decree will further state from the share of what person this share is to be carved out in favour of the plaintiff. This specification will be inserted in the decree when it is drawn up on the basis of partition papers which have already been called for by an order of this Court. As the appellants have succeeded in part only, there will be no order for costs of this appeal.

Decree varied.

MADRAS HIGH COURT.

FIRST CIVIL APPEAL No. 362 OF 1914.

August 12, 1915.

Present:—Sir John Wallis, Kt., Chief Justice, and Mr. Justice Srinivasa Aiyangar.

M. S. A. PL. PALANIAPPA CHETTY—
PLAINTIFF—APPELLANT

versus

T. MR. ALAGAPPA CHETTY—DEFENDANT
—RESPONDENT.

Principal and agent—Agency, termination of—Agent throwing up work and leaving place of business—Starting point of limitation—Re-joining work, effect of.

Where an agent throws up the agency and leaves his place of business, the agency is terminated within the meaning of Article 89, Schedule I, of the Limitation Act. The fact that he subsequently goes back to the place, and does some business, cannot prevent the running of time as regards the first agency unless there is any acknowledgment of liability to account. [p. 692, col. 1.]

Appeal against the decree of the Court of the Subordinate Judge of Ramnad at Madura, in Original Suit No. 151 of 1913.

Mr. K. S. Jayaram Aiyar, for the Appellant.

(6) 4 A. L. J. 662; A. W. N. (1907) 172.

(7) 23 M. 499; 10 M. L. J. 310.

MEYAPPA CHETTY v. MA MO YEIK.

Mr. K. V. Krishnasawmi Aiyar, for the Respondent.

JUDGMENT.—It is quite clear in this case that the agent was tired of waiting for his principal to send a successor, and that he eventually threw up the agency at Rangoon and came back to Madras in March 1909. This was a termination of this Agency and was a starting point for limitation. The fact that he went back to give evidence and again acted for a time until the principal sent a successor cannot prevent the running as regards the first agency. It is not pleaded that there was any acknowledgment of liability to account after the termination of the first agency, and it is not shown that any of the documents exhibited amounts to such an acknowledgment of liability to account for the first agency.

In the result the appeal is dismissed with costs.

Appeal dismissed.

LOWER BURMA CHIEF COURT.

SECOND CIVIL APPEAL No. 46 OF 1914.

March 26, 1915.

Present:—Mr. Justice Young.

P. L. R. MEYAPPA CHETTY—DEFENDANT
APPELLANT

versus

MA MO YEIK—PLAINTIFF—RESPONDENT.

Estoppel—Land standing in Revenue Registers in name of husband and wife, effect of—Wife, if precluded from showing that land was her sole property.

Where land stood in Revenue Registers and the tax receipts appeared to be in the joint names of husband and wife and the wife was living on the property:

Held, that she was not estopped from showing that the land was her sole and separate property.

Held, further, that the very fact that the wife was living on the property was sufficient to put a mortgagee of the property on inquiry to ascertain what her real interest was.

Appeal against the judgment and decree of the Divisional Court of Toungoo, dated the 15th September 1913 in Civil Appeal No. 9 of 1913 confirming those of the Sub-Divisional Court, Pyu, in a suit for declaration of a piece of land attached in execution of a mortgage-decree.

PAZHAYA OTTAYIL MUHAMAD v. ITHIRU AMMA.

Mr. Doctor, for the Appellant.

Mr. D. N. Palit, for the Respondent.

JUDGMENT.—The only question in this appeal is whether the respondent is estopped by the fact that certain land stood in the Revenue Registers in the joint names of herself and her husband from proving that the land in question was her sole and separate property. She was living on the property and, in my opinion, it cannot be reasonably supposed that anyone would lend money on it without inquiry from her as to what her interest was. No reasonable man would, in my opinion, be induced by such a circumstance to refrain from inquiring of her personally as to her interest. No reasonable man could suppose that he was intended to act merely upon the fact that the tax receipts were made out in the names of the plaintiff and her husband. The fact should rather have put him on inquiry to ascertain what her real interest was. In my opinion there was no estoppel and the mortgagee was grossly negligent in refraining from making the most obvious inquiries before he lent his money. The appeal must be dismissed with costs, 3 gold mohurs.

Appeal dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 2832 OF 1913.

August 12, 1915.

Present:—Mr. Justice Ayling and
Mr. Justice Tyabji.

CHUNDUM VEETIL PAZHAYA
OTTAYIL MUHAMAD *alias* IMBICHI—
DEFENDANT No. 4—APPELLANT

versus

THARAMEL CHERAM VEETIL
ITHIRU AMMA AND OTHERS—

PLAINTIFFS NOS. 1 TO 3 AND DEFENDANTS

NOS. 1 TO 3—RESPONDENTS.

Malabar Law—Purchase of property in son's name by father, whether sufficient to show that it is son's property—Family property.

Under Malabar Law it is competent to a father governed by the *Marumakatyam* Law to purchase property in the name of his son, to benefit his family (wives and children,) and where he so purchases, property is that of the family and not of the sons. [p. 694, col. 1.]

Where the question is whether a debt is binding on the family or not, an alienee cannot plead its inclusion in a decree to prove his good faith when

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there is sufficient in the decree to put him on inquiry into the validity of the proceedings. [p. 693, col. 2.] *Ummanga v. Appadorai Patter*, 5 Ind. Cas. 671; 34 M. 387; 20 M. L. J. 268; (1910) M. W. N. 195, followed.

Second appeal against the decree of the Court of the Temporary Subordinate Judge of Palghat, in Appeal Suit Nos. 165 and 69 of 1913, preferred against that of the Court of the District Munsif of Tirur, in Original Suit No. 312 of 1911.

Mr. C. V. Anantha Krishna Aiyer, for the Appellant.

Mr. S. Ranganadha Aiyer, for the Respondents.

This second appeal coming on for hearing on the 11th November 1914, and having stood over for consideration till the 16th November 1914, the Court (Oldfield and Tyabji, JJ.) delivered the following

JUDGMENT.—The decree under appeal is one declaring that a mortgage to the 1st and 2nd defendants of the plaintiffs' tarwad property by the 3rd defendant and a lease of it to him are not binding. The 4th defendant, the present appellant, was impleaded as being in possession of the property by the mortgage from the 3rd defendant, in consequence of the allegations in the 1st and 2nd defendants' written statements. But the necessary amendment in the plaint was, however, not made. The 4th defendant's first complaint here is that a decree has been passed against him, explicitly by the lower Appellate Court for profits, and by implication for possession, when no relief against him was asked for, and the plaint disclosed no cause of action against him. There is no doubt that the District Munsif and those concerned in the litigation were guilty of carelessness, in not making the necessary amendment, before beginning the trial. But we find that the 4th defendant never called attention to the omission in the two lower Courts; and it is in fact only on a liberal construction of his ground of appeal that he has been allowed to argue it here. On the other hand, his written statement directly traversed the allegations on which the claim against him is based. He explains that he appealed to the lower Appellate Court only to remove the cloud on his title, not on the understanding that the District Munsif's decree against him was for possession. But there is nothing in his appeal

grounds, which indicates that this was so. In the circumstances, though we think the District Munsif's omission regrettable, we do not consider that the 4th defendant was under any misapprehension as to the case he was contesting, or that he was entitled to relief on this ground. It is a repetition of this plea in another form that the lower Courts have not considered separately the 4th defendant's case as to the amount advanced by him in addition to that required for the discharge of the 3rd defendant's decree debt or the inclusion of other properties besides those in A Schedule in his mortgage. The answer is that the 4th defendant never attempted to contest this portion of the case on any separate footing, did not in fact file any copy of the decree and has not referred to any contention of this nature in his appeal grounds here or in the lower Appellate Court. In these circumstances this objection deserves no consideration. It is urged next that the lower Appellate Court's finding as to the nature of the debt for which the 4th defendant paid money, is not sustainable, and that even if the debt was not binding on the tarwad, the 4th defendant is protected by his *bona fide* belief that it was so. We concur fully in the lower Appellate Court's finding which is one of fact, against the binding nature of the debt, and we hold that though its embodiment in a decree might have been *prima facie* justification for the 4th defendant's belief that it was binding, there was sufficient in the decree itself to put him on inquiry into the validity of the proceedings. He has not given evidence or offered any acceptable explanation for his failure to make such inquiry. He, therefore, cannot succeed on the ground that he acted in good faith. It is then argued that on the lower Appellate Court's findings of fact, the property is partible with reference to *Ummanga v. Appadorai Patter* (1) and the 4th defendant should have a decree against the 3rd defendant's share. This was never suggested in the lower Courts and we cannot allow it to be put forward for the first time here. Lastly, exception is taken to the finding that the A Schedule property belongs to the tarwad and not to the 3rd defendant alone. We cannot allow the objection that the ownership of this

(1) 5 Ind. Cas. 671; 34 M. 387; 20 M. L. J. 268; (1910) M. W. N. 195.

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property was not put in issue. For the course of the trial makes it clear that it was and was understood to be covered by the second issue. That issue was no doubt general in its terms. But no complaint was made that it did not cover the point now in question until the hearing in this Court and the parties evidently contested it on the assumption that it did so. The correctness of the finding that the property belongs to the *tarwad* is, however, disputed on its merits. The property is in the name of the 3rd defendant in the title-deed, Exhibit E. It was acquired by the deceased father of the 3rd defendant by that document. It is no one's case that he acquired it as *tarwad* property. The alternatives are that he acquired it either for the 3rd defendant or for his wife and family (including 3rd defendant), the latter now composing the *tarwad*. In these circumstances the objections to drawing a presumption from the fact that Exhibit E is in 3rd defendant's name, which might be valid in the case of a junior member of a joint family, do not arise here. The learned Subordinate Judge has, however, held that this presumption is counterbalanced by the probability for which he vouches on his own knowledge of Malabar habits, that the property was intended to be a provision for the widow and family of the father. He does not refer to the other evidence on the plaintiff's side. We cannot accept this. It is not alleged that the making of such provision is or has ever been recognised by authority as a custom, which can be treated as invariable. If as the learned Subordinate Judge relies on it, it is merely a common incident, that may create a probability in the light of which the other evidence available may properly be appreciated. But it alone cannot justify the rejection of the clear evidence, which Exhibit E affords in the 4th defendant's favour. In these circumstances we must call on the Subordinate Judge to submit a revised finding on the issue :

"Whether the A Schedule property belongs to the *tarwad* or to the 3rd defendant" in the light of the foregoing and on the whole evidence on record. The finding should be submitted within six weeks and seven days will be allowed for filing objections. The remand will be to the Court for

the Temporary Subordinate Judge of Calicut, the Court having been transferred to that station.

In compliance with the above order of this Court, the Temporary Subordinate Judge of Palghat at Calicut submitted the following

FINDING.— * * * *

On a consideration of all the circumstances and the evidence I find that the property belongs to the *tarwad*.

[This second appeal coming on for final hearing after the return of the finding of the lower Appellate Court upon the issue referred by this Court for trial, the Court delivered the following]

JUDGMENT.—We accept the finding and dismiss the appeal with costs.

Appeal dismissed.

OUDH JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS APPEAL No. 4 OF 1915.

March 17, 1915.

Present:—Mr. Lindsay, J. C., and Mr. Stuart, A. J. C.

Chaudhri SHAFIQ UZ-ZAMAN—

INSOLVENT

versus

DEPUTY COMMISSIONER BARABANKI

—RECEIVER.

Provincial Insolvency Act (III of 1907), s. 27—Insolvency proceeding, scheme of arrangement proposed by insolvent in—District Judge, duty of, under Insolvency Act—Creditors, approval of scheme by—Scheme proposed by insolvent when rejected.

Where in an insolvency proceeding a proposal is made on behalf of the insolvent for a scheme of arrangement of his affairs the District Judge must, under the provisions of section 27 of Act III of 1907, fix a date for consideration of the proposal and issue notice to all creditors and put the scheme before them. If a majority in number and three-fourths in value of all the creditors whose debts are proved and who are present in person or by Pleader resolve to accept the proposal, it is the duty of the Court to consider whether it shall or shall not approve the proposal. The fact that the proposal is approved by the creditors does not involve approval by the Court. But if there is no such majority in favour of the proposal it will stand rejected whatever be the opinion of the Court as to its merits. [p. 695, col. 2; p. 696, col. 1.]

Appeal against an order of the District Judge, Lucknow, dated the 24th October 1914.

Mr. F. O. O'Neill, for the Appellant.

Babu Ajit Prasad, for the Respondent.

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JUDGMENT.—This is an appeal under the provisions of section 46, Act III of 1907, arising out of proceedings with regard to an insolvent of the name of Shafiq-uz-zaman. An order was passed on 27th January 1914, by the District Judge of Lucknow under the provisions of section 16, Act III of 1907, on the application of Chhanga Mal and Jawahir Nath creditors declaring Shafiq-uz-zaman to be an insolvent. The Deputy Commissioner of Barabanki has been appointed as Receiver and manager of landed property belonging to the insolvent, which produces an income of about Rs. 50,000 a year. The amounts of debt that rank against the insolvent are more than Rs. 12,00,000; the exact amount cannot be stated at present. On the 2nd July 1914, Mr. O'Neill sent to the District Judge of Lucknow a proposal on behalf of the insolvent for a scheme of arrangement of his affairs, to the effect that tenants and other persons in certain of the villages belonging to the insolvent should be approached to see if they would be ready to purchase under-proprietary or occupancy rights; it was suggested that it would be possible by the sale of such rights to raise sufficient money to liquidate the whole of the debts due from the insolvent. The District Judge, Mr. Sherring, consulted the Deputy Commissioner of Barabanki as Receiver. The latter appears to have put himself in communication with such persons and other tenants and to have ascertained that a certain number of persons were ready to purchase rights of the nature described and to pay considerable sums for their acquisition. After a certain amount of inquiry had been made by the Deputy Commissioner of Barabanki the matter came again before Mr. Warburton, the District Judge of Lucknow, who had in the meantime taken over charge from Mr. Sherring. He passed the following orders with reference to the scheme on 24th October 1914.

"Mr. O'Neill files statements showing that he expects 1390 tenants to pay 30 year's purchase of their rents to obtain occupancy rights, and thus to raise Rs. 12,39,847-11, for the payment of the debts of Shafiq-uz-zaman which amount to about that sum. This is a matter completely out of my experience and beyond my understanding. But I have no objection to the Deputy Commissioner of Barabanki as Receiver raising money under

this scheme if he finds it practicable and if he thinks, having regard to all considerations, that it should be proceeded with. In that case he will, of course, have full power to utilize the services of the debtor and his servants and his advisers to such extent as may seem to him proper. I note that Mr. O'Neill informs me that the figure given above (1390 tenants and Rs. 12,39,847-11) refer to holdings which comprise nearly 10,000 *bighas* or about half the cultivated area of the estate. This perhaps is by design, so that the debtor's sisters who are suing him for half the estate may not object to this scheme for raising money. Nothing has been said as to whence the tenants will get the funds for the proposed transaction, and the Receiver in his capacity of Deputy Commissioner may think that a fatal objection to the whole scheme."

This order does not definitely decide whether this scheme is or is not to be laid before the creditors, and contains no suggestion for its submission to them. The insolvent has appealed against the District Judge's order, and his appeal was admitted by an order of this Court dated 18th January 1915, under the provisions of section 46 clause 3 of Act III of 1907.

Under the provisions of section 27, Act III of 1907, it is laid down that when such a proposal is made, the Court shall fix a date for the consideration of the proposal and shall issue a notice to all creditors by publication in the Local Official Gazette and in such other manner as may be prescribed. The District Judge must under the terms of the Act fix a date for consideration of a proposal and issue notice to all creditors and put the scheme before them. We have examined the record and find that there is nothing to show that notice of the date fixed for consideration of the scheme was issued to all creditors by publication in the Local Official Gazette and in other manner. We cannot find that any notice was issued, although we observe that the Receiver of the property other than the landed property and the representatives of two creditors were present in Court on 24th October 1914. It is not clear how they had obtained information of the date of hearing. A letter No.

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1039, dated 7th September 1914, from the Deputy Commissioner, Barabanki, was considered. This letter does not contain a report on the scheme. It says that 529 tenants out of 1,127 have verified their agreement to purchase and 56 new tenants have agreed to purchase occupancy rights, and that it appears worthwhile to give the scheme a trial.

The procedure laid down under the provisions of section 27, Act III of 1907, is based on the procedure in the English Bankruptcy Act. The insolvent is permitted of right to make a proposal for a composition or a proposal for a scheme of arrangement of his affairs for the consideration of his creditors, and the duty of the Court on receiving this scheme is to lay it before the creditors, convening a meeting of the creditors by the issue of notices in an authorized form and additional notices in a form according to its own discretion. The first step is to bring the scheme to the notice of the creditors. The next step is to ascertain their views at a meeting convened under the provisions of the section. If a majority in number and three-fourths in value of all the creditors whose debts are proved and who are present in person or by Pleader resolve to accept the proposal, the Court notes that the proposal is duly accepted by the creditors. But if on a consideration of the proposal there is not a majority in number and three-fourths in value of all the creditors whose debts are proved and who are present in person or by Pleader in favour of the acceptance of the scheme, the proposal will stand rejected, whatever be the opinion of the Court as to its merits. When the scheme has been duly accepted by the creditors it is the duty of the Court to consider whether it shall or shall not approve the proposal. The fact that the proposal is approved by the creditors does not involve its approval by the Court. In the case of *Burr, In re, Board of Trade, Ex parte* (1) Lord Esher laid down at page 472 that in bankruptcy cases the Court has very often to protect creditors against themselves, and that is the duty of the Court to see that the Officers of the Court of Bankruptcy do not do that which would be of the very worst example in bankruptcy

(1) (1892) 2 Q. B. 467; 61 L. J. Q. B. 591; 66 L. T. 553; 9 Morrell, 133.

matters. Under the provisions of Act III of 1907 a District Judge has a similar duty to perform, and section 27 lays down some of the principles which should guide him in execution of that duty. Under the provisions of sub-section 4 a District Judge has to refer the matter, after the scheme has been duly accepted by the creditors, to the Receiver, if a Receiver has been appointed, for a report. A reference appears to have been made in the present case to the Deputy Commissioner of Barabanki, but no sufficient report has so far been received from him. The letter of the 7th September 1914 cannot be considered to be a report on the practicability of the scheme. It contains tentative comments. Next the District Judge has to consider objections which may be made by or on behalf of any creditor. In the present case it has been impossible for the District Judge to carry out this part of the procedure as no notice has been issued to the creditors and the large majority were not present in person or by Pleader. Next the District Judge has to consider under the provisions of sub-section 5 if facts are proved on proof of which the Court would be required either to refuse, suspend, or attach conditions to the debtor's discharge, and whether there is reasonable security for payment of not less than three-eighths of the amounts due on all the unsecured debts provable against the debtor's estate, and if there is not reasonable security for such payment the District Judge must refuse to approve the proposal; and sub-section 6 directs that the District Judge is to be left discretion to decide whether the proposal should or should not be accepted. In the present case the District Court has not complied with the provisions of section 27. When the report was originally received Mr. Sherring should have issued notice to all creditors. That was not done, and in the circumstances the insolvent rightly demands that such notice should now be issued.

We accept the appeal and direct that this notice shall now be issued.

After a meeting of the creditors has been convened, the learned District Judge will proceed to take their opinions according to the procedure laid down in sub-section 2. Two forms have been laid down by the Calcutta High Court of notice to the creditors of the date of consideration of such scheme

An agency is terminated by the death of the principal and the agent does not continue to be the agent of the heirs of the deceased principal as he was before his death, but if the agent continues to work for the heirs a new agency is created by implication; and if under such new agency the parties agree that accounts should be submitted from year to year, a suit for accounts would be governed by Article 89 and not by Article 115 of the Limitation Act. [p. 700, cols. 1 & 2.]

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Hafezuddin Mandal v. Jadu Nath Sahu, 35 C. 298; 12 C. W. N. 820; 7 C. L. J. 279; *Jogendra Nath v. Deb Nath Chatterjee*, 8 C. W. N. 113; *Shib Chandra Roy v. Chandra Narain Mukerjee*, 32 C. 719; 1 C. L. J. 232; *Chandra Madhab Barua v. Nabin Chandra Barua*, 18 Ind. Cas. 735; 40 C. 108; 17 C. L. J. 103, relied upon.

Jogesh Chandra v. Benode Lal Roy, 5 Ind. Cas. 59; 14 C. W. N. 122; *Mati Lal Bose v. Amin Chand Chatterpadhay*, 1 C. L. J. 211; *Easin Sarkar v. Barada Kishore Acharyya Chowdhury*, 5 Ind. Cas. 186; 11 C. L. J. 43; *Jhapa Jhanessa Bibi v. Bama Sundari Chaudhrani*, 16 Ind. Cas. 414; 16 C. W. N. 1042; 16 C. L. J. 286, not followed.

Where a principal's suit against his agent is governed by the second alternative provided in Article 89 of the Limitation Act, namely, where time runs against the principal from the date of termination of the agency, and a suit is brought within three years, the principal is entitled to accounts for the entire period of the agency. [p. 700, col. 2.]

Sures Kanta Banerjee v. Nawab Ali Sikdar, 29 Ind. Cas. 843; 21 C. L. J. 462; *Jawahir Singh v. Lachman Das*, 9 C. W. N. 745; *Nathubhai Bhikundas v. Devidas Mangaldas*, 8 Ind. Cas. 637; 12 Bom. L. R. 951, relied upon.

If there has been a demand for accounts and the agent has not responded to the call, there is, by implication, a refusal within the meaning of Article 89. If, however, the principal demands an account and the agent submits papers, there is not necessarily a refusal on the part of the agent to render accounts unless the agent fails to respond to the further demand of explaining the papers submitted by him. [p. 701, cols. 1 & 2.]

When there is nothing to show that there was a demand and refusal, a claim for accounts would be governed by the second alternative in the third column of Article 89. [p. 701, col. 2.]

The duty of an agent when he is called upon to render account to his principal does not terminate merely by the submission of account papers; he is bound to explain those papers, and if, on accounts taken, it is found that he has in his hands money which belongs to his principal, he is bound to pay that sum. [p. 701, col. 2; p. 702, col. 1.]

If an agent for collection has submitted the collection papers to one of the several principals, he is under no obligation to submit papers, again to the other principals; and he cannot be held responsible for the production of the papers, if they are not produced by the person to whom they were submitted by him. But he is obliged to produce such papers as have not already been produced and to explain all the papers to the satisfaction of the Court. [p. 702, cols. 1 & 2.]

Appeal from the decision of the Subordinate Judge, Dacca, dated the 19th May 1913, reversing that of the Munsif, Munshiganj, dated the 7th May 1912.

Fabus *Gunada Tharan Sen*, *Romesh Chandra Sen* and *Surendra Nath Das Gupta*, for the Appellant.

Dr. Sarat Chandra Basak and *Babu Bepin Chandra Bose*, for the Respondents.

JUDGMENT.—This is an appeal by the first defendant in a suit for accounts. The

facts material for the decision of the questions of law raised before us may be briefly stated. On the 5th September 1895 the defendant was appointed agent of the plaintiffs and their co-sharers for management of their estate. The defendant and his father at the time hypothecated immoveable property as security for the due performance of the duty of the first defendant as agent. This bond was executed in favour of persons who were proprietors of a half share of the entire property. One of these, Radhika Mohan Das, was interested to the extent of one-eighth share; another, Rakhal Chandra Das, for himself and as guardian of his infant brother, Brojo Gopal Das, was interested to the extent of another one-eighth share. Two other persons, Gobind Lal Das and Keshab Lal Das, were each interested to the extent of one-eighth share. The proprietors of the remaining one-half share were not parties to the transaction, but it has been alleged—and that statement has not been challenged—that the defendant was also their agent for the purpose of collection of rent. This agreement continued in force till the 19th August 1904, when its terms were varied in the manner following, *viz.*, the defendant undertook to collect the rent of one-fourth share separately and to submit separate collection papers in respect of that share year after year. In the interval, Radhika Mohan Das had died in the year 1900 and his interest in the property had vested in Rakhal Chandra Das and Brojo Gopal Das; but there was no new contract in writing between these persons and the defendant, although the latter continued to act as their agent as previously. The defendant was discharged from his office on the 7th August 1908. This suit for account was commenced against him on the 7th August 1911 by the plaintiffs who are representatives of the one-fourth share-holder other than Gobind Lal Das and Keshab Lal Das. These latter have not joined as co-plaintiffs and have consequently been joined as *pro forma* defendants. The plaintiffs claim accounts for the period from the 14th April 1901 to the 7th August 1908. The claim is resisted by the defendant on the merits as also on the ground of limitation; he urges that he has rendered accounts and is under no further obligation to the plaintiffs, and further contends that, if this plea is not established, the claim is barred by limitation.

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The Court of first instance decided in favour of the defendant and dismissed the suit. Upon appeal the Subordinate Judge has set aside that decision and has made a preliminary decree for accounts from the 14th April 1901 up to the 7th August 1908. On the present appeal, it has been urged on behalf of the defendant that the entire claim is barred by limitation. In our opinion, this contention cannot possibly prevail.

The defendant and his father hypothecated immoveable property as security for the due discharge of the duty of the defendant as agent of the plaintiffs and their co-sharers. The plaintiffs seek to realise from the defendant whatever sum may be found due to them on adjustment of accounts, by sale of the immoveable properties hypothecated. The suit is consequently one to enforce a charge on immoveable property within the meaning of Article 132 of the Indian Limitation Act. This view is supported by the decisions in *Hafezuddin Mandal v. Jadu Nath Saha* (1), *Troilukhyanath Mandal v. Abanish Chandra Roy* (2), *Sures Kanta Banerjee v. Nawab Ali Sikdar* (3) and *Venkatachalam Chetty v. Narayanan Chetty* (4). It has been pressed upon us, however, on behalf of the appellant that a contrary view is supported by the case of *Jogesh Chandra v. Benode Lal Roy* (5). But as was pointed in *Troilukhyanath Mandal v. Abanish Chandra Roy* (2), the case of *Hafezuddin Mandal v. Jadu Nath Saha* (1) was not brought to the notice of the Division Bench that decided the case of *Jogesh Chandra v. Benode Lal Roy* (5). For this reason that decision was not followed either in *Troilukhyanath Mandal v. Abanish Chandra Roy* (2) or in *Sures Kanta Banerjee v. Nawab Ali Sikdar* (3). In these circumstances, we adopt the view taken in *Hafezuddin Mandal v. Jadu Nath Saha* (1) and hold that the claim of the plaintiffs in so far as they are in a position to enforce a lien on immoveable property is not barred by limitation. This brings us to the question, whether the plaintiffs are entitled to enforce a lien on immove-

able property in respect of their entire claim.

On behalf of the appellant, it has been contended that when Radhika Mohon Das died in 1900, the agency of the defendant under him terminated. In support of this view, reliance has been placed upon section 201 of the Indian Contract Act, which provides that an agency is terminated by the death of either the principal or the agent. On behalf of the plaintiffs-respondents, it has been argued that a contrary view may be supported by a reference to the terms of section 209 which defines the duty of the agent on termination of the agency by the death of the principal. In our opinion, there is no foundation for this contention. Section 209 is in these terms:—"When an agency is terminated by the principal dying or becoming of unsound mind, the agent is bound to take, on behalf of the representatives of his late principal, all reasonable steps for the protection and preservation of the interests entrusted to him." This provision does not indicate that the agent continues to be the agent as he was before the death of the principal. If he continues to be the agent, no such provision as is embodied in section 209 is needed. On the other hand, if we contrast the provisions of section 253 which defines the effect of the death of any partner on a partnership, it becomes plain that under section 209 an agency is terminated by the death of the principal or the agent. Clause (10) of section 253 lays down that, in the absence of any contract to the contrary, partnerships, whether entered into for a fixed term or not, are dissolved by the death of any partner. In section 209 we miss the expression "in the absence of any contract to the contrary" which finds a place in section 253. We hold accordingly that the agency of the defendant was terminated in 1900 with regards to the share of Radhika Mohan Das, and that thereafter a new agency was created by implication in respect of that share as between the defendant and the representatives of the deceased: *Mohendra Nath Ghosh v. Jadu Nath Mullik* (6). In respect of the account of this share consequently the plaintiffs are not entitled to enforce a lien on immoveable property under the terms of the

(1) 35 C. 298; 12 C. W. N. 820; 7 C. L. J. 279.

(2) 24 Ind. Cas. 18; 21 C. L. J. 459.

(3) 29 Ind. Cas. 848; 21 C. L. J. 462.

(4) 26 Ind. Cas. 740; 28 M. L. J. 140.

(5) 5 Ind. Cas. 59; 14 C. W. N. 122.

(6) 3 Ind. Cas. 684; 9 C. L. J. 107.

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original contract of the 5th September 1895, *Behari Lal Roy v. Hara Kumar Dutta* (7) and *Sures Kanta Banerjee v. Nawab Ali Sikdar* (3). The question next arises, what period of limitation is applicable with regard to this portion of the claim of the plaintiffs. On behalf of the appellant, it has been contended that Article 115 applies and that as, on the 19th August 1904, the parties agreed that accounts would be submitted from year to year, there was a breach of obligation of the defendant at the end of each year, so that under Article 115, this portion of the claim is barred by limitation. In support of this view, reference has been made to the decisions of *Mati Lal Bose v. Amin Chand Chattopadhyay* (8), *Easin Sarkar v. Barada Kishore Acharyya Chowdhury* (9), *Jogesh Chandra v. Benode Lal Roy* (5) and *Jhapajhanessa Bibi v. Bama Sundari Chaudhrani* (10). The first three of the cases mentioned, no doubt, lend some support to the contention of the appellant. But it must be observed that, as pointed out in *Jhapajhanessa Bibi v. Bama Sundari Chaudhrani* (10), there is a strong current of authority in the contrary direction. The cases of *Jogendra Nath v. Deb Nath Chatterjee* (11), *Shib Chandra Roy v. Chandra Narain Mukerjee* (12), *Hafezuddin Mandal v. Jadu Nath Saha* (1) and *Chandra Madhab Barua v. Nabin Chandra Barua* (13) show that Article 89 is applicable to cases of this description. It is worthy of note that in the cases of *Easin Sarkar v. Barada Kishore Acharyya Chowdhury* (9) and *Jogesh Chandra v. Benode Lal Roy* (5), the attention of the Court was not invited to the decision of *Shib Chandra Roy v. Chandra Narain Mukerjee* (12) where it had been pointed out, on a review of the earlier authorities including the decision of the Judicial Committee in *Asghar Ali v. Khurshed Ali* (14), that Article 89 is applicable to a suit for accounts by a principal against his agent. We may observe parenthetically that the appellant has

argued that the case before the Judicial Committee was not in reality a suit by a principal against his agent. We are unable to give effect to this contention. The suit was brought by the then plaintiff for money in the hands of the defendant, who had consequently to account for the sum which he had taken and spent; and the Judicial Committee held that the suit was one for accounts, governed by Article 89 of the Indian Limitation Act. We hold accordingly that Article 89 is applicable in respect of this portion of the claim of the plaintiffs. We do not think it necessary to refer the question for the decision of a Full Bench of this Court, first, because the point is really concluded by the decision of the Judicial Committee in *Asghar Ali v. Khurshed Ali* (14), and, secondly,¹ because the later decisions to the contrary did not take notice of the earlier decisions which are precisely in point. It is further worthy of note that Mr. Justice Coxe who reluctantly followed the decision of *Jogesh Chandra v. Benode Lal Roy* (5) in *Jhapajhanessa Bibi v. Bama Sundari Chaudhrani* (10) was of opinion that the contrary view taken in *Shib Chandra Roy v. Chandra Narain Mukerjee* (12) gave effect to the true intention of the Legislature.

We now proceed to examine the effect of the application of Article 89 to the case before us. That Article provides that a suit by a principal against his agent for moveable property received by the latter and not accounted for may be instituted within three years from the date when the account is during the continuance of the agency, demanded and refused, or where no such demand is made, when the agency terminates. On behalf of the respondent it has been strenuously urged that the case is governed by the second alternative, namely, that time runs against the plaintiff from the date when the agency terminates. The reason for this contention is obvious, because if it prevails, the plaintiffs would be entitled to accounts for the entire period claimed; for, as was pointed in *Sures Kanta Banerjee v. Nawab Ali Sikdar* (3) and the same view had been taken by the Judicial Committee by implication in *Jawahir Singh v. Lachman Das* (15) and by the

(7) 29 Ind. Cas. 748; 21 C. L. J. 458.

(8) 1 C. L. J. 211.

(9) 5 Ind. Cas. 186; 11 C. L. J. 43.

(10) 16 Ind. Cas. 414; 16 C. W. N. 1042; 16 C. L. J. 286.

(11) 8 C. W. N. 113.

(12) 32 C. 719; 1 C. L. J. 232.

(13) 18 Ind. Cas. 735; 40 C. 108; 17 C. L. J. 103.

(14) 24 A. 27; 3 Bom. L. R. 576; 28 I. A. 227.

(15) 9 C. W. N. 745.

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Bombay High Court in *Nathubhai Bhikandas v. Devidas Mangaldas* (16), if the suit has been brought within three years, the plaintiff is entitled to accounts for the entire period of the agency. The appellant has fully appreciated the danger of this argument, and accordingly contended strenuously that the case falls within the first alternative, namely, that here the account was demanded and refused during the continuance of the agency. To substantiate this contention, reliance has been placed upon a letter written admittedly by the plaintiffs to the defendant on the 24th April 1909. In this letter, it was stated that the defendant had submitted account papers for 1311 and 1312 *Fasli* but had not explained them. He was accordingly called upon to appear before the plaintiffs and explain, as soon as possible, the accounts up to the end of the year 1312 *Fasli*. The defendant admittedly has not responded to this call. The question is, whether there has been a demand and refusal within the meaning of Article 89. Our attention has, in this connection, been invited to the cases of *Hori Narain Ghose v. Administrator-General of Bengal* (17), *Easin Sarkar v. Barada Kishore Acharyya Chowdhury* (9) and *Chandra Madhab Barua v. Nabin Chandra Barua* (13). The cases of *Hori Narain Ghose v. Administrator-General of Bengal* (17) and *Easin Sarkar v. Barada Kishore Acharyya Chowdhury* (9) show that if there has been a demand for accounts and the agent has not responded to the call there is, by implication, a refusal within the meaning of Article 89. A different view appears to have been taken in *Chandra Madhab Barua v. Nabin Chandra Barua* (13). In that case, there were apparently repeated demands by the principal, with which the agent had failed to comply. The Court held that as the demands were made while the business was in existence, limitation would run from the termination of the business. The facts of the case do not appear, however, fully either from the judgment or from the report; but, if this was intended as a formulation of a general principle applicable to all cases, we are unable to accept it as well-founded on

principle. In our opinion, if there has been a demand, failure to respond to the demand is refusal within the meaning of Article 89. There may, however, be cases where omission to render accounts may not be a refusal within the meaning of Article 89. To take one illustration, if the principal demands an account and the agent submits papers, there is not necessarily a refusal on the part of the agent to render accounts. But, in the case before us, after the papers had been submitted, there was a further demand upon the agent to explain them. To this he failed to respond. In these circumstances, there was a refusal within the meaning of Article 89. Consequently, the claim for accounts up to 1312 *Fasli* in respect of the share of Radhika Mohan Das, is barred by limitation. In respect of the accounts for the remaining period, there is nothing to show that there was a demand and refusal; consequently the claim for accounts from 1313 *Fasli* is governed by the second alternative in the third column of Article 89 and is not barred by limitation.

Finally, we have to deal with the question of the mode in which accounts should be rendered. On behalf of the defendant the position has been maintained that as soon as the defendant as agent of the plaintiffs submitted his account papers, his duty was discharged, and that the plaintiffs are under an obligation to examine these papers without his assistance. In support of this position, reliance has been placed upon observations in *Chand Ram v. Brojo Gobind Das* (18) and *Upendra Kishore Rai Chaudhury v. Ram Tara Debya Chaudhury* (19). We are unable to agree in the view put forward on behalf of the appellant. The duty of an agent when he is called upon to render account to his principal was explained by the Judicial Committee in the case of *Hurrinath Rai v. Krishna Kumar Bakshi* (20). It is well-settled that his obligation towards his principal does not terminate merely by the submission of account papers; he is bound to explain those papers, and if, on

(18) 19 W. R. 14.

(19) 4 Ind. Cas. 542; 13 C. W. N. 696.

(20) 14 C. 147; 13 I. A. 123; 10 Ind. Jur. 475; 4 Sar. P. C. J. 751.

(16) 8 Ind. Cas. 637; 12 Bom. L. R. 951.

(17) 3 C. L. R. 446.

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accounts taken, it is found that he has in his hands money which belongs to his principal, he is bound to pay that sum. This principle has been recognised in a long series of cases: *Shushee Shekhar Audhikaree v. Suleem Biswas* (21), *Aliaahmad alias Boolaki v. Nusibun Bibee* (22), *Annoda Persad Roy v. Dwarkanath Gungopadhya* (23), *Ram Chunder Shaha v. Manick Chunder Banikya* (24), *Shih Chandra Roy v. Chandra Narain Mukerjee* (12) and *Ram Das v. Bhagwat Das* (25). But the defendant here has not explained the papers, at any rate, the papers subsequently to 1310 *Fasli* and, consequently, he must render accounts when they are taken by a Commissioner.

As regards the submission of the papers, it has been argued on behalf of the defendant that up to the time when collection was joint he had submitted some of the collection papers to the *pro forma* defendants and other papers to the proprietors of the eight-annas share known as the Guha Babus. The Court of first instance found that the papers had been so submitted and in this view the defendant is under no obligation to submit papers again to the plaintiffs. It is plain, in so far as the papers relating to the time during which the collection was joint are concerned, that it is a matter between the landlords themselves and steps must be taken by the Court at the instance of the plaintiffs to compel the *pro forma* defendants and the Guha Babus to produce the papers which were made over to them by the defendant. The powers of the Court in this respect are ample and have certainly not been exhausted: every endeavour must be made by the Court below to obtain the papers from those persons. But, we desire to make it clear that the defendant cannot be held responsible for the production of the papers, if they are not produced by the persons to whom they were submitted by him.

There remains only one other point

for consideration. On behalf of the defendant it has been urged that the trial Court found expressly in his favour that the papers up to 1310 *Fasli* had not only been submitted but explained. Upon this point, the Subordinate Judge has not come to an explicit finding. One fact, however, is patent; namely, that the co-sharers of the plaintiffs are satisfied with the accounts up to the end of 1310 *Fasli* they, at any rate, have not put forward a claim in respect of the accounts for that period. In view of the special circumstances of this case, we hold that in respect of the accounts up to the end of 1310 *Fasli* the plaintiffs must establish that the accounts have not been explained to them by the defendant. If they make this out to the satisfaction of the Court below, the defendant must explain the papers before the Commissioner. But in respect of the period subsequent to 1310 *Fasli* the defendant is clearly under an obligation to produce such papers as have not already been produced and to explain all the papers to the satisfaction of the Court.

The result is that this appeal is allowed in part and the decree of the Subordinate Judge varied in the manner following. The plaintiffs will have a decree for accounts against the defendant in respect of one-eighth share for the entire period claimed in the suit, and for the sum which may be found due on account of this share, they will be allowed to enforce their claim by sale of the immoveable properties hypothecated. In respect of the one-eighth share originally vested in Radhika Mohan Das, the claim for accounts is dismissed up to the 13th April 1906 (that is, up to the end of the year 1312 *Fasli*). But the plaintiffs are entitled to an account in respect of that share for the period commencing with the 14th April 1906 (corresponding to the 1st *Baisakh* 1313) up to the date of the termination of the agency on the 7th August 1908. In respect of any sum which may be found due to the plaintiffs with regard to this share, the plaintiffs will have a money-decree against the defendant. Steps will be taken by the Court below to compel the *pro forma* defendant and the proprietors of the one-fourth share who

(21) 22 W. R. 191.

(22) 24 W. R. 70.

(23) 6 C. 754; 8 C. L. R. 321.

(24) 7 C. 428; 9 C. L. R. 157.

(25) 1 A. L. J. 347; A. W. N. (1905) 1.

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are not parties to this suit, to produce such papers as were placed in their hands by the defendant. The defendant will explain the accounts subsequent to 1310 and he will produce such papers as have not already been filed by him. In respect of the accounts antecedent to 1310 *Fasli*, the plaintiffs must establish to the satisfaction of the Court that they have not been explained by the defendant, and the defendant will be called upon to explain the accounts antecedent to 1310 *Fasli* only if the plaintiffs establish this. If the Court fails to secure the production of the papers made over to the co-sharers of the plaintiffs, the accounts covered thereby will be taken only if the plaintiffs are able to place other relevant materials before the Commissioner; if the plaintiffs fail to do so, the accounts covered thereby will not be taken. Each party will pay his costs in this Court. The costs in the Court of first instance and before the Subordinate Judge, as also the costs of the accounts now directed, will abide the ultimate result of the suit.

Appeal allowed; Decree verified.

MADRAS HIGH COURT.

APPEAL AGAINST ORDER NO. 155 OF 1914.

July 28, 1915.

Present:—Mr. Justice Oldfield and

Mr. Justice Sadasiva Aiyar.

MUNJULURI SIVARAMAYYA—

COUNTER-PETITIONER AND CREDITOR NO. 10—

APPELLANT

versus

SINGUMAHANTI BUJANGA RAO AND

ANOTHER—PETITIONER AND CREDITOR NO. 11—

RESPONDENTS.

Provincial Insolvency Act (III of 1907) ss. 16 (4), 46 (4)—Limitation Act (IX of 1908), ss. 5, 7, 29 (a)—Charter Act (24 & 25 Vict. C. 104), s. 15—Official Receiver, whether necessary party to suit against insolvent's property—Power of Court to excuse delay in presentation of appeal—Appeal, when to be treated as revision.

Per Oldfield and Sadasiva Aiyar, JJ.—An Official Receiver is a necessary party to any proceedings affecting the insolvent's estate when once it has become vested in him under section 16 (2) (a) of the Provincial Insolvency Act. Any order affecting the estate in his absence is clearly illegal. Proceedings so instituted cannot be rectified by impleading him subsequently in an Appellate Court. [p. 704, col. 1.]

An appeal against an order affecting the estate of an insolvent even if presented out of time can be treated as a revision petition and a High Court can interfere with such an order under section 15 of the

Charter Act if it is clearly illegal and interference is necessary in the interests of justice. [p. 704, col. 2; p. 705, col. 1.]

Abdullah v. Salaru, 18 A. 4; A. W. N. (1895) 124, followed.

Per Oldfield, J.—In regard to the applicability of sections 5 and 12 (2) of the Limitation Act to the orders passed under section 46 (4) of the Provincial Insolvency Act, there is no reason for distinguishing between cases under the Madras Forest Act and the Provincial Insolvency Act and the time taken in obtaining copies of judgment cannot be deducted in favour of an appellant. [p. 704, cols. 1 & 2.]

Abu Baker Sahib v. Secretary of State for India, 5 Ind. Cas. 884; 34 M. 505; 7 M. L. T. 132 (F. B.); 20 M. L. J. 283, followed.

Dropadi v. Hira Lal, 16 Ind. Cas. 149; 34 A. 496; 10 A. L. J. 3, dissented from.

Per Sadasiva Aiyar, J. (dissenting)—The power to excuse delay in the presentation of an appeal under section 5 of the Limitation Act, can also be exercised in regard to appeals presented beyond period of limitation prescribed by a special or local law; in the cases which hold otherwise, the question did not distinctly arise for decision. [p. 705, col. 1.]

Nijabuthoola v. Wazir Ali, 8 C. 910; 10 C. L. R. 333; 7 Ind. Jnr. 84; *Reference under Forest Act V of 1882*; 10 M. 210; *Seshama v. Sankara*, 12 M. 1 at p. 5, dissented from.

Veeramma v. Abbiah, 18 M. 99; *Appa Rau Sanayi Aswa Rau v. Krishnamurthi*, 20 M. 249; 7 M. L. J. 94, followed.

Appeal against the order of the District Court of Godavari at Rajahmundry, in Insolvency Appeal No. 551 of 1913 (in Insolvency Petition No. 8 of 1909).

Mr. B. Narasimha Rao, for the Appellant.

Mr. P. Chenchiah, for the Respondent.

JUDGMENT.

OLDFIELD, J. — The appellant is 10th creditor of a person, who has been adjudicated insolvent by the District Judge of Godavari, and, besides being an unsecured creditor, has, according to his counter-affidavit filed in the lower Court, a mortgage on part of the property now in question. The petitioner in the lower Court, here respondent, is another creditor, who alleged in his petition, Insolvency Appeal No. 551 of 1913, that he held an agreement, executed by the insolvent, his son, to transfer the property to him in discharge of his debt, that he had once prayed for execution of a document by the Court or Official Receiver, in whom the assets had vested, that, receiving no orders, he had later asked for leave to sue, and that, again receiving no orders, he finally asked for a direction to the Official Receiver to execute the document. Respondent made the defendant alone a party to his petition

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and appellant says in his counter-affidavit that he appeared to oppose it after hearing of it merely by chance. The lower Court passed the order under appeal, directing the Official Receiver to execute a transfer as prayed. It also in the same order allowed a claim by respondent to two items as his own and not the insolvent's property.

One defect in this order is that it makes no reference to the important contentions of appellant, *inter alia*, that the agreement in question could not prevail against his mortgage for want of registration and was unenforceable owing to lapse of time and that the claim to two items, which does not appear to have been made in the petition under disposal, had already been negatived by the Court after inquiry. But the proceedings were subject to the more fundamental objection, that, though the insolvent's assets had vested in the Official Receiver under section 16 (2) (a) Provincial Insolvency Act, the lower Court dealt with them by its order in the absence of that officer and without hearing his objections. We are astonished that this mistake should have been made and we cannot regard it as rectified by the impleading of the Official Receiver in this Court. The result is that the lower Court has passed an order irregular in a material respect and of no legal effect, since the person directly concerned has had no opportunity to oppose it.

It is, however, argued that no interference with this result is possible, because this appeal is out of time, inasmuch as section 46 (4), Provincial Insolvency Act, contains nothing authorising an appellant to deduct time spent in obtaining copies from the period of limitation it fixes, and the Provincial Insolvency Act being a special law within the purview of section 29 (1) (b) of the Limitation Act, section 12 (2) of the latter enactment is also inapplicable; and it is further contended that section 5 of the Limitation Act, is inapplicable for similar reasons and that we, therefore, cannot take the course, which my learned brother proposes and excuse the delay. On the first point I should follow *Abu Baker*

Sahib v. Secretary of State for India (1), in preference to *Dropadi v. Hira Lal* (2), holding that valid ground for distinguishing between cases under the Madras Forest Act and the Provincial Insolvency Act has not been shown and decide that the appeal is out of time. On the second point I should not be prepared to dissent from my learned brother's proposal to give weight to the circumstances of the case and the novelty of this objection and excuse the delay, if it were clear that it could legally be excused, and, if the matter were *res integra*. I should be inclined to the view taken in *Nijabutoolla v. Wazir Ali* (3). Reference under Forest Act V of 1882 (4) and *Seshama v. Sankara* (5), that the general provisions of the Limitation Act, including section 5, are applicable, inasmuch as they do not alter or affect any period of limitation within the meaning of section 29 (1) (b). Later decisions however of this Court, *Veeramma v. Abbiah* (6) and *Appa Rau Sanayi Aswa Rau v. Krishnamurthi* (7), are to the contrary effect, and it would be necessary either to follow them or refer the matter to a Full Bench for authoritative decision.

My learned brother, however, agrees with me that in the exceptional circumstances of this case, an alternative course is open to us, which we propose to take, to treat the appeal as a revision petition and deal with it as such, under section 15 of the Charter Act. Those exceptional circumstances consist in the clear illegality of the lower Court's action, the fact that its order may, if acted on, prejudice the creditors as a body, though it cannot really bind them or the Official Receiver, who represents them. There is the further circumstance that, if interference is delayed, respondent might alienate the property and irreparable loss might result. *Abdullah v. Salaru* (8) is a precedent for interference with an appealable decision. In these

(1) 5 Ind. Cas. 884; 34 M. 505; 7 M. L. T. 132 (F. B.); 20 M. L. J. 283.

(2) 16 Ind. Cas. 149; 34 A. 496; 10 A. L. J. 3.

(3) 8 C. 910; 10 C. L. R. 333; 7 Ind. Jur. 84.

(4) 10 M. 210.

(5) 12 M. 1 at p. 5.

(6) 18 M. 99.

(7) 20 M. 249; 7 M. L. J. 94.

(8) 18 A. 4; A. W. N. (1895) 124.

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circumstances we revise the lower Court's order by setting it aside and directing that the petition before it be re-heard after the Official Receiver has been made a party, and be disposed of with reference to all of his and appellant's contentions. There will be no order as to costs in this Court. Costs to date in the lower Court will be provided for in the order it eventually passes.

SADASIVA AIYAR, J.—I entirely agree that the District Judge's order has to be set aside for the reasons given by my learned brother, so I concur in the order passed by him under section 15 of the Charter Act.

On the question whether section 5 of the Limitation Act gives this Court the power to excuse the delay in the presentation of this appeal, I agree with the decisions of *Nijabutoolla v. Wazir Ali* (3); *Reference under Forest Act* (4) and *Seshama v. Sankara* (5), which answer that question in the affirmative. The case of *Veeramma v. Abbiah* (6) was not concerned with the power of the Court to excuse delay under section 5 but with the provisions of section 7 of the old Limitation Act (present section 6), the application of which provisions would have "affected" and "altered," the period of limitation provided by a special Statute by excluding the interval during which the plaintiff was under disability and thus by lengthening the period. The decision in *Appa Rau Sanayi Aswa Rau v. Krishnamurthy* (7) no doubt, interprets the reasoning in *Veeramma v. Abbiah* (6), as involving the conclusion that section 5 of the Limitation Act is also inapplicable to a case governed by a special Statute. With the greatest respect I feel inclined to doubt if the reasoning of all the three Judges who decided the case of *Veeramma v. Abbiah* (6), really leads to that conclusion, though some of the observations in the judgment of one of the learned Judges (Shepherd, J.) might so point. I respectfully dissent from the decision of *Appa Rau Sanayi Aswa Rau v. Krishnamurthy* (7), the learned Judges who decided that case themselves conceding that the argument urged before them in favour of the applicability of section 5 appeared "to have considerable force."

Appeal allowed; Petition remanded.

LOWER BURMA CHIEF COURT.
FULL BENCH.

CIVIL REFERENCE NO. 4 OF 1915.

July 13, 1915.

Present:—Sir Charles Fox, Kt., Chief Judge,
Mr. Justice Twomey and Mr. Justice
Ormond.

THE BANK OF BENGAL—PLAINTIFF—
APPELLANT

versus

R. M. M. L. MUTHIA CHETTY—

OPPOSITE PARTY.

Court Fees Act (VII of 1870), s. 17, construction of—Distinct causes of action—Civil Procedure Code Act V of 1908), O. II, r. 2—One debt guaranteed by different guarantors—Single suit against debtor and guarantors—Court-fee payable on amount of debt guaranteed or on different amounts guaranteed.

Where the plaintiff sues the principal debtor on a cash credit account and also in the same suit seeks decrees against the several persons who have guaranteed that account for the full amounts to which they have guaranteed it, by separate pro-notes or mortgages, the plaint is chargeable under section 17 of the Court Fees Act with the aggregate amount of fees due on the amount claimed from each and all the guarantors separately. [p. 707, col. 1.]

FACTS appear from the following Order of Reference, dated the 14th June 1915, made by

ROBINSON, J.—The plaintiff Bank sued a Chetty Firm for the amount due on a cash credit account and also certain persons who had guaranteed re-payment of the amount due to the extent of Rs. 25,000 each. The Bank required such guarantors to endorse to the Bank promissory notes for the amount of the guarantee drawn in their favour by the Firm to be guaranteed and further required the guarantors to execute a letter of guarantee in a certain printed form.

The plaint is stamped on the amount claimed from the Chetty Firm and the question is whether it should not be stamped on the various amounts for which decrees are asked for against each guarantor or in other words whether section 17 of the Court Fees Act, 1870, does not apply to the case.

In Civil Regular No. 114 of 1915, I decided that a very similar suit embraced two or more distinct subjects. In that suit the Bank did not sue the principal debtor as it does in the present case, but I do not think that this makes any difference. Again in the former suit the aggregate amount of the sums claimed from the various

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guarantors exceeded the amount due by the principal debtor while in the present case it is less. The Court-fee, however, if section 17 applies, would exceed Rs. 3,000 in the present case while on the other view it would be less than Rs. 2,000.

Mr. Giles adheres to his previous arguments and asks me to refer the matter to a Bench of Judges and says that section 12 of the Court Fees Act allows no appeal from the decision of the Court of the first instance.

It is to be noted that the agreement as to the cash credit account is made on a different date to the various contracts of guarantee with the various guarantors and that the contracts of guarantee are not all made on the same dates. They must, therefore, be regarded as separate and distinct contracts and the causes of action on them are separate and distinct.

In *Perchiappa Chetty v. Po K'n* (1) a Full Bench of this Court held that the words "distinct subjects" were practically synonymous with "distinct causes of action."

As regards the principal debtor the cause of action is the agreement as to the cash credit account and the amount due. As regards each guarantor it is these facts *plus* the contract of guarantee. The former facts are common to the cause of action against each guarantor but they have to be supplemented in the case of each by proof of the separate and distinct contracts of guarantee. The subject of the suit or the cause of action consists of all the facts the plaintiff must prove and which form the foundation of his claim against each guarantor. These being distinct it appears to me that the suit embraces two or more distinct subjects and that section 17 applies, for each separate contract made with the same or different persons constitutes a separate cause of action.

Order II, rule 2, of the Code of Civil Procedure, is strongly pressed and it is urged that the plaintiff must join all his claims in a single suit and that the explanation thereto declares that the obligation and a collateral security and successive claims arising under the same obligation are to be deemed to constitute but one cause of action. It is urged that these

guarantees are merely collateral securities. I venture to doubt the correctness of the argument that plaintiff must join all these causes of action in one suit and also that these contracts of guarantee are merely collateral securities, but even if it be correct it seems to me that this provision, which is one of procedure only, was meant for the avoidance of a multiplicity of suits and does not touch the matter provided for in section 17 of the Court Fees Act.

That section is aimed at protecting the revenue from loss by lawful act on the part of plaintiff that is by separate causes of action being lawfully combined in one suit and the question still remains whether the suit as framed embraces several distinct subjects.

The matter is, however, not free from difficulty and involves large sums of money and will arise in several suits before the Court. I think it right, therefore, to refer the following question for decision by a Bench of this Court.

Where the plaintiff sues the principal debtor on a cash credit account and also in the same suit seeks decrees against the several persons who have guaranteed that account for the full amounts to which they have guaranteed it, should the plaintiff bear a Court-fee calculated on the amount claimed from the principal debtor or on the various amounts claimed from each and all the guarantors whichever is greater?

Mr. Giles, for the Applicant.

JUDGMENT.

Fox, C. J.—The plaint in the suit is headed "suit for the balance of an account and to enforce security:" it has not been claimed, however, that it is a suit for the balance due on a mutual, open and current account falling under Article 85 of the first Schedule of the Indian Limitation Act. No other Article in that Schedule referring to an account is applicable, so that the suit must really be a suit for money lent governed by Article 59 of the first Schedule, if the lending of the money can be separated from the promissory notes and the equitable mortgages.

The guarantee agreements contemplate that the Bank shall, subject to a specified con-

(1) 4 Ind. Cas. 289; 5 L. B. R. 94.

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dition, be at liberty to take steps to enforce payment of the promissory notes referred to in the agreements. This is what the Bank is doing in the suit. In the 30th paragraph of the plaint, exemption from the ordinary period of limitation for suits on the notes is claimed. It appears to me that so far as the guarantors are concerned the suit must be regarded as one on promissory notes and so far as the mortgagor-defendant is concerned as a suit upon a mortgage. Each note is a separate cause of action, and the mortgage affords an entirely distinct cause of action.

The suit, in my opinion, embraces two or more distinct subjects and the plaint is chargeable under section 17 of the Court Fees Act. I would answer the question referred as follows:—

The plaint is chargeable with the aggregate amount of the fees to which plaints embracing separately each of the promissory notes and a plaint in a suit on the mortgage would be chargeable.

TOWMEY, J.—I concur.

ORMOND, J.—The claim is based on two mortgages and seven promissory notes. Each of the promissory notes might have formed the subject-matter of a separate suit, and they form the only cause of action against defendants Nos. 19 to 24 respectively.

The facts that the mortgages and promissory notes were given as security for a consolidated loan by the Bank to A. L. A. S. R. M., does not consolidate the several causes of action into one for the purpose of Court Fees Act.

In my opinion the claims have been rightly taken to be distinct subjects within the meaning of section 17 of the Court Fees Act.

MADRAS HIGH COURT.

APPEAL AGAINST APPELLATE ORDER No. 67
OF 1914.

August 19, 1915.

Present:—Mr. Justice Sadasiva Aiyar and
Mr. Justice Napier.

VARADARAJA MUDALI—JUDGMENT-
DEBTOR—RESPONDENT—APPELLANT

versus

MURUGESAM PILLAI AND OTHERS—
RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Art. 182, cls. (5), (6), construction of—"Applying in accordance with law," meaning of—Transfer of Property Act (IV of 1882), s. 99—Disability of mortgagee to bring mortgaged property to sale—Change in procedure—Civil Procedure Code (Act V of 1908), O. XXXIV, r. 14—Sale permitted—Subsequent application for execution—Res judicata.

Article 182 of Schedule I to the Limitation Act, 1908, should receive a fair and not too technical a construction so as to enable the decree-holder to obtain the fruits of his decree. [p. 709, col. 1.]

Deo Nuraia Singh v. Sri Bhagwat Naik, 10 Ind. Cas. 411; *Kamakshi Pillai v. Ramasami Pillai*, 18 M. L. J. 14; *Jamma Dat v. Bishnath Singh*, 3 Ind. Cas. 817; 6 A. L. J. 944, followed.

Clauses (5) and (6) of Article 182, Schedule I, to the Limitation Act (IX of 1908) are independent and exclusive of each other and the provision contained in the one clause cannot be imported into the other. [p. 708, col. 2.]

Therefore the mere issue of a notice under section 248 of the Code of Civil Procedure, 1882, has the effect of starting the period of limitation afresh whether the application for execution upon which such notice was issued was one "in accordance with law or not". [p. 709, col. 1.]

Where substantive rights are decided in an order passed in an execution proceeding; such decision is, no doubt, *res judicata* and subsequent applications are barred if the procedure under which such applications were made remains the same. [p. 709, col. 2.]

Vyapuri Koundan v. Chidambara Mudaliar, 18 Ind. Cas. 607; 24 M. L. J. 26; 37 M. 314, referred to.

Where an order dismissing a previous application for execution was based on the view that the then existing procedure made it illegal for the decree-holder to claim the relief, that order will not operate as *res judicata* when that procedure is changed, and gives the decree-holder a right to claim that relief. [p. 709, col. 2.]

Amanat Bibi v. Imdad Husain, 15 I. A. 106 at pp. 111, 112; 15 C. 800; 12 Ind. Jur. 255; 5 Sar. P. C. J. 214; *Rafique Jackson's P. C. No. 103*; *Ramasami Ayyar v. Vythinatha Ayyar*, 26 M. 760; 13 M. L. J. 448; *Alimunnissa Chowdhurani v. Shama Charan Roy*, 32 C. 749; 9 C. W. N. 466; 1 C. L. J. 176; *Babu Baij Nath Goenka v. Pudmanand Singh*, 14 Ind. Cas. 124; 16 C. W. N. 621; 16 C. L. J. 154; 39 C. 848, followed.

Appeal against the decree of the District Court of Trichinopoly, in Appeal Suit No. 632 of 1912, preferred against that

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of the Court of the District Munsif of Namakal in Execution Petition No. 812 of 1912, in Original Suit No. 253 of 1894 on the file of the Court of the District Munsif of Trichinopoly.

FACTS.—The plaintiff, a mortgagee, obtained a decree for money apart from the mortgage and in execution brought the mortgaged property to sale. No order for sale was made, as that would be in contravention of section 99 of the Transfer of Property Act, and the application for execution was dismissed. The new Code of Civil Procedure, Order XXXIV, rule 14, made an alteration in the mortgagee's rights, and confined his disability only to *claim under the mortgage*. The decree-holder presented another application and on that, a notice was issued. Both the lower Courts held that the issue of notice saved limitation under clause (6) of Article 182 of Schedule I of the Limitation Act and the subsequent application was not barred by *res judicata*. The present appeal is against that order.

Mr. T. R. Venkatarama Sastri, for the Appellant: The application for sale being one in contravention of section 99 of the Transfer of Property Act, it was not one in accordance with law, "under clause (5) of Article 182 and would not save limitation." The subsequent application is barred by *res judicata*, as the application previously made was decided on the merits. The fact that the Code of Civil Procedure, Order XXXIV, rule 14, altered the mortgagee's right would not improve his position.

Mr. P. R. Ganesha Iyer, for the Respondent: The issue of notice under clause (6) of Article 182 is enough to save limitation. Question is only one of proceedings and the doctrine of *res judicata* does not apply.

JUDGMENT.

SADASIVA AIYAR, J.—The judgment-debtor is the appellant. His learned Vakil Mr. T. R. Venkatarama Sastri has raised two contentions in his arguments before us, those two contentions being :

(a) that the application in execution made by the decree-holder dated 4th March 1908 was barred by limitation and,

(b) that the relief prayed for in that

application could not be granted to the decree-holder, the matter being *res judicata* against the decree-holder by reason of a prior execution petition, dated 13th September 1905, praying for the same relief having been dismissed on the ground that by section 99 of the Transfer of Property Act the decree-holder could not bring to sale the attached property subject to the decree-holder's own mortgage in execution of the money-decree, though that decree was obtained on a cause of action other than the mortgage document. (Some other contentions suggested before us need not be noticed as they have not been raised in the grounds mentioned in the memorandum of appeal.)

Contention (a) on the question of limitation is based on the argument that the application of 13th September 1905 was not in accordance with law as it prayed for a relief which could not be legally granted by the Court and that an application not in accordance with law cannot furnish a fresh starting point of limitation as the expression used in clause 5 of Article 182 of the Limitation Act is "the date of applying in accordance with law to the proper Court for execution, or to take some step-in-aid of execution of the decree or order." But the learned District Judge does not rely on clause 5 of Article 182 but on clause 6 of the same Article. Mr. Venkatarama Sastri, therefore, further argued that clause 6, though it used the wide phrase "the date of issue of notice to the person against whom execution is applied for to show cause why the decree should not be executed against him" must be confined to the date of the issue of such notice *in respect of an execution application made in accordance with law* and ought not to be extended to the date of issue of notice in respect of an application not in accordance with law. (The execution petition of 1905 was dated 13th September 1905 and the date of the issue of such notice seems to have been about a week later.) I see no sufficient reason why the words "in accordance with law" found in clause 5, should be introduced into clause 6 when the Legislature has not thought fit to do so." Mr. Venkatarama Sastri argued that if those words are not introduced the mere issue of a notice in respect of an

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execution petition might be contended to give a fresh starting point for limitation. The answer to this objection is that a fresh starting point can be given to a right to sue or to apply only when the right had not become barred on the date of the alleged fresh starting point and that a right to sue or to apply, once barred by limitation, cannot be revived. This was the answer made to a similar argument addressed for the judgment-debtor in the case reported as *Jamna Dat v. Bishnath Singh* (1).

Next it was argued that the issue of notice in respect of an execution application not made to the proper Court might be contended to give a fresh starting point of limitation if clause 6 was given too wide an interpretation. The answer to this objection is that an application made to a Court having no jurisdiction will be treated as waste paper, and such an application to such a Court is also of no value in the eye of the law.

Article 182 should receive a fair and liberal and not too technical a construction so as to enable the decree-holder to obtain the fruits of his decree. That the language of the Article ought not to be strained in the judgment-debtor's favour has been held in numerous cases which are quoted at page 470 of Rustonjee's Book on Limitation. In *Deo Narain Singh v. Sri Bhagwat Naik* (2) Mookerjee and Caspersz, JJ., held that the issue of a notice under section 248 of the old Civil Procedure Code was sufficient to save a decree from the bar of limitation under the old Article 179 corresponding to present Article 182 even though it was issued upon an application which was not in accordance with law.

In *Kamakshi Pillai v. Ramasami Pillai* (3), Miller and Munro, JJ., held the same view following Civil Miscellaneous Second Appeal No. 86 of 1905 and *Pachiappa Achari v. Poojali Seenan* (4). I am prepared to follow these two decisions and the decision *Jamna Dat v. Bishnath Singh* (1)

as the dangers alleged to arise by giving too wide an interpretation to clause 6 are not real dangers as I have already tried to point out. The case of *Kamakshi Pillai v. Ramasami Pillai* (3) does not expressly refer to clause 5 of Article 179 of the old Code corresponding to clause 6 of the present Article 182 and in some of the other cases quoted before us, the application for issue of notice was itself treated as a step-in-aid of execution so as to fall under clause 4 of Article 179 of the old Code (corresponding to clause 5 of Article 182 of the new Limitation Act). However, the decisions of *Deo Narain Singh v. Sri Bhagwat Naik* (2), and *Jamna Dat v. Bishnath Singh* (1) refer to clause 5 of Article 179 and are direct authorities which, as I said, I shall follow. I would, therefore, overrule the first contention as to limitation.

As regards *res judicata* the dismissal of the earlier application of 1905 was based on the then existing law of procedure when properties are sought to be brought to sale after they are attached subject to a mortgage in the decree-holder's own favour. A decision, especially on a question of procedure cannot be treated as *res judicata* when that procedure itself is changed by the Statute Law. Whether substantive rights are decided in an order passed in execution proceedings, such decision is, no doubt, *res judicata* in subsequent execution applications. [See *Vyapuri Koundan v. Chidambara Mudaliar* (5).] The only judicial determination on the application of 1905 was that on the procedure law as it then stood, the decree-holder could not pursue the line of remedy which he then wanted to follow. The new remedy in execution given by the new Statute created a new right to apply in execution for the remedy formerly disallowed and the dismissal of a former application on the ground that there was then no right to apply for that particular line of remedy cannot be *res judicata* when the new right to apply is relied on. A plaintiff can maintain a suit on a new cause of action which did not exist when he brought a former suit for the same relief, though that suit was dismissed on the ground that the plaintiff was not entitled to that relief on the cause of action on which he based it.

(1) 3 Ind. Cas. 817; 6 A. L. J. 944.

(2) 10 Ind. Cas. 411.

(3) 18 M. L. J. 14.

(4) 28 M. 557.

(5) 18 Ind. Cas. 607; 37 M. 314; 24 M. L. J. 26.

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A decree-holder can, therefore, it seems to me, similarly, maintain an application for a new line of remedy granted by a new Statute even though his former application for the same relief had been rejected before his right to the new relief arose. As was said by the Privy Council in *Amanat Bibi v. Imdad Husain* (6): "But if it be established that the respondent was mortgagor in 1854 with the right of redemption, why should he be barred of his right merely because at an earlier date" (1853) "he may have had no right to the property at all?" (The respondent had brought a former suit for possession basing his right on an alleged proprietorship right created in 1853 and had failed in that suit.) "The respondent's present claim certainly did not arise out of the cause of action which was the foundation of the former suit." Let us again take a case where the brother of the husband of a childless Hindu widow sued during her life-time for recovery of property in her hands on the ground that he and her husband were undivided in interest and she took unlawful possession of the property and his suit was dismissed on the ground that he and his brother were divided in interest and the properties sued for belonged to his brother solely. If after the dismissal of such a suit, the widow conveyed the properties to him and he again sued for possession on the strength of that conveyance, his new claim cannot surely be defeated by the plea of *res judicata*. I see no difference in principle whether the second suit or application is based on a new cause of action or on a new right created in the plaintiff or applicant by new Statute Law. The whole question has been elaborately considered by Sir Bhashyam Iyengar, J., in *Ramaswami Ayyar v. Vythinatha Ayyar* (7) and it is difficult to add anything useful to the considerations mentioned in his judgment as to the principles to be applied by a Court in coming to a decision on the plea of *res judicata*. [I would, however, just refer to the two cases in *Alimunnissa Chowdhurani v. Shama Charan Roy* (8) and *Babu Baij Nath Goenka v. Raja Pudmanand Singh* (9) in which

(6) 15 L. A. 106 at pp. 111, 112; 15 C. 800; 12 Ind. Jur. 255; 5 Sar. P. C. J. 214; Rafique Jackson's P. C. No. 108.

(7) 13 M. L. J. 448; 26 M. 760.

(8) 9 C. W. N. 466; 32 C. 749; 1 C. L. J. 176.

(9) 14 Ind. Cas. 124; 16 C. W. N. 621; 16 C. L. J. 154; 39 C. 848.

it was held that a first suit or application will lie even though a former suit or application of a similar nature was decided on an erroneous view of the law between the same parties.

I would, in the result, dismiss the appeal with costs.

NAPIER, J.—I concur.

Appeal dismissed.

LOWER BURMA CHIEF COURT.

SECOND CIVIL APPEAL No. 270 of 1914.

July 9, 1915.

Present:—Sir Charles Fox, Kt., Chief Judge.

MG. SAN BWIN—PLAINTIFF—APPELLANT

versus

A. N. K. NAGAMUTU—DEFENDANT—RESPONDENT.

Mortgage—Prior usufructuary mortgagee's rights—Rights of purchaser of equity of redemption in decree of 1st mortgagee's suit to which puisne mortgagee was not made party—Declaratory suit by puisne mortgagee without asking for further relief, maintainability of—Transfer of Property Act (IV of 1882), s. 67—Civil Procedure Code (Act V of 1908), O. XXXIV, r. 1.

A second mortgagee in possession under a mortgage under which he was entitled to possession, cannot be lawfully ousted from possession by his mortgagor or by the 1st mortgagee or by a purchaser at a sale under a decree in a suit on the 1st mortgage to which he was not a party. The purchaser in such a suit, whether he is a 1st mortgagee or a stranger, does not acquire the rights of the mortgagor as at the date of the 1st mortgage but only those that subsist in him at the date of the suit. [p. 712, col. 1.]

Therefore a puisne mortgagee's suit for declarations that the decree and sale in the first mortgagee's suit was inoperative against him and that the purchaser was not entitled to disturb his possession, without asking for further relief is maintainable. [p. 712, col. 1.]

Mulla Veetil v. Achuthan Nair, 9 Ind. Cas. 513; (1911) 1 M. W. N. 165; 21 M. L. J. 213; 9 M. L. T. 431; *Goverdhan Doss v. Veerasami Chetti*, 26 M. 537, referred to.

Mr. Bomanji, for the Appellant.

Mr. N. S. Aiyer, for the Respondent.

JUDGMENT.—Eliminating from the plaint unnecessary and irrelevant matter the state of facts on which the plaintiff asked a declaratory decree was as follows:—In 1905 the 3rd defendant Ma The and two others (U. Lin and Ko Lon) mortgaged two holdings of paddy land, one of which is the subject-matter of this suit, to the first defendant firm for Rs. 750 by a registered mortgage with-

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out possession. In 1910 the 1st defendant firm pressed for payment and Ma The borrowed Rs. 1,100 from the plaintiff with which she paid to the 1st defendant firm her share of the debt to that firm. As security for this Rs. 1,100 Ma The mortgaged one of the holdings to the plaintiff by a registered deed. This mortgage was usufructuary and under it the plaintiff was to hold possession of the holding for six years, the principal not being re-payable until the expiration of such period. In pursuance to this mortgage the plaintiff had entered into the possession of the land and was in possession of it when the suit was filed. In 1913 the 1st defendant firm had sued the mortgagors on the mortgage of 1905 for Rs. 300 principal and interest due, and had obtained a mortgage decree for such amount of principal Rs. 172-8 interest, and Rs. 52-8 costs. The decree directed that in default of payment of Rs. 525 with interest at Rs. 6 per cent. per annum from the 16th October 1912 the two mortgaged holdings were to be sold. The plaintiff was not a party to the suit and no mention was made of his having the usufructuary mortgage over one holding. The holdings were sold under the decree and the 2nd defendant bought the one mortgaged to the plaintiff for Rs. 735; an order had been made at the instance of the 2nd defendant ordering Ma The to deliver up the land to him. The plaintiff apprehended disturbance of his possession under his usufructuary mortgage.

The prayer of the plaint is.

1. That it may be declared that the decree in Civil Regular Suit No. 448 of 1912 (the suit on the 1st defendant firm's mortgage) and the sale of the land in Civil Execution No. 150 of 1913 of the Township Court of Yedashe is inoperative against the plaintiff's interest in the land and voidable, and

2. That the defendant No. 2 the purchaser at the sale in execution is not entitled to disturb the plaintiff's possession.

It may be said at once that the plaintiff can have no right to a declaration that the sale under the decree is voidable either at his instance or that of any of the mortgagors. There is, however, a question whether he can prove what he alleges; he is not entitled to a decree containing the other declarations he asked for.

The Sub-Divisional Judge did not appreciate the real point involved in the case, which is whether the plaintiff as a puisne usufructuary mortgagee who was not made a party to a suit on the 1st mortgage as he should have been under Order XXXIV, rule 1 of the Procedure has a right to a merely declaratory decree. The Divisional Judge discussed some of the very numerous decisions on the rights of puisne mortgagees, and came to the conclusion that the plaintiff had not adopted either of the two remedies open to him, and that further relief being open to him his suit for a mere declaratory decree would not lie.

The rights of a puisne mortgagee who has not been made a party to a suit on the 1st mortgage, has been the subject of much discussion in the Indian High Court. It has been dealt with fully by a Full Bench of the Madras High Court in *Mulla Veetil v. Achuthan Nair* (1) which, although it is a most important decision, has not so far been included in the official reports. The cases in all the High Courts which had any bearing on the question were considered at length and the Courts held that the following propositions were established viz. :—

1. A second mortgagee is entitled to the same rights as the 1st mortgagee with reference to his security having regard to the nature of his mortgage.

2. The purchaser of the equity of redemption after the 1st mortgage and the 2nd mortgagee both stand on the same footing with reference to their respective rights against the 1st mortgagee when they have not been impleaded in the suit instituted by him on his mortgage.

3. Those rights are unaffected by the suit of the 1st mortgagee to which they are not made parties and the decree passed therein made in pursuance thereof.

4. The purchaser in such a suit, whether it is a 1st mortgagee or a stranger, does not acquire the rights of the mortgagor as at the date of the 1st mortgage but only those that subsist in him at the date of the suit.

The question referred was "whether a first mortgagee who has purchased the mortgaged property in execution of a decree on his

(1) 9 Ind. Cas. 513; (1911) 1 M. W. N. 165; 21 M. L. J. 213; 9 M. L. T. 431.

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mortgage and sues for possession, or in the alternative for the recovery of his money, is entitled to a decree for possession subject to redemption by a puisne mortgagee with possession who was not a party to the suit by the first mortgagee"? The answer of the Full Bench was in the negative.

The judgment makes it clear that a stranger who buys is in no better position than a first mortgagee who buys at the sale in pursuance of his decree. Their Lordships say, "the authority, therefore, of the Judicial Committee is clear for the position that whatever rights the second mortgagee as such may have at the date of his mortgage whether to possession (if his mortgage be one with possession and the previous mortgage without it) or to sale or foreclosure under section 67 (of the Transfer of Property Act), such rights remain altogether unaffected by the suit of the first mortgagee without the second being a party to it and the sale in execution of his decree." This judgment arrived definitely at the conclusions which at the latter decisions were tending towards, and it appears to me to undoubtedly state the law accordingly. Their Lordships say that there is nothing in *Goverdhana Dos v. Veerasami Chetti* (2) to support the contentions of the respondent who argued in favour of an affirmative answer to the question referred. Adopting this judgment the plaintiff in this case, if he was a second mortgagee in possession under a mortgage under which he was entitled to possession could not be lawfully ousted from possession by his mortgagor, or by the 1st mortgagee or by a purchaser at a sale under a decree in a suit on the 1st mortgage to which he was not a party. That being so a suit for declarations that the decree and sale in the 1st defendant's suit was inoperative against him, and that the 2nd defendant was not entitled to disturb his possession was open to the plaintiff in this case, and he was not obliged to seek further relief. All he wants is to be left in the possession which he alleged he had at the time he filed his suit. It is open to him to choose his own time for enforcing other rights which the law may give him in respect of his usufructuary mortgage.

(2) 26 M. 537.

The case will be remanded for trial, but the issues fixed by the Sub-Divisional Judge are not appropriate. I fix the following issues:—

1. Did Ma The mortgage the holding in suit to the plaintiff by an usufructuary mortgage and was the plaintiff in possession of the holding under such usufructuary mortgage at the time the suit was filed?

2. Was the plaintiff a party to the suit by the 1st defendant firm on their 1st mortgage over the lands?

If the 1st issue is answered in the affirmative and the second issue in the negative plaintiff will be entitled to the declaratory decree which he asks for except in so far he asks that the decree obtained by the 1st defendant and the sale under it are voidable.

It will be unnecessary for the Sub-Divisional Court to go into any question of collusion or fraud, or whether the 2nd defendant had notice of the plaintiff's mortgage. This Court has held that the registration of a document concerning land affords notice to all persons dealing with it subsequently, consequently the 2nd defendant cannot resist the plaintiff's claim on the ground that he was a *bona fide* purchaser of the land without notice of the plaintiff's mortgage.

The appeal is allowed, the decrees of both the lower Courts are set aside and the case is remanded for admission under its original number and for trial on the issues I have fixed.

The first and the second defendants must pay the plaintiff's costs of the appeals in the Divisional Court and in this Court.

A certificate will issue to the appellant under section 13 of the Court Fees Act.

Note.—First defendant was not made a party to the appeal either in this or in the Divisional Court. No mention was made in the decree to pay the plaintiff's costs by him.

Appeal allowed.

ULLATTIL KALATHIL NETHIRI MENON v. MULLAPULLI GOPALAN NAIR.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 439 OF 1913.

July 30, 1915.

Present:—Mr. Justice Spencer and

Mr. Justice Coutts-Trotter.

ULLATTIL KALATHIL NETHIRI

MENON—PLAINTIFF—APPELLANT

versus

MULLAPULLI GOPALAN NAIR AND

OTHERS—DEFENDANTS—RESPONDENTS.

Trust—Trustees, majority of, power of—Document intended to be signed by all trustees—Signature by some only, effect of—Trusts Act (II of 1882), s. 42—“Any trustees or trustee,” meaning of.

The majority of a body of charitable trustees can legally bind the whole body. [p. 714, col. 1.]

Wilkinson v. Malin, (1832) 2 Tyr. 544; 2 C. & J. 636; 1 L. J. Ex. 234; 37 R. R. 791; *Whiteley, In re, London (Bishop) v. Whiteley*, (1910) 1 Ch. D. 600; 102 L. T. 313; 54 S. J. 406; 26 T. L. R. 309; *Charavur Teramath v. Urath Lakshmi*, 6 M. 270, followed.

Where a document is drawn up in the name of all the trustees and if it is the intention of the parties that all should execute it, it will be incomplete and inoperative till all have done so. [p. 714, col. 1.]

Sivasami Chetti v. Serugan Chetti, 12 M. L. J. 17; 25 M. 389; *Latch v. Wedlake*, 3 P. & D. 499; 9 L. J. Q. B. 201; 11 A. & E. 959; 52 R. R. 552; 113 E. R. 678, followed.

Where it was intended at first that all the trustees should join in the execution of a deed but where it was found impossible after the lapse of a month to obtain the consent of one of the trustees and the obligee of the bond paid the money without his signature:

Held, that the intention of the parties was to hold the parties bound by the obligation notwithstanding the refusal of one trustee to sign the deed. [p. 714, col. 2.]

The words “any trustee or trustees” in section 42 of the Trusts Act (II of 1882) mean the “trustee where there is only one, the trustees where there are more” and, therefore, a few only of the trustees without any authority to themselves cannot validly discharge third parties from payment of rent due by them to the trust. [p. 715, col. 2.]

Rambabu Parbu Mirasi v. Members of the Committee of Management of Savasthan Shri Dev Rameshwar of Achare Antaji Ramchandra Nadkarni, 1 Bom. L. R. 667, dissented from.

Second appeal against the decree of the District Court of South Malabar, in Appeal Suit No. 306 of 1912, preferred against that of the Court of the District Munsif of Ottapalam, in Original Suit No. 29 of 1911.

Mr. C. V. Ananthakrishna Aiyar, for the Appellant.

Messrs. G. S. Ramachandra Aiyar and T. Eroman Unni, for the Respondents.

JUDGMENT.—The facts of this case are reasonably clear, and can be shortly stated

as follows: Defendants Nos. 9 to 13 are the *uralans* or trustees of a temple known as the Tiruvegapura Devaswami, and the lands referred to in the suit are the property of the temple, and at the period material to this suit the management of the property of the temple was vested in the whole body of *uralans*. In 1904 the lands in question in this case were mortgaged to the 1st defendant on behalf of the *tavazhi* of defendants Nos. 1 to 6 with a corresponding obligation on them to pay certain rents and revenues while in possession to the *uralans* (Exhibit A). In this state of things, the 9th defendant, who appears for some reason to have been on bad terms with his fellow *uralans*, brought a suit against them, obtained a decree, and attached in execution the moveables of the temple, including the vessels and jewels necessary for the performance of the daily worship. It thereupon became an urgent matter to free the vessels and jewels, and the plaintiff came forward with the requisite funds. Meetings of the *uralans* were held which the 9th defendant though summoned, refused to attend, and it was agreed that the plaintiff should be reimbursed by making over to him certain of the rents and revenues due under Exhibit A. For this purpose a *karar* was drawn up, Exhibit B, and it is on this document that he brings his action. As drawn up, the contracting parties are expressed to be all the five *uralans* of the one part and the plaintiff of the other part; but the 9th defendant could not be got to execute it and in fact never did execute it. Finally it was executed by the remaining four *uralans* on the 24th April 1909 and handed to the plaintiff, who forthwith paid into Court the moneys necessary to release the moveable property of the temple. When the plaintiff endeavoured to recoup himself by collecting the moneys due to him under Exhibit B, he was met by a refusal based upon various grounds and among them the allegation that the moneys had already been paid to defendants Nos. 9 and 12, and in support of this allegation a receipt was produced dated 27th November 1910 and signed by defendants Nos. 9, 12 and the *anandravan* of defendant No. 11's *tarwad* (Exhibit I). He thereupon instituted the present suit; so far he has failed in both Courts below, and he now comes in second appeal before this Court. No one conversant with the facts of th

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case can fail to entertain strong suspicions that the alleged payment to the 9th and 12th defendants was a fiction, and Exhibit I a sham document concocted to defeat the plaintiff's just claim and that was part of his case in the Courts below. The manner in which this issue was treated below is most cursory and unsatisfactory; however both Courts have found that the payment was made; that is a finding of fact in support of which there was no doubt some evidence and we must accept it here. That being so, two questions only arise for our decision. *First*, was Exhibit B a valid document or was it vitiated by the fact that only four of the five contracting trustees executed it and *secondly*, was the payment evidenced by Exhibit I, a good discharge to the defendants from the plaintiff's claim? At one time a third point was suggested, *viz.*, that Exhibit B only effected an assignment of an actionable claim but this was not seriously pressed, and is at once refused by an examination of the documents. As to the first point, the law is well settled and clearly understood both in this country and in England. The majority of a body of charitable trustees can legally bind the whole body [*Wilkinson v. Malin* (1), *Whiteley, In re, London (Bishop) v. Whiteley* (2) and *Charavur Teramath v. Urath Lakshmi* (3)] but if a document is drawn up in the name of all, and it is the intention of the parties that all should execute it, it will be incomplete and inoperative till all have done so. See *Sivasami Chetti v. Sevugan Chetti* (4), *Latch v. Wedlake* (5). It is a question of fact as to what was the intention of the parties. In this case the District Munsif has found as a fact that they intended the document to be executed by all the five trustees, and the District Judge has accepted his finding; if there is evidence to support that finding, we cannot interfere with it in second appeal; if there was no evidence to support it, it is our duty to set it aside. Upon a careful consideration

of the facts, we think that not only was there no evidence in support of this finding, but that all the evidence points wholly and conclusively the other way. The document was drawn up certainly as early as the 17th March 1909, as on that day the four trustees sent an urgent notice to the 9th defendant informing him that it was drawn up, that his signature to it was required, and that if he did not sign it the other four would sign it without him and "give it the same effect as if he had also taken part" (Exhibit C1). Another equally urgent notice in similar terms was sent to the 9th defendant on the 9th April (Exhibit C). As he did not answer these communications, the document was executed by the other four trustees on the 24th April and handed to the plaintiff, who thereupon paid the money in satisfaction of the decree. The Judges below have been misled by an answer in the plaintiff's cross-examination, which appears in the deposition as follows:—

The intention when Exhibit B was written was that 9th defendant should also execute it." That is doubtless perfectly true; but the learned Judges have overlooked the fact that more than a month elapsed between the writing of the document and its execution that during that month the 9th defendant had been asked repeatedly to sign, and had failed to do so, and that the remaining *urualans* had announced their intention of signing themselves and delivering the document to the plaintiff. The intention of the *urualans* is sufficiently evidenced by their own words in Exhibits C 1 and C 2; that of the plaintiff is equally manifest from the fact that as soon as he got the document signed, he parted with his money. We think that there was no evidence to support this finding of the lower Courts, and we set it aside and declare Exhibit B to be a valid and binding document.

There remains the question as to whether the payment to two of the five trustees is a valid payment. There is no doubt that even one out of many trustees can receive and give a good discharge for rent and similar payments of income, if he has or is held out by his co-trustees as having authority to do so. Here it is not contended that the two *urualans* had any such authority actual or by estoppel. But it is said that though the Indian Trusts Act does not apply to charit-

(1) (1832) 2 Tyr. 544; 2 C. & J. 636; 1 L. J. Ex. 234; 37 R. R. 791.

(2) (1910) 1 Ch. D. 600; 102 L. T. 313; 54 S. J. 406; 26 T. L. R. 309.

(3) 6 M. 270.

(4) 25 M. 389; 12 M. L. J. 17.

(5) 11 A. & E. 959; 3 P. & D. 499; 9 L. J. Q. B. 201; 52 R. R. 553; 113 E. R. 678.

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able trusts; its provisions should guide us by analogy in matters of this sort; and that was the view adopted in *Rambabu Parbu Mirasi v. Members of the Committee of Management of Savasthan Shri Dev Rameshwar of Achare Antaji Ramchandra Nadkarni* (6); and that section 42 of the Indian Trusts Act, if applied, validates this payment. The Court in that case (Jenkins, C. J., and Ranade, J.) applied the provisions of section 42 of the Act to a case of charitable trust; and proceeded to give an interpretation of the section. It runs as follows:—

"Any trustees or trustee may give a receipt in writing for any money, securities or other moveable property payable, transferable or deliverable to them or him by reason, or in the exercise, of any trust or power; and, in the absence of fraud, such receipt shall discharge the person paying, transferring or delivering the same therefrom, and from seeing to the application thereof, or being accountable for any loss or misapplication thereof."

It will be noticed from the report of the Bombay case (6) that the learned Judges quote the section as beginning "any trustee may," whereas the words are "any trustee or trustees may." They proceed to interpret the section as meaning that any member of a body of trustees may give an effectual receipt for a payment made to him solely. We do not agree with this decision; and we do not think that the learned Judges would have decided it as they did, if their attention had been drawn to the sections of the English Statutes upon which the Indian section is modelled. These sections are 23 and 24 Vict. c. 149, section 29; 22 and 23 Vict. c. 35, section 33; and 44 and 45 Vict. c. 41, section 33. Before the first of those enactments, a person who paid money over to trustees was responsible to the *cestui que trust* for seeing to the proper application to the trust of the moneys so paid. The object of the English sections (their purport is the same, but they apply to different classes of trust) was to put an end to so great a hardship, and to discharge those who in good faith paid trustees from any further responsibility as to the disposal of the moneys. Such being the origin of the English sections we think it is clear

that on their true construction the words "any trustee or trustees" mean "the trustee where there is only one, the trustees where there are more" and we see no reason for applying a different construction of the words of the Indian Trusts Act. Accordingly we hold that the payment to the 9th and 12th defendants, and the receipt, Exhibit I, failed to discharge defendants Nos. 1 to 6, and leaves them no answer to the plaintiff's claim.

The appeal is allowed with costs in all Courts, and the plaintiff must have a decree in the terms of his plaint except as regards the rent due for the *Malayalam* year 1080, which is not now pressed. In default of payment within six months, the properties in suit must be sold.

Appeal allowed; Suit decreed.

LOWER BURMA CHIEF COURT.

SECOND CIVIL APPEAL No. 155 OF 1914.

May 20, 1915.

Present:—Mr. Justice Young.

SAW MOUNG GYI—PLAINTIFF—APPELLANT
versus.

MA THU KHA—DEPENDANT—RESPONDENT.

Chinese Buddhist Law—Custom of marriage—Elopement—Subsequent consent of bride's parents, effect of.

Among Chinese Buddhists, elopement of the girl and the subsequent consent of the girl's parents are, in the cases of inferior marriages, sufficient to constitute a valid marriage without any ceremony. [p. 716, col. 1.]

Mr. Dawson, for the Appellant.

Mr. May Aung, for the Respondent.

JUDGMENT.—This is an application by the plaintiff to have it declared that he is not the husband of the defendant. The onus is, therefore, upon him: in most of the cases cited the application was the wife under the maintenance section of the Criminal Procedure Code, in which it would be for the applicant to prove affirmatively that she was married to the respondent in accordance with Chinese Customary Law. In *Fone Lan v. Ma Gye* (1) where the plaintiff had to prove affirmatively a right under Chinese Customary Law, it was

(6) 1 Bom. L. R. 667.

(1) 2 L. B. R. 95.

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held that he had failed, a result not to be wondered at, considering the conflict that prevails amongst the available authorities and amongst Chinese witnesses themselves. In *Pai Beng Teng v. Ko Maung* (2) which was also a civil case, being an application by a Chinaman to administer the estate of his wife a Burmese woman, the learned Judge seems to have held that under the circumstances of the case the applicant would whatever law was applicable be entitled to grant of Letters. In *T. Wain Shain v. Ma Hnin Hlaing* (3) which was again a civil suit brought by a Burmese girl for the restitution of conjugal rights it was held that she had failed to prove the validity of the marriage. In fact from the authorities cited to me it would appear to be the case that the party on whom the onus lies usually fails. In the present case here is almost an unanimous consensus of opinion not amongst the Chinamen called by the wife but also amongst the Chinamen called by the husband that the marriage is valid. Thus Sa Tin Hi, plaintiff's witness No. 3, says I recognise plaintiff and defendant as man and wife and defendant not as kept mistress. In case of elopement amongst Chinese Buddhists when the girl is brought back to her parents and the latter consent to the union, it would be recognised as a marriage if no other marriage ceremony be performed even if defendant does not visit plaintiff's parents, still, she will be recognised as his wife; witness No. 5 agrees with witness No. 3, witnesses Nos. 2 and 4 also say that in this particular case they would recognise the union as legitimate as the pair have children a somewhat extraordinary reason but the fact remains that the plaintiff is unable to produce a single person of his own nationality who does not regard him as the husband of the defendant.

There are, as it seems to me, all admissions made against the plaintiff by persons whom plaintiff has himself called forward as persons likely to know his customary law. The *ratio decidendi* with at least three of them is that it suffices if the girl's parents consented to the marriage.

Thus P. W. No. 2, Lim Chaik, says that the custom in this country for a run-away couple is that after a little time the girl is brought back to her parents and the latter consent to the union, it will be recognised as marriage if no other ceremony is performed, even if defendant do not visit plaintiff's parents she will be recognised as plaintiff's wife.

Plaintiff's witness No. 4 says in Burma if a young Chinaman elopes with a Burmese girl and if the parents of both sides consent marriage becomes valid. Plaintiff's 5th and the last witness says in case of elopement if the girl is brought back and her parents consent, the marriage becomes valid.

Turning to the authorities cited. I cannot find anything, definitely prohibitive of such a custom. Parker in his Chinese Family Law speaks of certain preliminaries as being gone through in the case of a first class marriage, but he also speaks of inferior categories of women who he says are still wives. Alabaster on the other hand would make the Chinaman monogamous and their women mere concubines, *vide* page 171. It is evident, however, that he considers the consent of the parents, is the important thing even for the head wife and it is significant that when he goes into details that he says to constitute a valid marriage the written assents of the relatives must be given. The consent of the father of the woman will suffice but not that of the mother?" He does not mention the consent of the father of the bridegroom as necessary. Having regard to the veneration of the Chinese sons for their parents one would expect it to be necessary at any rate for a first class marriage, but in face of the contradiction between these two authorities I am not prepared to hold affirmatively that a lesser wife may not be a lawful wife or that in the absence of these ceremonies that may be necessary for a first class marriage, the tie of the bridegroom obtains the consent of the girl's parents, may not still be lawful and the girl be an inferior wife. The question as already stated will or may largely depend in the present state of the authorities available on the question on whom the onus lies.

(2) 2 L. B. R. 261.

(3) 4 Ind. Cas. 801; 4 Bur. L. T. 124.

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I should, therefore, not be prepared to hold that this woman was a mere mistress of the plaintiff if it be shown that he asked for and obtained the consent of the girl's parents to a more regular union, even after an elopement.

Let us look at plaintiff's own evidence. It does not prepossess one in his favour. He says distinctly I never visited defendant's parents' house with U Taik and Gwan Taik before or after the birth of her second child, neither did I go from Gwan Taik's house with U Taik and Ma Paw, I do not know if U Taik and Ma Paw went. A moment later he, however, admits that he did go but says that he did not enter, that he went with them in spite of his willingness to the re-union proposed by them—again he says—it is true. U Taik and Ma Paw took me to defendant's house to speak to her parents to come to a reconciliation with them for having deserted plaintiff. On the other hand the evidence of Gwan Taik, U Taik, Ma Thein Gywe is directly to the effect that the parents did consent and I am not prepared to hold that what they consented to was an illicit union. In other proceedings plaintiff as he himself admits sought to prove that she was a wife but a divorced wife because he had deserted her for three years. He seems to be a person that will take up any position that he considers will suit him without regard to its truth. In my opinion he did apply to the girl's parents for their consent to a regular union. Gwan Taik occupies a respectable position and seems to be related to the defendant and I believe his indignant assertion that he would not have been a party to any other kind of application and I am not satisfied that the union so sought by the bridegroom and consented to by the bride's parents did not constitute a valid marriage. I must, therefore, decline to interfere with the judgments of the Courts below and dismiss the appeal with three gold mohurs costs.

Appeal dismissed.

PUNJAB CHIEF COURT.

FIRST CIVIL APPEAL NO. 175 OF 1910.

January 21, 1913.

Present:—Mr. Justice Shah Din and Mr. Justice Chevis.

November 19, 1914.

Present:—Sir Alfred Kensington, Kt., Chief Judge, and Mr. Justice LeRossignol.

February 1, 1915.

Present:—Sir Alfred Kensington, Kt., Chief Judge, and Mr. Justice Rattigan.

MUHAMMAD SUBHAN BAKHSH—

PLAINTIFF—APPELLANT

versus

ABDUL RAHMAN KHAN AND ANOTHER—

DEFENDANTS—RESPONDENTS.

Appeal, abatement of—Application to set aside—Insufficient cause—Neglect of appellant—Civil Procedure Code (Act V of 1908), O. XXII, rr. 4, 9—Case, if can proceed against other respondents.

Where one of the respondents died on 10th July 1912 and on 16th October 1912 the fact was brought to the notice of the appellant's Counsel by the Chief Court office, but no further steps prior to the hearing on 21st January 1913 were taken while the parties lived at Delhi and there was no difficulty to know the respondent's death or ascertain the names of his heirs and where consequently the appeal was ordered to have abated against the deceased respondent:

Held, that the appellant's carelessness and the culpable means adopted by him for trying to conceal his neglect were sufficient for declining under Order XXII, rule 9 (2), Civil Procedure Code, 1908, to set aside the order of abatement and that the case could not proceed against other respondents. [p. 718, col. 2.]

First appeal from the decree of the District Judge, Delhi, dated the 1st of December 1909, dismissing the claim.

The Hon'ble Mr. Muhammad Shafi, K. B., for the Appellant.

The Hon'ble Mr. Shadi Lal, R. B., for Muhammad Ismail deceased, Respondent.

ORDER.

SHAH DIN AND CHEVIS, JJ.—(January 21st, 1913.)—Muhammad Ismail, respondent No. 3, is dead and no application has yet been made to bring his legal representatives on the record.

Mr. Shadi Lal has put in an affidavit by one Sheikh Mumtaz-ud-din, said to be one of the sons of Muhammad Ismail, stating that the latter died on the 10th July 1912 and that he left several heirs who are his legal representatives for purposes of this case. A certified copy of an extract from the register of births and deaths has been filed in support of the affidavit showing that the deceased died on the 10th July, 1912.

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As no application to bring the legal representatives of the deceased, Muhammad Ismail, on the record has been made within the prescribed period of limitation, the appeal abates as against him under Order XXII, rule 4, Civil Procedure Code. The case is adjourned till Monday, the 27th January, to enable the appellant's Counsel to make up his mind whether he would press the appeal against respondents Nos. 1 and 2.

Chaudhri *Rambhaj Datta*, for the Appellant.

Messrs. *Clarence Kirkpatrick and K. Santanam*, representing Mumtaz-ud-Din, son of Muhammad Ismail, deceased, defendant No. 3.

ORDER.

KENSINGTON, C. J. AND LEROSIGNOL, J.—(November 19th, 1914.)—On the 21st January 1913 the Chief Court ordered abatement of this appeal as against the defendant-respondent, Muhammad Ismail, and gave the plaintiff-appellant an opportunity of considering up to 27th January whether the appeal would be pressed against the remaining respondents, defendants Nos. 1 and 2.

On the 27th January 1913, an affidavit by the plaintiff-appellant, dated the 25th, was presented and the Court thereon directed that notice should issue to the legal representatives of Muhammad Ismail to show cause why the order of abatement should not be set aside, and also directed that if the abatement was set aside the appeal would be heard on the merits.

There are on record affidavits by Mumtaz-ud-Din, eldest son of Muhammad Ismail, dated 9th January and 30th October 1913 and by various other persons, and the question of abatement has been fully argued.

We find that there has been great carelessness on the part of the plaintiff-appellant. Muhammad Ismail died on the 10th July 1912 and it is admitted that on the 16th October 1912 the fact was brought to the notice of Mr. Muhammad Shafi's clerk by the Chief Court office. Mr. Muhammad Shafi seems to have communicated with his client but to have taken no further steps prior to the hearing of 21st January 1913.

In support of the plaintiff-appellant's affidavits it is urged that he on 2nd December 1912 moved the Tahsildar of Delhi to

assist him in procuring a detail of the heirs of the deceased, but we find that though the application (put in by Mr. Ram Bhaj Datta and attached to the record) professes to be dated 2nd December 1912 no order was passed by the Tahsildar till the 28th January 1913. There is every reason to believe that this application has been intentionally antedated in order to give support to an erroneous affidavit.

Further we find that all parties concerned live in Delhi and we cannot believe either (1) that plaintiff had any real difficulty in ascertaining the names of the heirs of deceased, or (2) that he was unaware of Muhammad Ismail's death till October 1912 or thereabouts.

Considering the plaintiff's carelessness and the culpable means adopted by him to try and conceal his neglect we decline under Order XXII, rule 9 (2), Civil Procedure Code, to set aside the order of abatement.

Mr. Ram Bhaj Datta then asks that the appeal may proceed against the defendant-respondents Nos. 1 and 2. We do not understand the attitude adopted, but it is necessary that fresh notice should be given to these respondents before that portion of the appeal can be argued.

Fresh date for hearing of the appeal as against defendants Nos. 1 and 2 only.

The Hon'ble Mr. *Muhammad Shafi*, K.B., for the Appellant.

JUDGMENT.

KENSINGTON, C. J. AND RATTIGAN, J.—(February 1st, 1915.)—Mr. Shafi now informs us that after considering the position arrived at under the previous Bench Order of 19th November 1914, he is unable to press this appeal against the defendants Nos. 1 and 2 who are now the sole respondents.

As indicated in the previous order we recognise the correctness of this attitude, and we understand that this is the explanation of the failure of those respondents to appear. We accordingly dismiss the appeal, making no order as to costs.

Appeal dismissed

BISHWAMBHAR SAHA v. RAM SUNDAR KAIBARTA DAS.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL NO. 1016 OF 1912.

May 27, 1914.

Present:—Mr. Justice Holmwood and
Mr. Justice Chapman.

BISHWAMBHAR SAHA AND OTHERS—

JUDGMENT DEBTORS—OPPOSITE PARTY—

APPELLANTS

versus

RAM SUNDAR KAIBARTA DAS—

DECREE-HOLDER—PETITIONER—RESPONDENT.

Limitation Act (IX of 1908), Sch. I, Art. 181, applicability of—Civil Procedure Code (Act V of 1908), O. XXXIV, rr. 3, 6, applications under—Limitation.

Applications under Order XXXIV, rule 6, of the Civil Procedure Code, 1908, are not governed by Article 181 of the Limitation Act of 1908 any more than applications for orders absolute under Order XXXIV, rule 3. [p. 720, col. 2.]

Appeal against the decree of the Subordinate Judge, Comilla, dated the 13th November 1911, reversing that of the Munsif, 2nd Court, at Comilla, dated the 20th of May 1911.

FACTS.—The decree-holder was the mortgagee under a mortgage dated 2nd March 1901 in which the due date was 12th February 1902. The suit on the mortgage was brought on 11th February 1905 and the decree was made on 1st April 1905. The mortgaged property was sold in pursuance of this decree and the sale was confirmed on 12th September 1907. An application for personal decree was made on 31st January 1911. On that date both the new Code of Civil Procedure, Act V of 1908, and the new Limitation Act, IX of 1908, were in force. And the question was raised whether the application was not necessarily barred under Article 181 of the new Limitation Act.

The first Court gave effect to this contention, but the lower Appellate Court reversed the decision on the question of limitation and remanded the case for trial on the merits, and against that order this appeal was preferred. But before the appeal came on for hearing the order of remand was carried out, and though the appellant was debarred from questioning the propriety of the remand, he was heard on the question of limitation which was still open to him.

Babu Dharendra Lal Kastagir, for the Appellant.

Babu Sasadhar Roy, for the Respondent.

JUDGMENT.—This is a second appeal arising out of a decision given by the Subordinate Judge of Comilla on the 13th November 1911 holding that a certain application under section 90 of the Transfer of Property Act was not barred by limitation and that the suit must be remanded to the Munsif for determination of what balance is legally recoverable from the defendant otherwise than from the property sold. An appeal was preferred to this Court on the 15th July 1912 and the first ground was with regard to the question of limitation; the second ground was with regard to the order of remand, the third was the general ground that the learned Subordinate Judge has misconstrued the law. That can only refer to the law of limitation which was the only question raised.

As regards the remand we find that the defendants-appellants have been guilty of the greatest laches. The appeal, which they filed on the 4th May 1912, was without the certified copy of the Munsif's judgment and could not be admitted till the 15th July. The *talabana* was not filed till the 10th January 1913, and meanwhile the learned Munsif had heard the remand and decided it in November 1912. We have seldom met with a case where the appellant deserved less consideration from this Court. But as regards the question of limitation it is, of course, quite open to him still to argue that.

This is the only point which we can consider. It raises a somewhat new point. The mortgage-decree was passed on the 1st April 1905, the mortgage was dated the 2nd March 1901 the due date was 12th February 1902, and the plaint in the mortgage suit was filed on the 11th February 1905. On the authority of the ruling in *Rahmat Karim v. Abdul Karim* (1) the plaintiff had his personal remedy at the date of the institution of the suit. The question which has been raised in this case is whether he loses that personal right by reason of his not having made the application for personal decree under Order XXXIV, rule 6, within three years of the date of the confirmation of the mortgage

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sale which took place on the 12th September 1907. The application which he did make was on the 31st January 1911. On that date the new Code of Civil Procedure was in force, and it is argued that Article 181 must necessarily apply to an application of this nature. It was held that the section which corresponded to section 181 in the later Limitation Act, namely Article 178, did not apply to an application by a mortgagee for a supplemental decree under section 90 of the Transfer of Property Act and since the new Civil Procedure Code has come into force, there has been the ruling in the case of *Madhab Moni Dasi v. Pamela Lambert* (2), where Mr. Justice Mookerjee, in delivering the judgment of the Court follow the decision to which one of us was a party in *Rahmat Karim v. Abdul Karim* (1) and applies it to Order XXXIV, rule 3, which is the case of order absolute in a mortgage suit.

It is urged that what applies to Order XXXIV, rule 3, does not apply to Order XXXIV, rule 6. But we are unable to accede to this contention. Not only are both the cases in our opinion strictly parallel but the rule of law and justice which was the *ratio decidendi* of the case in *Rahmat Karim v. Abdul Karim* (1), applies as has been shown by Mr. Justice Mookerjee to both the cases equally. The passage to which we were referred in his judgment may be quoted: "It may be conceded that Article 178 of the Limitation Act of 1877 did not apply to applications beyond the scope of the Civil Procedure Code, but it does not follow that that Article or the corresponding Article of the Limitation Act of 1908, applies to all applications made in the course of a suit. It may be pointed out, in the first place, that the preamble to the Limitation Act of 1908 states expressly that the object of the Legislature was to consolidate and amend the law of limitation relating to only certain applications to Courts. In other words, the Limitation Act does not profess to provide for all kinds of applications to Courts whatsoever. The Act certainly does not apply to applications to the Court to do what the Court has no

discretion to refuse," and this is one of those matters in which the Court has no discretion to refuse if it is legally recoverable. The words "legally recoverable" cannot possibly apply to any question of limitation "nor can the provisions of the Act be held to apply to an application to the Court to terminate a pending proceeding, the final order in which has been postponed for the benefit of the defendant or for the convenience of the Court. In cases of this class, it has been suggested that the right to make the application may indeed be deemed to accrue from moment to moment; if this view is adopted, any exception on the ground of limitation cannot obviously be supported;" and in this connection the learned Judge cites the case of *Rahmat Karim v. Abdul Karim* (1) to which we have already referred and applies it in support of the principle which he here lays down. It is, therefore, clear that applications under Order XXXIV, rule 6, are not governed by Article 181 of the Limitation Act of 1908 any more than applications for order absolute under Order XXXIV, rule 3.

We are, therefore, of opinion that the learned Judge was right in holding that the suit was not barred by limitation and he was right in making the remand and we dismiss the appeal and direct that all costs including the costs in remand be paid by the appellant to the respondent.

We mark our sense of the defendant's dilatory conduct by doubling the ordinary hearing fee and making it two gold mohurs.

Appeal dismissed.

(2) 6 Ind. Cas. 537; 12 C. L. J. 328; 37 C. 796; 15 C. W. N. 337.

DEPUTY LEGAL REMEMBRANCER V. SITAL CHANDRA PAL.

CALCUTTA HIGH COURT.

GOVERNMENT APPEAL NO. 2 OF 1914.

June 4, 1914.

Present:—Mr. Justice Holmwood and
Mr. Justice Chapman.DEPUTY LEGAL REMEMBRANCER—
APPELLANT

versus

SITAL CHANDRA PAL AND OTHERS—
RESPONDENTS.*Provident Insurance Societies Act (V of 1912), ss. 2 (8), 21—Company undertaking life insurance business, registration of, before starting business.*

A Company embarking in the business of life insurance must be registered under the Provident Insurance Societies Act before business can be carried on under the conditions laid down in that Act. [p. 722, col. 1.]

Appeal against the order of the Chief Presidency Magistrate of Calcutta, dated September 20th, 1913.

Mr. B. C. Mitter, for the Crown.

Mr. N. C. Sen and Babu Hem Chandra Sen,
for the Respondents.

JUDGMENT.—This is an appeal preferred by the Government against an order passed by the Chief Presidency Magistrate, Calcutta, on the 20th September 1913, acquitting the respondents Sital Chandra Pal, Surendra Nath Chowdhry, B. P. Ghose and Purna Chandra Ghose of an offence punishable under section 21 of the Provident Insurance Societies Act (V of 1912). That section provides that any provident insurance society which makes default in complying with any of the requirements of this Act, and every Director, Manager or Secretary or other officer or agent of the society who is knowingly a party to the default, shall be punished with fine which may extend to five hundred rupees, etc.

The learned Presidency Magistrate on an apparent misreading of the judgment of Mr. Justice Fletcher in the case of *Oriental Government Security Life Assurance Co., Ltd. v. Oriental Assurance Co., Ltd.* (1), thought that the Company in question called the "New King Insurance Company, Limited" was not amenable to Act V of 1912, inasmuch as it was a Company which had share capital divided into shares. But this is obviously untenable upon the construction of the plain

wording of the Act in section 2, sub-clause (8), where it is stated that a provident insurance society means any person or body of persons, whether corporate or unincorporate, which receives premiums or contributions for insuring money, etc. That clearly lays down that whether the society already in existence is a corporate company before, or whether its share capital is divided into shares or not, registration under the Provident Insurance Societies Act is necessary before business can be carried on under the conditions laid down in that Act. There is nothing in Mr. Justice Fletcher's judgment to the contrary. It appears that the legal advisers of the Company were misled, *first*, by a remark which Fletcher, J., made in the course of the argument; and, *secondly*, by a passage in his judgment at page 578. The remark was that the defendant Company cannot be a provident insurance society as a provident society is not incorporated under the Companies Act but registered or inscribed under the Provident Insurance Societies Act. That is against the view taken by the Chief Presidency Magistrate, for what Fletcher, J., says is that a Company incorporated under the Companies Act cannot be a provident insurance society by reason of its registration under the Companies Act, not that any society may not be both a Company and a provident insurance society; and again in the passage in his judgment at page 578 what he says is that the Company he was dealing with considered that, by issuing policies not exceeding Rs. 500, they can bring themselves under the heading of a provident insurance Company, and were entitled to carry on business untrammelled by the provisions of the law. This is not so, because under the Provident Insurance Societies Act registration has to be made subject to certain conditions which are set out in the Act and which have to be approved of by the Registrar, and these provisions do not apply to a Company which has a share capital divided into shares. In saying this he does not say that a Company which wishes to carry on the business of a provident insurance Company need not be registered under the Act, but he says that the conditions which are set out in the Act obviously do not apply to a Company which has already complied with these conditions in its published prospectus under another Act, and what he is

(1) 21 Ind. Cas. 258; 40 C. 570.

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referring to is the form of the policy and he holds that, so far from having complied with the law, they have simply tried to avoid the provisions of another Act, namely, the Indian Life Insurance Act of 1912, which were intended to prevent a Company from embarking in the business of life insurance unless and until they had the amount of cash that was necessary for them to deposit with the Governor-General in Council in order to meet their obligations. So in this case the Act V of 1912 which is before us was intended to prevent the Company from embarking in the business of life insurance unless and until it had been registered under the Act. There seems to have been a misunderstanding, and the learned standing Counsel, who appears for the Government, does not press for anything more than a nominal penalty. But a mistake of law cannot take the defendants out of the word 'knowingly' in the section.

The order of acquittal must, therefore, be set aside, and in lieu thereof the respondents Nos. 1 to 3 will each be fined Rs. 5. The respondent No. 4, Purna Chandra Ghose, against whom proceedings do not seem to have been pressed in the Court below, will be exempted from this order.

We understand that the society has already applied for registration but that the Government has not yet made rules necessary to carry out the purposes of the Act, and, in the circumstances, we are of opinion that this conviction should make no difference whatever to the result of any such application.

Appeal allowed.

ALLAHABAD HIGH COURT.
CRIMINAL REFERENCE NO. 302 OF 1915.
April 30, 1915.

Present:—Mr. Justice Piggott.

EMPEROR—PROSECUTOR

versus

RAM SARUP—OPPOSITE PARTY.

Agra Tenancy Act (II of 1901), s. 51—Suspension of rent—Right of zemindar to recover rent—Landholder collecting suspended rent by distraint, if commits offence—Penal Code (Act XLV of 1860), s. 188.

An order suspending or remitting arrears of rent is not an order prohibiting the land-holder from receiving the same if tendered, or attempting to realize the same by lawful means. [p. 724, col. 1.]

Therefore a land-holder endeavouring to collect suspended arrears by process of distraint is not guilty of an offence under section 188 of the Penal Code. [p. 724, col. 1.]

Its effect is simply to deprive him of his right of suit in respect of the arrears remitted or of the suspended arrears during the period of suspension. [p. 724, cols. 1 & 2.]

Criminal Reference made by the Sessions Judge of Bareilly.

REFERENCE.

Ram Sarup, a *zemindar* of Mauza Darabnagar, has been tried summarily and convicted of an offence under section 188, Indian Penal Code, in that he distrained and attempted to collect rents for 1321 *Fasli* in October 1914 (1322 *Fasli*) in disobedience of an order of the Collector of which he had cognizance; that the payment of those rents had been suspended.

He has been fined Rs. 150 and this is an application for revision.

The first ground is that section 188 cannot apply to the facts of the case, and this is expanded in ground 4, that there is no proof that the disobedience caused any obstruction, annoyance or injury.

It is, I think, a little unfortunate that a test case of this nature should have been tried summarily. Apparently the only evidence taken was that of the *vasil-bagi navis* who proved the orders suspending rent signed by the *zemindar*. What exactly Ram Sarup did is not clear but from a report of the Deputy Collector, dated 23rd November 1914, as a result of which these proceedings were initiated, it appears that Ram Sarup distrained many holdings of the tenants for the arrears of rent without deducting the amount of suspended rent of 1321 *Fasli*. These tenants filed a complaint against the *zemindar*.

The fact of the distraint seems to have been admitted by Ram Sarup, for in his examination he seeks to excuse himself for his conduct, and does not deny it. The order of suspension was lawfully promulgated by the Collector under section 51, Tenancy Act. That order was disobeyed, the attempt to collect the suspended rents by distraint amounting to a disobedience. Nor can it be

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argued that disobedience did not cause obstruction and annoyance to the tenants concerned though it would have been well to take the evidence of the tenants. I should not, therefore, be prepared to recommend revision of the finding and sentence on this view of the facts alone.

But their legality is, I think, open to question on the grounds stated in paragraphs 2 and 3 of the application for revision.

Section 51 of the Tenancy Act provides a special remedy for the disobedience to the order, and in cases of failure to comply with the direction of a Statute the special remedy provided by the Statute should be followed and no other can be supposed to exist (Ref. Mew's Digest of English Case-Law, 1911 Edition, Volume 13 under 'remedy given by a Statute, how far exclusive' page 1959).

Whenever there is an intention to apply the provisions of the criminal law to acts authorised or required by particular Statutes, that intention is always made clear by express words to that effect. (Ref. Ratan Lal, Law of Crimes, 1911 Edition, page 63, under section 41, Indian Penal Code). Section 149 of the Tenancy Act is an instance to this effect. The disobedience to an order of the Collector under section 51 is nowhere in the Tenancy Act made a criminal offence. Section 26 of the General Clauses Act, it is true, enacts that where an act or omission constitutes an offence under two or more enactments, then the offender shall be liable to be prosecuted and punished under either or any of those enactments but shall not be liable to be punished twice for the same offence. Ram Sarup's act was an offence under section 51, Tenancy Act, and it can, I think, be held to come within the terms of section 188, Indian Penal Code. (I note, however, that the application for revision, ground 3 says that the punishment specified in section 51 has 'been undergone').

But the principle referred to by me above that a special Act of the nature of the Tenancy Act is intended to be complete in itself as regards offences committed against the rent law is, in my opinion, the one that must prevail. It has been followed by the Courts in this country the ruling of *Chandi Pershad v. Abdur Rahman* (1), being an instance in point.

P(1) 22 C. 131 at p. 139.

The result is that I consider that as the Tenancy Act provided a special remedy for disobedience to an order under section 51 the Collector was not competent to sanction prosecution for an offence under section 188, Indian Penal Code, in respect of that disobedience.

Whether any action could have been taken on a complaint brought by one of the tenants concerned under some section of the Indian Penal Code is a matter which the Collector might have considered that was an alternative method of bringing home to the *zemindar* the consequence of his action which was most reprehensible, but the Collector, *qua*-Collector, had, it seems to me, no remedy but that provided by section 51 itself, *i.e.*, the immediate realisation of the suspended revenue.

I, therefore, refer the case for orders of the Hon'ble High Court with the recommendation that the sentence be set aside and the fine refunded.

I further note that the Magistrate who tried the case had in a previous page of the proceedings expressed the opinion that Ram Sarup should, without doubt, be prosecuted under section 188, Indian Penal Code, and I think that in the circumstances it would have been better that some other Magistrate should have tried the case.

The report will be sent to the Magistrate for any explanation or remark that he may have to offer before submission to the High Court.

JUDGMENT.—The facts disclosed by this order of reference are peculiar. Ram Sarup is a land-holder of a village Darabnagar in the Bareilly District. By an order lawfully passed and promulgated under section 51 of the Agra Tenancy Act (Local Act II of 1901), a portion of the rents due from tenants of that village had been suspended. Ram Sarup was aware of the order of suspension but he endeavoured to collect suspended arrears by process of distraint. He has been prosecuted for having disobeyed an order promulgated by a public servant, lawfully empowered to promulgate such order, directing him to abstain from such act. The learned Sessions Judge has doubted the propriety of the conviction and the sentence of Rs. 150, fine which followed the prosecution and has referred the matter

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to this Court for orders. The effect of an order suspending or remitting rent under section 51 of the Tenancy Act already referred to is not to prohibit the *zemindar* or *zemindars* affected by such order from collecting the same. This is obvious from sub-clause 5 of the said section which prescribes the consequences which will result in the event of a land-holder's succeeding in collecting rents which have been suspended or remitted. If the tenants are in fact sufficiently well off to pay the suspended rents I cannot see that any principle of public policy is violated by permitting them to do so. The appropriate consequences will follow under the provisions of the Tenancy Act itself. It will be presumed that a mistake was made in suspending rents and land revenue in a village where the tenants are in fact able to pay, and the *zemindar* will become immediately liable for payment of the suspended arrears of land revenue. The difficulty in the present case seems to have arisen because of Ram Sarup's attempt to invoke the power of distraint. The whole facts are not before me, and, moreover, the question whether distraint can lawfully be levied in respect of rents under suspension is one entirely within the jurisdiction of the Revenue Courts. I should have thought myself that such distraints could be successfully contested by the tenants under section 142 of the Tenancy Act, whereby the distrainer can be put to proof of his claim to the contested arrears just as if he were the plaintiff in a suit to recover the same. It is expressly laid down that a suit for the recovery of suspended arrears of rent will not lie during the period of suspension. If I am mistaken in this view—and I conceive it possible that some difficulty may have been felt by reason of the definition of what constitutes an "arrear of rent" given in section 101 of the Tenancy Act—then the question of the re-drafting of the provisions of that Act relating to distraint deserves the attention of the Legislature. As regards the effect of section 51 of the Tenancy Act I feel no doubt whatever. An order suspending or remitting arrears of rent is not an order prohibiting the land-holder from receiving the same if tendered or from attempting to realise the same by lawful means. Its effect is simply to deprive him of his right of suit in res-

pect of the arrears remitted or of the suspended arrears during the period of suspension. Ram Sarup either had a right in law to distrain for these suspended arrears, or he had not. I should have thought that he had not, and in that case the distraints levied by him can be set aside and he is liable to compensate the tenants inconvenienced thereby. If, however, it be held that the suspension of arrears of rent does not deprive the land-holder of his power of distraint during the period of suspension I am unable to hold that he is liable to punishment for availing himself of his legal right.

I set aside the conviction and sentence in this case; the fine, if paid, will be refunded.

Conviction set aside.

LOWER BURMA CHIEF COURT.

CRIMINAL REVISION NO. 133B OF 1915.

July 20, 1915.

Present:—Sir Charles Fox, Kt., Chief Judge,
Mr. Justice Ormond and Mr. Justice Twomey.

S. P. GHOSH—PETITIONER

versus

EMPEROR—RESPONDENT.

Jury trial—Charge of dacoity—Return of unanimous verdict of abetment of robbery, validity of—Criminal Procedure Code (Act V of 1898), ss. 303, 305—Lower Burma Courts Act (VI of 1900), ss. 11, 12.

Under section 12 of the Lower Burma Courts Act, the Government Advocate's certificate must be as to something decided by the Judge and there is no power to certify as to anything decided by the Jury; the Court dealing with the case on the certificate cannot deal with any other part of the case until it has determined that there is an error on the part of the Judge on some point contained in the certificate. A Court dealing with a certificate is not a Court of Appeal and is subject to limitations even as a Court of review. [p. 727, col. 2.]

Muthukumaraswami Pillai v. Emperor, 14 Ind. Cas. 896; 13 Cr. L. J. 352; (1912) M. W. N. 549; 12 M. L. T. 1; 35 M. 397 at pp. 409; 424, 425 (F. B.), followed.

An unanimous verdict of a Jury is bound to be accepted by the Judge and under section 305 of the Criminal Procedure Code it is only when the Jury are not unanimous that it lies with the Judge to take one of the courses specified in the section. [p. 727, col. 1.]

Hla Gyi v. Emperor, 3 L. B. R. 75 (F. B.); 3 Cr. L. J. 8; 11 Bur. L. R. 298, referred to.

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The fact that an accused has been charged with dacoity only, does not necessarily invalidate a verdict of guilty of abetment of robbery. [p. 729, col 2.]

Emperor v. Kashia Antoo, 3 M. L. T. 122; 7 Cr. L. J. 32; 10 Bom. L. R. 26, referred to.

Review of the order of the Hon'ble the Chief Judge, dated the 7th May, 1915, passed in Sessions Trial No. 17 of 1915.

Mr. *Giles* with him Mr. *Sen*, for the Petitioner.

Maung *Kin* (Assistant Government Advocate), for the Respondent.

JUDGMENT.

Fox, C. J.—The accused, S. P. Ghosh, was tried with five other accused at a Criminal Sessions of this Court at which I presided on the following charge:—

"That you on or about the 31st day of March 1915 in the Pegu creek near Dawbong committed dacoity in that you conjointly confined Moungh Lun Mong and his crew, beat and robbed them of Rs. 20".

The general effect of the story of Mg. Lun Moungh and those with him was shortly as follows. Eight of them were going up the Pegu river at night in a Burmese paddy boat: the helm of their boat fouled the anchor chain of a barge anchored in the stream. One of the crew of the Burmese boat fell into the river. Lun Moungh asked the men on the barge to send their sampan to rescue the man, but they refused to do so, and they tied the helm of the Burmese boat to the chain of the barge and would not release it. A sampan put off from the barge to another barge anchored near by, and brought back some Indians. The Burmese were then told that the clerk had come and that they must come on to the barge. They got into it and were told to go into a small room on the deck. When they went in they were told by the third accused S. P. Ghosh to sit down. He asked them their names and took these down in writing. When this was done the 1st accused in the case demanded to know which of them had abused him, and without more kicked Lun Moungh severely. The second accused then seized him by the hair and pressed his head down and the 1st accused beat him very severely with a stick. He also beat others, and all the Indians in the room set to either kick or beat the Burmans. Two Indians stood at the door armed with *dahs* evidently to prevent the Burmans

leaving the room. While the assault was going on the first accused demanded payment from Lun Moungh of Rs. 20 under threat of the assault on him being continued to extreme lengths. Lun Moungh through fear of his threat asked one of his men to get the money. This man was allowed to go back to their boat and having got the money he paid it to the first accused. The Burmans were then allowed to go back to their own boat which was released. According to Lun Moungh it was the 3rd accused who said they might go when the money was paid. The defence of those of the Chittagonian accused who admitted that they had been on the barge was that there had been a fight between them and the Burmans in consequence of which the third accused had been called to the barge and no further violence occurred after that. The defence of the 3rd accused was that he only got to the barge when the fight was over, and that all that he had to do with the affair was to ask what the row had been about, look and see what damage had been done to the barge and take the name of the tindal or steersman of the Burmese boat, and tell the bargemen to push it away. He said it was his duty in case of damage to a barge to take down the name of the tindal of the boat causing damage and to report to his superiors. His version denied the Burmans' story about their having been with him in the small room on the barge. It was proved that he made no report to his superiors. Only one of the Burmans spoke to this accused having taken part in the violence, and his evidence as to this was obviously open to doubt. The Magistrate had committed him on the ground that as the demand for money was said to have been made in his presence, and the beating was said to have gone in his presence, he must be held to have been a party to the plan of getting money from the Burmans. The prosecuting Counsel put the prosecution's case against this accused before the Jury on the same grounds.

His case was that the circumstances pointed to a plan having been formed amongst all those on board the barge to get the Burmans to come on to the barge and to go into the room, confine them there, and then beat them and get money from them. I told the Jury in the course of my summing up that assuming that they did not believe the one witness

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who spoke this 3rd accused having joined in the violence they should not convict him merely because he was present when the violence took place and the money was demanded, and that before they could convict him they must be satisfied that he was a party to a plan for obtaining money from the Burmans by violence or threats or that he had in some way joined or had a part in extorting the money from Lun Moun by the violence and threats spoken to. I put before them for consideration the possibility of coming to a conclusion that no plan for extorting money from the Burmans had been arranged prior to their being sent into the room, and that the idea of beating them and getting money from them may have started with the 1st accused when he demanded to know who had abused him.

In dealing with the case of each accused separately I pointed out to the Jury that this 3rd accused's case on the facts that he was not present on the barge when any violence occurred, and I told them that if they believed this they should, of course, acquit him.

In my general explanation of the constituents of the offences of extortion, robbery and dacoity, and of what they should be satisfied before they convicted any of the accused, I told them that if they believed the Burman witness's story about the Rs. 20 having been extorted by violence and threats they should convict those of the accused who in their opinion had taken any part in extorting or in any plan for extorting the money by such violence and threats of either dacoity or robbery according as they found that five or less than five persons took part in committing the offence. Having at the end of the case for the prosecution directed the acquittal of 5th and 6th on the ground that there was no evidence identifying them as having been present at the occurrence the case of four accused had to be decided by the Jury. After retirement to consider their verdict the Jury found the 1st and 2nd accused not guilty of dacoity but guilty of robbery and the third accused not guilty of dacoity but guilty of aiding and abetting robbery. They acquitted the 4th accused.

Nothing has been said during the course of the case by either the prosecuting Counsel or myself about abetment of robbery or about it being open to the Jury to convict the 3rd

accused of abetment of dacoity or robbery. My view was that if the Jury accepted the prosecution's case that the circumstances proved by the evidence showed that a plan or scheme had been made by the men on the barge to extort money from the Burman boatmen and that the 3rd accused was a party to that plan or scheme, and had acted conjointly with the other parties to it throughout, the 3rd accused should be found guilty of either dacoity or robbery although the evidence might not show that he had either demanded money or said or done anything to put the Burmans in fear of injury.

The verdict against the 3rd accused appeared to me definite, unambiguous and complete, and consequently not one about which it was open to me as the Judge at the trial to ask any questions under section 303 of the Criminal Procedure Code. I thought at the time that the only course open to me as the Judge was to have the verdict recorded and to pass sentence in accordance with it.

The case is now before this Bench on a certificate by the Government Advocate that it should be further considered on the following grounds:—

1. Whether the learned Chief Judge who presided at the Sessions held at Rangoon at which the case above-named was tried on or about the 7th May erred in accepting the verdict of the Jury that the 3rd accused, S. P. Ghosh, was guilty of the offence of abetment of robbery, the said accused not having been charged with having committed the said offence of abetment, but only charged along with the other accused of the offence of dacoity on which charge, the Jury found him not guilty.

2. Whether the learned Chief Judge erred in not putting to the Jury whether the 3rd accused, S. P. Ghosh, was present at the time of the commission of the robbery.

The 2nd of the above grounds based on a misstatement must be made to the Government Advocate. I certainly put to the Jury the 3rd accused's case that he was not present at the time of the commission of any dacoity, robbery and told them that if they believed that they should acquit him. If the Burman witnesses were believed there could be no question as to his having been present at the dacoity or robbery.

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As to the 1st ground the verdict was unanimous, and the Code makes no provision for the presiding Judge not accepting an unanimous verdict. Under section 305 of the Code, it is only when the Jury are not unanimous that it lies with the Judge to take one of the courses specified in the section. There could be no error in law in my accepting the verdict because no question of acceptance of the unanimous verdict can arise, *Vide Hla Gyi v. Emperor* (1). The verdict had to be recorded and the accused was by it convicted of the offence of which the Jury found him guilty. The contention of the learned Advocate who argued the case for the accused before this Bench was not that I committed any error in law in accepting the verdict. He was unable to show what course other than the one I took should have been adopted by me under the peculiar circumstances of the case. His contention was that the Jury had given a verdict which for several reasons was illegal.

The first question for consideration is whether it is competent for this Bench to enter into and deal with the points other than those raised in the certificate.

In *Muthukumaraswami Pillai v. Emperor* (2) a Full Bench of the Madras High Court unanimously held that a certificate of the Advocate-General has not the effect of opening the whole case as if on appeal, but it only gives the Court the power or authority to review the case or so much of it as is necessary in order to determine the point or points of law raised in the certificate and thereupon, that is to say, if it finds there has been error of law in those points, to alter the sentence and pass such judgment and sentence as may seem right.

Section 12 of the lower Burma Courts Act 1900, says, that where in any case tried in the original criminal jurisdiction any question mentioned in section 11 (i.e., any question of law, or custom having the force of law or of the construction of any

document or of the admissibility of any evidence) has been decided by the Judge and no reference has been made by the Judge himself, the Chief Court on its being certified by the Government-Advocate that in his opinion the decision should be further considered, review the case or such part of it as may be necessary and finally determine the question, and may thereupon alter the judgment, order or sentence passed by the Judge, and pass such judgment, order or sentence as it thinks right. It is plain that the certificate must be as to something decided by the Judge and there is no power to certify as to anything decided by a Jury, and consequently there is no power, to review anything decided by a Jury. Benson, J.'s judgment at page 425 of the report of the above quoted Madras Full Bench case makes it quite clear that the Court dealing with the case on the certificate cannot deal with any other part of the case until it has determined that there has been error on the part of the Judge on some point contained in the certificate.

It appears to me of supreme importance to bear in mind that a Court dealing with a certificate is not a Court of Appeal and that it is subject to limitations even as a Court of review. Provided that there has been no error of law in something decided by the Judge the law accords absolute finality to unanimous verdicts of Juries in cases tried in the highest Courts in India. For those Courts the system prevailing in greater portion of the British Empire has been adopted and whether it is a good or bad system it is a cherished one and it appears to me that any possible infringement of it should be well considered and that no verdict should be interfered with unless it is quite clear that the Judges are authorised by the provisions of law to interfere.

In my opinion it would be sufficient for the disposal of this review to say that there was error of law on the part of the Judge on any point decided by the Judge which is mentioned in the Government Advocate's certificate. Lest, however, I am taking too narrow a view of the powers of this Bench, I will deal with some of the points

(1) 3 L. B. R. 75 (F. B.); 11 Bur. L. R. 298; 3 Cr. L. J. 8.

(2) 14 Ind. Cas. 896; 13 Cr. L. J. 352; 35 M. 397 at pp. 409, 424, 425 (F. B.); (1912) M. W. N. 549; 12 N. L. T. 1.

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raised by the learned Advocate who argued the case.

One was that the accused having been charged with dacoity only, he could not be legally convicted of abetment of robbery whether he was present or not present at it. It was not disputed that if present he could be convicted of robbery although the only charge was of dacoity, but it was argued that if he was to be convicted at all he had to be convicted of either dacoity or of robbery. The argument was founded on the wording of section 114 of the Indian Penal Code and some of the sections in Chapter XIV of the Criminal Procedure Code dealing with the law as to the charges, and on some decisions of the High Courts in India.

The first of the cases bearing on this question is *Reg. v. Chand Nur and Pirbhai Adamji* (3). In that case Chand. at the instigation, it was said, of Pirbhai put some poison into a mill belonging to Rajebhai an enemy of Pirbhai's. Rajebhai was not killed but two of his sons were killed. Chand and Pirbhai were charged with murder. The Sessions Judge found on the evidence that Pirbhai was not present at the commission of the offence but he found him guilty of abetment of murder. The High Court held that this conviction was wrong, and directed that Pirbhai should be re-tried on a charge of abetment of murder. The reasoning, at which the High Court arrived at this conclusion, was that the section of the then Code of Criminal Procedure which corresponds to section 238 of the present Code, did not apply to a collateral offence, which was in that case the instigation by Pirbhai of Chand to commit the offence which instigation must have been taken place before the murder at a different place, so that the set of facts Pirbhai had to meet if he had been charged with abetment of the murder was separate and distinct from the facts the actual murderer had to meet. The learned Judges said that when a man is accused of murder he may not be conscious that he will have to meet an imputation of collateral circumstances constituting abetment of it, which may be quite distinct from the circumstances constituting the murder itself; in other words the Judges considered that the

(3) 11 B. H. C. R. 240.

charge in that case of murder against Pirbhai did not give him proper notice of what he had to meet. The decision is no authority for the proposition that an accused charged with an offence cannot, in any case, be convicted of abetment of the offence. On the contrary it was held that when a charge of a graver offence gives notice to the accused of all the circumstances going to constitute a minor offence he may be convicted of the minor offence. In the present case there can be no doubt that the charge against the third accused as well as of the other accused of conjointly committing dacoity gave him and them full notice of all the circumstances going to constitute minor offences involved in those circumstances. The charge must have conveyed to each of the accused that he conjointly with others confined Mounng Lun Mounng and his crew, and beat them and robbed them. It must have conveyed to each and all of them that they were all present at the commission of the dacoity or robbery and that each took part in it and so aided it or joined in a plan or conspiracy for committing it.

The next case cited—*Padmanaba Payi Kanniah v. Emperor* (4)—purported to follow *Reg. v. Chand Nur and Pirbhai Adamji* (3), but one sentence in the judgment goes a good deal further than the Bombay case did. The actual facts are not given in the judgment or reported, and it cannot be gathered that whether the Judges intended to lay down the sweeping proposition the sentence may possibly be held to do.

In *Singaravelu Pillay v. Emperor* (5) all the accused were charged and convicted of theft of crops. On appeal the Appellate Court altered the conviction of the first accused to abetment of theft; because it found that he was not present at the offence, the High Court held this alteration and the conviction of abetment of theft were wrong. The reasoning of the Bombay case obviously applied.

In *Yeditha Subbaya v. Emperor* (6) Sundara Aiyar, J., said he did not think that

(4) 5 Ind. Cas. 145; 11 Cr. L. J. 49; 33 M. 264; 7 M. L. T. 79; 20 M. L. J. 84.

(5) 14 Ind. Cas. 203; 13 Cr. L. J. 203.

(6) 15 Ind. Cas. 85; 23 M. L. J. 722; (1912) M. W. N. 725; 12 M. L. T. 203; 18 Cr. L. J. 453.

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the learned Judges who decided the case of *Padmanaba Payi Kanniah v. Emperor* (4) intended to lay down a universal rule that in no case can a conviction for abetment be possible where the charge was only of the principal offence. He went on to say: "The question is what were the facts charged. If on these facts, two charges could be framed, namely, the commission of the principal offence and the abetment, then by virtue of the provisions of section 237 the accused may be convicted of the offence of the abetment though it was not charged separately against him."

In my opinion a charge of abetment of robbery might have been made against the 3rd accused in this case notwithstanding that the prosecution's case was that he was present at the robbery, and section 114 of the Penal Code would not have been a bar to his conviction for abetment of the robbery. The wording of the section is:—

"Whenever any person who, if absent, would be liable to be punished as an abettor, is present when the act or offence for which he would be punishable in consequence of the abetment, is committed, he shall be deemed to have committed such act or offence."

The exact meaning is somewhat obscure, and as Mr. Mayne says the section introduces a statutory legal fiction whereby an abettor is treated as if he has actually committed the offence himself by reason of his presence at the time and place of the offence. It has been decided, however, that this section does not apply to the case of an abettor whose abetment consists in something done or omitted when the offence was committed in his presence.

In a case reported at page XXXVII of the Appendix to the 4th Volume of the Madras High Court Reports (7) that Court said that the section simply provides for the punishment of what the English Law calls principals in the second degree, who according to paragraph 803 of Dr. Gour's Penal Law of India are persons who abet a crime and countenance it by their presence at it, but who do not actually engage in it.

Dr. Gour remarks on the words "shall be deemed" in the section are that they imply that the change of status from abettor only to principal is only by way of legal fiction, not that the abettor actually com-

mits the offence he is present at. This view is also expressed in *Emperor v. Kashia Antoo* (8). In *Queen v. Musammat Niruni* (9) it was held that to bring a prisoner within section 114 of the Penal Code it is necessary *first* to make out the circumstances which constitute abetment so that if absent he would have been liable to be punished as an abettor and *then* to show that he was also present when the offence was committed. It follows that the section only applies when an abettor has done or omitted something constituting abetment prior to the commission of the crime itself, and when he has also been present at the commission of the crime, but has not actually committed it. This is the view of Dr. Gour, and in *Abdulla Khan v. Queen-Empress* (10) it was held that no previous conspiracy, instigation or act or illegal omission is proved; and the abetment consists only of participation in the actual commission of the offence section 109 of the Code is the section applicable. On this part of the case I am of opinion that neither section 114 of the Penal Code nor any of the sections of Chapter XIX of the Criminal Procedure Code is opposed to the legality of the conviction of the third accused of abetment of robbery. If the case had been tried by a Sessions Court without a Jury, a finding by the Judge that this accused had abetted the robbery committed by the 1st and 2nd accused would, in my opinion, have been legal, notwithstanding that the only offence specifically charged was of dacoity. On the charge the third accused had not to meet any facts other than those which occurred at the commission of the offence.

Another ground urged against the legality of the conviction is that it was not in accordance with any direction of the Judge as to what constituted abetment and that the Jury must have acted on their own ideas as to abetment which may not have been in accordance with the law of abetment stated in the Penal Code. It is the fact that the Jury acted on their own initiative in returning a verdict of aiding and abetting the robbery but whether the error is such as to vitiate the conviction, even if this point could be regarded as included in the Govern-

(8) 3 M. L. T. 122; 7 Cr. L. J. 32; 10 Bom. L. R. 28.

(9) 7 W. R. 49 Cr.

(10) 15 P. R. 1893 Cr.

(7) 4 M. H. C. R. App. xxxvii; 1 Weir 49.

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ment Advocate's certificate is another matter.

We should have to consider whether the error had in fact occasioned a failure of justice.

The error consisted in returning a verdict of aiding and abetting the robbery when according to the direction I gave the Jury they should, if they accepted the case of prosecution, have found this accused guilty of robbery.

The verdict was not guilty of dacoity in respect to all the accused, guilty of robbery against the 1st and 2nd accused: in respect to the third accused it was neither one of guilty nor one of not guilty of robbery but a special verdict of aiding in and abetment of the robbery. From the points of view of the layman this verdict was a perfectly reasonable one, and on the facts before them it expressed a view which any non-lawyer might take. They had to consider and decide whether this third accused had taken any part and if so what part in the crime spoken to by the Burmese witnesses. None of these witnesses had spoken of the third accused having demanded money, and the evidence as to his having used threats or violence was very dubious and weak, but his story as to not having been present when the crime was committed could not be believed, and the circumstances showed that he was present at it and that he was party to a plan for extorting money as suggested by the prosecution. I can quite understand reasonable men coming to decision that although this man be liable to be convicted of the grave offence of actual robbery we will convey our view that he did not take such an active part in robbery as those we convict of it by convicting him of an offence which will indicate more closely that a conviction of robbery would, the actual view we take of what he did. The verdict is not open to the charge of inconsistency even from a lawyer's point of view: it was not one of not guilty of robbery but guilty of aiding and abetting the robbery; it was one finding him guilty of what would appear to the ordinary man to be a minor offence instead of finding him guilty of a grave offence. If the bringing in a verdict of guilty of a minor offence when according to the direction of the Judge there should not

have been a verdict of guilty of a minor offence is to be regarded as a ground for the setting aside a verdict altogether and releasing an accused it strikes me that the consequence may be direful.

We have not to deal in this case with any extravagantly erroneous verdict; if such a case should arise and have to be considered by a Bench it will no doubt be considered on its merits. The present case is at most one by a Jury having brought in a verdict which necessitated a conviction being recorded under section 392 and the section 109 instead of section 392 only; as I have shown before a verdict under section 392 coupled with section 109 was admissible in the case. The accused had a fair trial and as a result the Jury convicted him of a less grave offence than the Judge told he should on one view of the facts be convicted of.

I do not think he has any reasonable ground for complaint.

My conclusions are that there being no error of law in the points of law included in the Government Advocate's certificate, the Bench has no power to interfere with the conviction, but if it has such power it should not do so.

The result of the conclusions of the members of the Bench is that it does not interfere with the conviction or sentence.

ORMOND, J.—The Government Advocate has certified two questions for our consideration. We are concerned only with the first, *viz.*; whether the presiding Judge erred in accepting the verdict against the third accused, of guilty of abetment of robbery; he not having been charged with abetment but only charged along with the other accused with dacoity.

Our powers are derived from section 12 of the Lower Burma Courts Act which refers only to the questions of law, custom, construction of documents, and admissibility of evidence, which have been decided by the Judge. The presiding Judge having accepted the verdict, must be deemed to have decided that it was a legal verdict; for if the verdict was illegal, the acceptance of the verdict by the Judge and the conviction following thereon would also be illegal.

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The question before us in effect, therefore, is this; was the verdict against the third accused, of guilty of abetment of robbery, a lawful verdict, he having been charged with dacoity only?

Sections 237 and 238 of the Criminal Procedure Code do not authorise the conviction of an accused upon facts which are not stated or indicated in the charge:—*Reg. v. Chand Nur and Purbhai Adamji* (3) and *Subbaya v. Emperor* (6).

The third accused was charged with five others with committing dacoity in that they conjointly confined Maung Lun Maung and his crew, beat them and robbed them of Rs. 20 and thereby committed an offence under section 395 of the Indian Penal Code.

Section 391 of the Indian Penal Code which defines dacoity says "where the whole number of persons conjointly committing or attempting to commit a robbery, and persons present and aiding such commission or attempt, amount to five or more, every person so committing, attempting or aiding, is said to commit dacoity."

The case against the third accused as disclosed in the charge was:—that he participated in the common intention of committing the robbery; that he either took part in the actual commission of the robbery or that he was present and aided the commission of robbery. Possibly the charge would not warrant a conviction of abetment of robbery on the ground that the accused had previously instigated the robbery; but it would clearly warrant a conviction of abetment by being present and aiding in the robbery. And even if the acts constituting such abetment were sufficient to make the accused liable for the robbery under section 34, Indian Penal Code; a conviction or a verdict of guilty, of abetment of robbery, would be lawful.

The fact, therefore, that the accused had been charged with dacoity only, does not necessarily invalidate a verdict of guilty of abetment of the robbery. No reference is made by the Government Advocate in his certificate, to the facts of the case or to the learned Chief Judge's charge to the Jury. As the question before us stands, it must be assumed that—but for the fact that there was no specific charge of abetment of robbery

but a charge of dacoity only, the verdict of the Jury is not open to question.

There is nothing in the certificate of the Government Advocate which would warrant us in going into the question whether the verdict was bad on any other grounds, *e. g.*, that the law relating to abetment was not explained to the Jury, or that the verdict was not in accordance with the directions of the Judge; those are distinct questions of law and are not involved in the question before us.

I would answer the first question in the negative.

TWOMEY, J.—I agree in thinking that the Bench has no power to deal with questions which are not covered with the Government Advocate's certificate.

The first ground raises the question whether the learned Chief Judge erred in accepting the verdict that S. P. Ghosh was guilty of abetment of robbery, the offence charged being one of dacoity. The verdict was unanimous and if there is an unanimous verdict the Judge is bound to pass judgment accordingly, if it is a lawful verdict the learned Chief Judge has shown clearly that a verdict of abetment of robbery or as the Jury expressed it "aiding and abetting" the robbery was one which might lawfully be returned upon the charge as is framed in the case. I, therefore, concur in answering the reference in the negative.

The second ground is shown to be based on a misapprehension.

PUNJAB CHIEF COURT.

CRIMINAL REVISION PETITION No. 722 of 1914.

April 13, 1915.

Present:—Mr. Justice Shah Din and
Mr. Justice LeRossignol.

UMAR DIN—CONVICT—PETITIONER
versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), ss. 297, 441.—"Trespass" in s. 297, meaning of—Purchaser of land containing graves, if commits trespass by destroying graves—Purchaser, if acquires title in graves—Waqf.

The word "trespass" in section 297 of the Penal Code has not the same meaning as is attached to

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"criminal trespass" in section 441 of the same Code. It denotes there a wrongful act. [p. 735, col. 1.]

An act of a person who destroys or disturbs a place of sepulchre with the intention of wounding the feelings of any person, or with the knowledge that the feelings of any person are likely to be wounded is wrongful and amounts to a "trespass" within the meaning of section 297, Indian Penal Code, no matter whether the land in which the place of sepulchre is included does or does not belong to the persons who are guilty of the acts of destruction. [p. 735, col. 1.]

The sale of a *khassra* number containing graves does not and in law cannot pass to a vendee any proprietary rights in the graves which exist on that land at the time of the sale and the graves remain as before *wagf* property and so far as they are susceptible of possession remain in the possession of the persons whose relatives are buried in them. [p. 735, col. 2.]

Where, therefore, a vendee of a land which contains graves enters on the land and destroys the graves he enters not on his own property, but upon property which is *wagf* and which he cannot lawfully take possession of and his entry on the graves, for the purpose of destroying or levelling them is wrongful and amounts to a "trespass" on a place of sepulchre within the meaning of section 297 of Indian Penal Code. [p. 736, col. 1.]

Per *LeRossignol, J.*—The word "trespass" in section 297, Indian Penal Code, has not any peculiar meaning. [p. 737, col. 1.]

Petition for revision, under section 439 of the Criminal Procedure Code, of the order of the Additional Sessions Judge, Lahore, dated the 12th January 1914, modifying that of the Magistrate, first Class, Lahore, dated the 29th November 1913 and convicting the petitioner.

Mr. B. Bevan Petman, for the Petitioner.

JUDGMENT.

SHAH DIN, J.—In this case the petitioner, Umar Din, was convicted by the Magistrate of an offence under section 297, Indian Penal Code, in that he had destroyed some old graves and thereby wounded the feelings of the complainant, Khair Din, and of other persons whose relations had been buried in those graves and he was sentenced to six months' rigorous imprisonment. On appeal the learned Sessions Judge maintained the conviction but reduced the sentence to one of fine of Rs. 300. The petitioner has filed this petition for revision of the order of the Sessions Judge, urging (1) that the facts as held do not constitute an offence under section 297, Indian Penal Code, and (2) that the inference drawn

as to "knowledge" on the part of the petitioner is contrary to the facts as held.

The case for the prosecution is briefly this. On or about the 26th October 1912 the petitioner dug up and levelled certain graves that existed on a part of land, *Khasra* No. 383 which is described in the Revenue Records as *qabristan ghair mumkin* and is situated close to a shrine known as the shrine of Shah Abul Maali in Lahore. The *mujawars* of this shrine were known in the Revenue Records as owners of *Khasra* No. 383 and some of them sold the land comprised in that *khassra* by 13 deeds of sale to the petitioner in the years 1911 and 1912. In October 1912 the petitioner proceeded to level part of *Khasra* No. 383 with a view to erect a building on the site and in the process of levelling the land he dug up and destroyed some graves in which the father of Khair Din, complainant, and the relatives of three other persons, Habib Ullah, Mahomed Din and Ilam Din, who have been examined as witnesses for the prosecution, had been buried. In January 1913 Khair Din lodged a complaint under section 297, Indian Penal Code, against the petitioner. After examining the complainant at some length and after taking down the petitioner's statement, Mr. Clark, Magistrate of the first Class, dismissed the complaint on the 31st January 1913 and discharged the accused. The order of discharge was set aside by the District Magistrate on the 9th April 1913, and a petition for revision of that order was dismissed by this Court on the 2nd July 1913. As a result of the further inquiry ordered by the District Magistrate, the petitioner has been convicted of an offence under section 297, Indian Penal Code, as above stated.

The questions of fact discussed by the learned Sessions Judge in his judgment are stated by him, in the following terms:—

(1). Is the land shown in Exhibit D A (*i.e.*, the plot of land comprised in *Khasra* No. 383, which the petitioner is alleged to have levelled) a place of sepulchre or a place set apart as a depositary for the remains of the dead?

(2). Did appellant (*i. e.* present peti-

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tioner) actually remove or level any graves or disturb the bones of the dead?

(3). Had he knowledge that the feeling of any person were likely to be wounded?

Upon these questions the learned Judge had found as follows:

(1) That the whole area A, B, C, shown in Exhibit D A constitutes one old graveyard.

(2) That the appellant (present petitioner) did disturb old graves by levelling the site even towards the south (portion C), and

(3) that the appellant had knowledge that the feelings of the persons whose relatives were buried in the graves were likely to be wounded by his acts

The learned Counsel for the petitioner has contended that, assuming the correctness of the facts found by the learned Sessions Judge (apart from the inference as to the petitioner's "knowledge" that the feelings of any persons were likely to be wounded by his acts), the petitioner has not been guilty of an offence under section 297, Indian Penal Code. The argument is briefly this. Although the plot of land which was purchased by the petitioner from the *mujawars* of the shrine of Shah Abul Maali is entered in the Revenue papers as a graveyard, it has not been used as a burial ground for a great many years past, because the Municipal Committee declared it to be a closed graveyard at least fifteen years ago. The land having been purchased by the petitioner from certain persons who are entered in the Revenue Records as owners thereof became the private property of the petitioner before October 1912, and assuming that the petitioner levelled, or interfered with, certain graves situated on his land, he could not be said to have committed a "trespass" on any place of sepulchre within the meaning of section 297, Indian Penal Code. The word "trespass" in section 297, has the same meaning as in the expression "criminal trespass" in section 441 of the Code, in other words, it means that the person guilty of committing "trespass" must be shown to have entered into or upon property in the possession of another. In the present case the petitioner entered upon land which belonged to himself and was in his possession, and it is incorrect to say that by entering upon his own land and by levelling it and disturbing any graves that were situated on it, he committed a "trespass" so

as to bring himself within the purview of section 297, Indian Penal Code.

In support of this part of his argument the learned Counsel has relied on the meaning of the word "trespass" in the English Law, and also on the opinion of Beaman, J., in the case of *Mustafa Rahim v. Motilal Chumilal* (1), but, on the other hand, a contrary view has been taken in three decisions of the Allahabad and Calcutta High Courts which are more or less in point *viz.* *Queen-Empress v. Subhan* (2), *Ram Prasad v. Emperor* (3) and *Jhulam Sain v. Emperor* (4). With reference to the Bombay case which has been relied on by the petitioner's Counsel, it has to be observed that the opinion expressed by Mr. Justice Beaman that the "trespass" contemplated in section 297, Indian Penal Code, is such a trespass as is defined by the Indian Penal Code was mere *obiter dictum*, for upon the facts found by the District Magistrate whose order was under revision in the High Court, and which facts were accepted by the High Court as correct, no question arose as to the interpretation to be placed upon the word "trespass" used in section 297: Mr. Justice Batchelor, who was the other member of the Division Bench that decided the Bombay case, in the course of his judgment, said at page 827:—

"It was at least incumbent on the prosecution to establish to the Magistrate's satisfaction that the place was in fact a place of sepulchre, but the evidence which they offered in that behalf was found to be wholly inconclusive. Proceeding further, the Magistrate, as I read his judgment, says that even admitting for the sake of argument that there were a few isolated and secret cases of burial in the course of many years upon this piece of property that would not be enough to constitute it a place of sepulchre within the meaning of the section."

This finding of the Magistrate was accepted by the High Court as correct, one noteworthy fact upon which that finding was based being that the land on which graves were said to have existed and been destroyed by the accused in that case was not entered as a

(1) 21 Ind. Cas. 825; 10 Cr. L. J. 160.

(2) 18 A. 395; A. W. N. (1896) 119.

(3) 12 Ind. Cas. 300; 8 A. L. J. 927; 33 A. 773; 12 Cr. L. J. 532.

(4) 18 Ind. Cas. 677; 40 C. 548; 14 Cr. L. J. 117; 17 C. W. N. 534.

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qabristan in any public record. Upon that view of the case, it was unnecessary for the learned Judges of the High Court to consider whether the accused had been guilty of a "trespass" within the meaning of section 297, Indian Penal Code, or not; and Batchelor, J., carefully refrained from expressing any opinion on that point. This Bombay authority is not, therefore, of much help in the present case.

On the other hand, in the two Allahabad cases and in the Calcutta case above referred to the question of the true meaning of the word "trespass" as used in section 297, Indian Penal Code, was directly involved, and the view expressed by the learned Judges was that this word in section 297 has not the same meaning as in the expression "criminal trespass" which is defined in section 441, Indian Penal Code. In *Queen-Empress v. Subhan* (2) it was held by Knox, J. that persons who entered upon a burial place and ploughed up the graves were liable to be convicted of the offence defined by section 297 of the Indian Penal Code notwithstanding that their entry on the land was by the consent of the owner thereof. In the course of his judgment the learned Judge said:—

"The ground ploughed up was used as a burial ground and graves were as a fact disturbed. It is still, however, contended that as Subhan entered on the property with the permission of the owner, therefore, he could not be said to have committed trespass I am not prepared to construe the word 'trespass' in the present section as it is defined in the case of 'criminal trespass' under the Penal Code. The act of the petitioners was an act of injury to the place of sepulture, and it was an act which they must have known would have been likely to wound the feelings of others."

In *Ram Prasad v. Emperor* (3) it was held by a Division Bench of the Allahabad High Court that where a person entered upon a grave for the purpose of demarcating his share therein and in doing so dug up certain graves and exposed the bones of the person buried there in spite of the remonstrances of the relations of the buried persons, he was properly convicted of an offence under section 297, Indian Penal Code, and nonetheless because he happened

to be part-owner of the grave. The meaning given to the word "trespass" in section 297 by Knox, J. in *Queen-Empress v. Subhan* (2) was accepted as correct.

In *Jhulam Sain v. Emperor* (4) a Division Bench of the Calcutta High Court held that the erection of a shed over a visible grave belonging to the complainant's family in a disused graveyard, claimed to be private property of the trespasser, with the knowledge that the feelings of the complainant would be likely to be thereby wounded, is an offence under section 297 of the Indian Penal Code. The argument that since the land on which the complainant's mother's grave existed was the private property of the accused, the latter could not be guilty of committing a trespass on the grave was rejected by the High Court; and Richardson, J., one of the members of the Division Bench that decided the case, expressly held that the word "trespass" used in section 297, Indian Penal Code, has not the same meaning as that attached to the expression "criminal trespass" by section 441 of the Indian Penal Code. Accordingly to him, the term "trespass" in section 297 appears to mean any violent or injurious act committed in such place and with such knowledge or intention as is defined in that section. This decision of the Calcutta High Court has an important bearing upon the present case, inasmuch as there the piece of land which was claimed by the accused as his own property and on which the complainant's mother's grave existed had, under the orders of the Municipality, not been used as a burial ground for about fourteen years before the commission of the offence, and the accused had been in undisturbed possession of the land and had enjoyed the fruits of the trees growing on it. Sharaf-ud-Din, J., in the course of his judgment said at page 550:—

"The contentions on behalf of the petitioner are that the land in question is his ancestral land, that it belongs to him and is in his possession, that he is in enjoyment of the fruits of the trees standing upon it and that the land is no more a burying ground or depositary for the remains of the dead, inasmuch as it has not been used for burying purposes for a great many years. In my opinion, however, it is not necessary for the purposes of section 297 of the Indian

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Penal Code, that a burial ground should be in use. If it has been a burial ground and if there are visible graves in it, it becomes a depositary for the remains of the dead. . . . any act of trespass by which the feelings of the relations of the dead are wounded would certainly come under section 297 of the Indian Penal Code." These decisions of the Allahabad and the Calcutta High Courts strongly support the prosecution in this Code, and after giving the matter my most careful consideration, I am of opinion, that the meaning of the word "trespass" in section 297, Indian Penal Code, is not the same as is attached to it in the expression "criminal trespass" in section 441 of the same Code. To my mind the word "trespass" in section 297 denoted a wrongful act, and the act of a person who destroys or disturbs a place of sepulchre with the intention of wounding the feelings of any person, or with the knowledge that the feelings of any person are likely to be wounded is wrongful and amounts to a "trespass" within the meaning of the said section, no matter whether the land in which the "place of sepulchre" is included does or does not belong to the persons who are guilty of the act complained of. My view on this point is thus the same as that expressed by the learned Judges in the two Allahabad cases and in the Calcutta case above referred to and with every respect to Beaman, J., I find myself unable to accept his interpretation of the word "trespass" in section 297. The proposition contended for by the learned Counsel for the petitioner in this case would, if accepted, lead to startling results. Suppose A is entered in the Revenue Records as owner of a *bigha* of land of which one *kanal* comprises a graveyard containing a number of well-preserved graves. A sells the land to B; and shortly after the sale, the latter digs up and levels the graves and ploughs up the one *kanal* of graveyard with the deliberate intention of wounding the feelings of certain persons whose relatives are buried in those graves, or with the knowledge that the feelings of these persons are likely to be wounded by his act. According to the petitioner's Counsel, B having purchased from A the land including the graveyard and having thus become the owner of it, his entry of the graveyard and his act in destroying

the graves with the intention or knowledge specified in section 297, Indian Penal Code, does not amount to a "trespass" as contemplated by the section and he is not guilty of an offence under that section. The reasoning would apply to a case where one of two or more joint owners of a piece of land containing a graveyard enters upon it and destroys the graves existing on the land with the intention of wounding the feelings of the other co-owners or with the knowledge that their feelings are likely to be wounded.

It seems to me that in the present case a wholly wrong assumption underlies the argument of the petitioner's learned Counsel when he says that since the land comprised in *Khasra* No. 383 was owned by the petitioner by virtue of the sale-deeds executed in his favour by the *mujawars* of the shrine of Shah Abul Maali, his act in digging up and levelling the graves on that land did not amount to a "trespass" as contemplated by section 297. There is undoubtedly some force in the contention that the decision of their Lordships of the Privy Council in *Court of Wards v. Ilahi Bakhsh* (5) which relates to an "open graveyard" is not applicable to a "closed graveyard" like the one under consideration in this case, and that the learned Sessions Judge was not justified in holding that sale of *Khasra* No. 383 in favour of the petitioner was invalid. The question of the validity or otherwise of the sale of the land in favour of the petitioner does not arise in this case and need not be decided, and it may be assumed for the sake of argument that the petitioner became the owner of the land by virtue of the sale in his favour. But what has been overlooked by the petitioner's learned Counsel is that the sale of *Khasra* number in question in fact did not, and in law could not, pass to him any proprietary rights in the graves which existed on that land at the time of the sale; and the graves remained as before *waqf* property and so far as they were susceptible of possession, must be deemed to have remained in the possession of the persons whose relatives were buried in them. In *Ameer Ali's Muhammadan Law*, Vol. I (4th Edition) at page 406 we find the following passages:

(5) 17 Ind. Cas. 744. 27 P. R. 1913; 1 P. W. R. 1913; 11 A. L. J. 265; 13 M. L. T. 318; (1913) M. W. N. 270; 17 C. L. J. 360; 83 P. L. R. 1913; 40 C. 297; 15 Bom. L. R. 436; 25 M. L. J. 61; 40 I. A. 18 (P. C.).

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"A cemetery or graveyard is consecrated ground and cannot be sold or partitioned. Even lands which are not expressly dedicated but are covered by graves are regarded as consecrated and consequently inalienable and non-heritable. But when a place is found not to be a *makbara* (a burial-ground) but only one or two bodies are buried there, the actual spot where the bodies lie buried is consecrated."

It is clear from this passage that the actual place of sepulchre in which dead bodies are buried, as contra-distinguished from the land round about it, which is not covered by graves, cannot be the subject of a sale by one person to another: and it follows that assuming that the sale of *Khasra* No. 383, the whole of which apparently was not covered by graves, in favour of the petitioner was valid, he did not by virtue of that sale acquire rights of ownership in the graves which he is found to have dug up and destroyed in the process of levelling the land sold to him. When, therefore, he entered on the land actually occupied by the graves and destroyed them he entered not on his own property, but upon property which was *waqf* and which he could not lawfully take possession of and his entry on the graves for the purpose of destroying or levelling them was wrongful and amounted clearly to a "trespass" on a place of sepulchre within the meaning of section 297, Indian Penal Code. The matter would have been different if he had entered on the land which he had purchased and levelled a portion of it on which there were no graves at all, in that case there would have been no trespass on a place of sepulchre, properly so called and he could not then have been guilty of an offence under section 297 of the Code. The gist of the offence is the committing of trespass on a place of sepulchre with the intention or with the knowledge specified in section 297, and if these essentials are not established no offence under section 297, Indian Penal Code, is made out.

As regards the question whether the petitioner dug up and destroyed the graves as alleged by the prosecution, the Sessions Judge's finding of fact must be accepted as final as the case is before us on the revision side; but to satisfy myself as to the correctness of that finding I have carefully read the evidence in this case, and in my

opinion there is overwhelming testimony of a reliable character on the record, especially the evidence of the two Municipal Commissioners, Sheikh Abdul Karim and Sheikh Karam Bakhsh and of the Municipal Engineer, Mr. Longdin, which thoroughly justifies the Sessions Judge's finding on this part of the case.

There remains the question whether the petitioner had the "knowledge" that the feelings of any person were likely to be wounded by his act in digging up and levelling the graves. This again is a question of fact, and I agree with the Sessions Judge that the requisite knowledge on the part of the petitioner has been amply established. The reports made to the Police by the Municipal *Chaukidar* Kasim Ali, and by the Municipal Commissioners, Sheikh Abdul Karim and Sheikh Karam Bakhsh, which are on the record (Exhibits PA, PB) read with the oral evidence of the prosecution witnesses, fully established that the destruction of graves be they old or new, in a Muhammadan graveyard is regarded by the Muhammadans as a sacrilege, and the petitioner must be presumed to have the knowledge that by such acts of desecration as he has been found to have been guilty of, the feelings of the complainant and of other persons whose relatives were buried in the graves on the land in question were likely to be wounded. The petitioner's learned Counsel filed a list of passages to be found in certain original authorities in Arabic which, according to him, lay down that if a dead body is rotten and turned into dust the site can be built upon or brought under cultivation. The passage quoted in Ameer Ali's *Muhammadan Law*, Vol. I, (4th Edition), page 406, 4th paragraph, contains an expression of opinion to the contrary. In the present case it is unnecessary to go into this question, for the question before us is not whether, according to some authorities on Muhammadan law the site of the grave, can or cannot under certain contingencies, be built upon or brought under cultivation; but whether, in a case like the present in which there is no proof that the dead bodies buried in the graves had turned into dust the destruction of visible graves, some of which were of *pakka* masonry, did not, having regard to the religious

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notions generally prevailing among the Muhammadans, amount to an act of desecration by which the feelings of Muhammadans were likely to be wounded. In my opinion there can be but one answer to this question, and that is that the feelings of persons in the position of the complainant and of the witnesses for the prosecution whose relatives were buried in the graves, which were dug up and levelled by the petitioners, were likely to be wounded by the acts complained of, and I have no doubt that the petitioner had knowledge that his acts would have that result.

For the foregoing reasons, I would maintain the conviction and sentence and dismiss this petition for revision.

LEROSSIGNOL, J.—With all respect, I regret I am unable to give the word “trespass” as used in section 297, Indian Penal Code, any peculiar meaning. It is an accepted principle of law that all penal Statutes must be construed strictly, and a well-established principle of interpretation that words must be interpreted in their natural sense in which they are used in other contemporaneous Statutes is a good guide.

Now in the Indian Penal Code we find a definition of criminal trespass; “trespass” is employed also in the Indian Telegraph Act, the Forest Act and the Cattle Trespass Act. In all these Statutes we find the word used to signify unauthorised entry upon the property of another. For these reasons I would hold that no person can trespass upon his own property.

However in this case the point is not of immediate importance, for I concur in my learned colleague’s view that in purchasing this graveyard, the petitioner did not acquire an unencumbered property. All that he purchased was the right of the vendors, and that right was subject to the right of relatives of those who were interred in the land sold.

It follows that I hold that the petitioner did trespass on the graves, which under the sale did not become his property. Seeing that many portions of Lahore are built on old grave-grounds, and that Muhammadan Law permits of the building upon or ploughing up of graves when the interred bodies have been reduced to dust, I think a nominal sentence might have

been inflicted, but as the matter of sentence was not greatly pressed before us, and as I argue that, though petitioner had no desire to wound feelings, still he had reason to believe that his act would wound the feelings of the relatives of the buried dead, and as further it is not established that the interred bodies had been reduced to dust, I concur in the conclusion that the petition should be rejected.

Petition rejected.

PUNJAB CHIEF COURT.

CRIMINAL APPEALS NOS. 144 TO 147, 150, 151
AND 164 OF 1915.

March 9, 1915.

Present:—Justice Sir Alfred Kensington, Kt.,
Chief Judge, and Mr. Justice Rattigan.

DHIAN SINGH AND OTHERS—CONVICTS—

APPELLANTS

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), ss. 149, 302—Criminal Procedure Code (Act V of 1898), s. 537—Charge, omission in—Failure of justice—Unlawful assembly—Liability of all for offence committed by some.

The specific common object of a riot need not necessarily be set out in a charge including section 149 of the Penal Code though it may be desirable to do so in a particular case. [p. 741, col. 2.]

A High Court will not interfere unless an omission in the charge has in fact occasioned a failure of justice. [p. 741, col. 2.]

Of the two parts of section 149 (1) the common object prosecuted and (2) the object which the members of an unlawful assembly must have known to be likely to be committed, for the application of the latter portion there must be an expectation founded upon facts known to all the members, amounting to something more than a mere speculation. [p. 741, col. 2.]

Where the whole of a party setting out from a particular town must have known that the common intention was to commit dacoity, that the party was going heavily armed, that there was every likelihood of something occurring either on their way or at the scene of dacoity to interfere with their highly criminal plans, and that their deliberate intention was to use their arms whenever necessary, either to effect the object in view or to avoid the risk of capture at any stage in the adventure, every one of them would be liable equally with others for the murders committed for which they were prepared beforehand and which they knew to be likely to occur. [p. 741, col. 2; p. 742, col. 1.]

Appeal from an order of the Sessions Judge, Ferozepore, dated the 2nd February 1915, convicting the appellants.

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Messrs. *Beechey, Manohar Lal and Vaughan*, for the Appellants.

The *Government Advocate*, for the Respondent.

JUDGMENT.—These seven appeals may be disposed of together. They cover the cases of the following men:—

1. Appeal No. 145—Kanshi Ram, *Brahman*, aged 33, of Ambala District;
2. Appeal No. 146—Lal Singh, *Jat*, aged 32, of Ludhiana District;
3. Appeal No. 144—Dhian Singh, *Jat*, aged 25, of Amritsar District;
4. Appeal No. 147—Bakhshish Singh, *Jat*, aged 20, of Ludhiana District;
5. Appeal No. 150—Rahmat Ali, *Kureshi*, aged 28, of Patiala State;
6. Appeal No. 151—Jagat Singh, *Jat*, aged 24, of Ludhiana District;
7. Appeal No. 164—Jiwan Singh, *Jat*, aged 27, of Patiala State.

No two of the men come from the same village. They have all been sentenced to death on convictions under section 302, Indian Penal Code, in the Case of No. 6 (Jagat Singh) and sections 302-149 in the cases of the remaining six. Before us Nos. 1 to 3 have been represented by Counsel, No. 4 by his brother, and the other three have appealed from Jail and are not represented.

The learned Sessions Judge has given a clear and sufficiently full account of the circumstances under which these men have been convicted in respect of two murders committed in the most open manner at about 2 P. M. on the 27th November 1914, and as the main facts are for the most part admitted, there is no necessity for covering the ground again in great detail. The murders were committed on or close to the main road leading from Ferozepore Cantonment to Moga, at a spot some 8 miles from Ferozepore and 80 yards or so from a large village, Misriwala, which is practically on the road. The prosecution story is that the actual murderers were some out of a party of 15 men, who had driven out together from Ferozepore in three *tumtums*. Five of the appellants have never disputed the fact that they were among the party, though they deny all connection with the murders, representing themselves to be innocent travellers. Of the remaining two, Lal Singh stated in the lower Courts that he was on foot, walk-

ing either from or to Ferozepore, his statements varying as to the direction in which he was going, but before us his Counsel has accepted the fact that he was in one of the *tumtums*, while Jagat Singh has vaguely professed to be following the *tumtums* in an *ekka*. We have not the slightest doubt that Jagat Singh was one of the party of 15 who all got into *tumtums* together at Ferozepore Cantonment as described by two of the drivers, witnesses Nos. 11 and 12.

The victims were Basharat Ali, Sub-Inspector of the Ghal Police Station, distant about three miles beyond Misriwala, and Jawala Singh, *zaildar*. They were among a small party waiting on the road at Misriwala to meet the District Superintendent of Police who was expected from Ferozepore on his way to Ghal, and Basharat Ali was, therefore, in uniform. He did not like the looks of the men in the *tumtums*, as they drove by and disregarded his warning to stop. Ghulam Kadir, witness No. 5, was sent after them, and being mounted he succeeded in stopping them and bringing them back. They all got out of the *tumtums* and after the Sub-Inspector had said that their names would be taken and that they would be searched, several of them opened fire on him suddenly with pistols. He was shot in five places, three in the head, and these bullet wounds would probably have been fatal, but the immediate cause of his death on the spot was a series of further blows with a formidable axe. There is ample evidence that these blows were struck by Jagat Singh, and this is why he in particular is convicted of direct murder.

There was at once a scene of wild confusion, and three further shots killed the *zaildar*, while others of the Police party ran away or hid as best they could. One of them Fatteh Singh, witness No. 4, was armed with a pistol and fired it, and this resistance, coupled with the fact that the uproar was bringing a swarm of villagers out from Misriwala, caused the appellants' party to make off. They did so by a path leading across the fields to the Sirhind Canal, without being immediately followed. As soon, however, as the Police party recovered from the shock of this sudden attack they took sensible steps. Ghulam Kadir, witness No. 5, and Kalu Singh, witness No. 8, galloped along the road to a bridge across the canal and

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thence to a canal bungalow half way between the bridge and the place where the path taken by the appellants' party struck the canal, while Ida *chankidar*, witness No. 10, was sent driving in one of the *tumtums* to the Ghal Police Station three miles off to report.

From the canal bungalow Mohammad Sadiq, Head Constable, witness No. 14, rode off up the canal for about half a mile, overtook the appellants' party soon after they had crossed the canal, exchanged shots with them and followed them up towards the reeds along a railway line where nine of the party took cover, while the remaining 6 made off across the railway and escaped. Out of the nine Jiwan Singh appellant was almost at once arrested lying under a tree by the reeds, this capture being effected by witnesses Nos. 28 and 29, the latter a constable from the bungalow.

In the meanwhile Amir Din, Sub-Inspector, witness No. 15, had received the report brought by Ida to his Police Station, and promptly drove in the *tumtum* with the posse of Police armed with rifles towards the railway. The country side was also up and some 300 or 400 men collected round the reed jungle and a siege began, lasting apparently for some considerable time. There was a good deal of rifle and pistol firing on both sides without much apparent result, though as a fact two of the appellants' party were found later to have been shot dead, but it was only when the reeds were set on fire that the remaining six appellants were driven out of cover and caught one by one.

The above is the merest outline of the story, sufficient for our purposes, and we need only add to it by expressing our high appreciation of the courage and resource shown by the Police and the villagers in organizing so successful a pursuit and capture, special praise being due among the latter to the *Zaildar* Fattah Singh and the *Safaidposh* Ghulam Kadir, witnesses Nos. 4 and 5, for their prompt measures after the first disastrous attack on their party.

What we have first to consider is the main line of defence of the appellants, urged strongly by Counsel, to the effect that however bad the case may be as regards the two men killed among the reeds and others who succeeded in escaping, there is

no attempt at proof that any of the appellants, except Jagat Singh, took an active part in the murders. No one is in a position to say that they used pistols and no weapons or cartridges were found on them when they were captured. The contention is that they should be assumed in consequence to be innocent travellers who happened to be going the same way as the real culprits, and quite by accident came to be in the same *tumtums* with a well-armed gang of men bent on dacoity with whom they had no connection of any sort. There are several points in the case, enumerated as follows, which make it impossible for us to accept this plausible story.

(1) The admitted fact that all seven men were recently returned emigrants from America and China, taken with the remarkable evidence of the accomplice Jawala Singh, witness No. 31, who unlike them belongs to the Ferozepore District, conclusively establishes association. The appellants Kanshi Ram, Rahmat Ali and Jiwan Singh were fellow-passengers with him to India and all these landed in Calcutta together on or about the 29th November. We need not discuss his long story. It appears to us trustworthy in its main points as indicating a general scheme of rebellion and robbery concocted in foreign parts, in which he himself, one Nidhan Singh (still at large), and one of the men shot in the reeds named Dhian Singh, *alias* Nidhan Singh, were taking leading parts. All the appellants except Bakhshish Singh were evidently well known to him and working in concert with him. He was probably giving the benefit of his local knowledge in getting all these men collected at Ferozepore with criminal intent, and whether he actually suggested it or not there is no reason for doubting that the immediate object of the whole party was an attack on Moga Tahsil and sub-treasury about 18 miles further on the road beyond Misriwala.

(2) The evidence of the *tumtum* drivers, witnesses Nos. 11 and 12, is conclusive that they did not pick up the appellants as casual fares going in the same direction. The whole party chartered the vehicles together, one man bargaining for the lot. They insisted on overloading the *tumtums* and on dashing past the Police when attempts were

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made to stop them at both Ferozepore and Misriwala.

(3) The various explanations given by the appellants of their reasons for driving towards Ferozeshah (Pheru Shahr) at the same time are thoroughly unsatisfactory. The coincidence that these newly returned emigrants belonging to Ambala, Ludhiana, Patiala and Amritsar should suddenly meet at Ferozepore and that many of them should be seized with a desire to visit the battlefield and monument at Ferozeshah is too remarkable to be taken at its face value.

(4) The appellants, if innocent of knowledge of their fellow travellers, would not have quietly looked on while murders were committed. They would naturally have come to the rescue of the relatively small Police party or at any rate have actively dissociated themselves from the attackers, instead of cheering them on as they are shown by the evidence to have done.

(5) Unless the appellants and the murderers were banded together why should the former have gone off with the latter in a body? Their natural course was to either stay where they were and protest that they had nothing to do with the affair, or if they were too scared for that, to disperse in all directions. Their keeping with the murderers is in itself conclusive of their close association with them, and their intimate knowledge of the schemes on which their leaders were embarking with them may be safely assumed.

The exhibits in the case have been produced before us and we regard them as a very important element in the case, as tending to disprove the defence theory. The one automatic pistol found close to the body of Dhian Singh among the reeds, taken with the fact that he had 49 cartridges on him, is conclusive enough that he was one of the men so armed. Counsel made a strong point of the fact that no other fire-arms have been traced, and though the record suggests at page 147 that Dhian Singh had a revolver as well, we may assume that this is a mistake and that the fact is as stated. We cannot, however, allow the inference that because others of the party armed with pistols made good their escape, no one among the appellants (except Jagat Singh)

should be considered to have come prepared for violence. The bundle of five *chhavi*-heads, Exhibits 4 to 8, found in the *tuntum* of Phangan, witness No. 11, all quite new and very sharp, proves that at least that number of men were well-armed in addition to those carrying pistols, while Jagat Singh's axe, Exhibit 3 (found in the reeds), is not an ordinary villager's implement. The head is small, but solidly made and firmly screwed on with a nut at the back to a long and very heavy handle, making it almost as dangerous a weapon as a *chhavi* and undoubtedly intended for use in the same way. Altogether there must have been enough dangerous weapons to go round nearly the whole party of 15, while it is possible that others may have been secreted in the reeds before the appellants were compelled by fire to leave their hiding place.

The two new tools, Exhibits 10 and 11, found in the same *tuntum* and described by the Sessions Judge as hack saws, are large size ribbon saws, marked as made in Germany, with detachable frames on the principle of the common fretwork saw so as to admit of being unscrewed and inserted between iron bars. We are satisfied that practically any iron bars or padlocks which burglars would be likely to encounter could be sawn through with these powerful tools, while the evidence of witness No. 17, to whose shop in Lahore they were easily traced as having been sold about the time of this affair, proves that the purchaser had in addition negotiated unsuccessfully for another expensive tool for dealing with screws. The saws could not possibly be wanted by ordinary peaceful villagers, who would not even understand how to adjust and use them, and they materially strengthen the prosecution theory that the whole gang of men were bent on attacking the Moga sub-treasury. That was not the sort of enterprise to be undertaken with any hope of success by a small body of six or eight men, so that there is additional ground for discrediting the defence story that the appellants were mere chance passengers in the *tuntums*, who had the bad luck to be travelling the same way as the murderers though with independent and harmless objects of their own. Our conclusion on this

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part of the case is that though evidence is wanting to prove that the appellants, other than Jagat Singh, took the primary part in the murders, they and all other members of the whole party of 15 were banded together with a common object, well knowing that any form of desperate violence would be freely used in order to achieve it and to escape capture in case of resistance. The sudden attack on the Police party at Misriwala was an unpremeditated incident in their plans, rendered necessary by the certainty that their threatened search must lead to their detection as a gang of armed dacoits. They were, however, prepared for any incident of the kind, if necessary, in pursuit of their plans.

The question what offence has actually been committed by the appellants other than Jagat Singh, whose conviction under section 302, Indian Penal Code, is clear enough, was not very carefully considered by the Sessions Judge, and their conviction in general terms under section 302, read with section 149, Indian Penal Code, leaves something to be desired in point of precision. He has taken these two sections as covering generally the first four charges against the appellants, which deal separately with the murder and abetment of murder of each of the two men killed at Misriwala, and has not discussed the question of abetment at all.

Counsel has made a good deal of this indefiniteness as to the specific offences of which the appellants have been convicted and has also laid stress upon the omission in the charges as drawn to set out the precise common object which the rioters were alleged to have in view, relying in particular on the ruling of *Kudrutullah v. Emperor* (1) in support of his contention that the omission is a fatal defect.

So far as concerns the form of the charges, we consider that section 537 of the Criminal Procedure Code amply covers any technical deficiencies there may have been in this case, and we are satisfied that the appellants could have been under no misapprehension of the nature of the offences charged against them. With all due respect we feel unable to follow the learned Judges of the High Court of Calcutta in their

conclusion that the specific common object of a riot must necessarily be set out in a charge including section 149, Indian Penal Code. We can easily understand that it may be desirable to do so in a particular case, but we are not prepared to go further and lay down any general proposition of law on the point, and we do not consider it incumbent on us to do more than ascertain what the law requires, namely, whether an omission in the charge has in fact occasioned a failure of justice. In the case before us we are clear upon this essential point that there has been no such failure of justice.

So far as rulings go, there has been a more exhaustive discussion of section 149, Indian Penal Code, in *Madat Khan v. Empress* (2), dealing with the two parts of the section covering (1) the common object prosecuted and (2) the object which the members of an unlawful assembly must have known to be likely to be committed. It was there pointed out that for the latter portion of the section, which is more directly applicable to the facts now before us, there must be an expectation founded upon facts known to all the members, amounting to something more than a mere speculation. We have no sort of doubt that this condition was amply fulfilled in the present case. The whole of the party which set out together from Ferozepore must have known that the common intention was to commit dacoity, that the party was going heavily armed, that there was every likelihood of something occurring either on their way or at the scene of dacoity to interfere with their highly criminal plans, and that their deliberate intention was to use their arms, whenever necessary, either to effect the object in view or to avoid the risk of capture at any stage in the adventure.

In other words, the party had made up their minds before they started to stick at nothing in the way of violence which would secure their success and safety. Looking at the whole enterprise in this light, each member of the party is equally liable for the fatal consequences of their stoppage on suspicion while still on the road. It would not be a mere speculation that they might be stopped. They would all know that

(1) 14 Ind. Cas. 314; 39 C. 781; 13 Cr. L. J. 218.

(2) 61 P. R. 1887 Cr.

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such stoppage was quite likely and would effectually wreck their nefarious schemes unless resisted with desperate violence. We must hold, therefore, that the appellants were liable equally with others who escaped for both the murders which occurred, as being a contingency for which they were prepared beforehand and which they knew to be likely to occur. The omission to set all this out in the charges (1) and (3) cannot have misled the appellants in any way in respect of the defence which they were able to put forward, and we think that it would be directly opposed to law to hold that the omission constitutes a fatal defect.

The learned Government Advocate has also correctly pointed out that apart from that construction put by us on the law bearing on these matters in connection with charges (1) and (3), there is a good deal of evidence to establish abetment by instigation by all members of the party in respect of the second murder, that of the *Zai'dar* Jawala Singh. The first murder, of the Sub-Inspector, might conceivably be treated as a sudden outbreak by individual members of the party, not directly abetted by the rest except by way of conspiracy and aid, but the second was a very different matter. In our minds there is force in this argument. It is not, in the case of the second murder, necessary that there should be definite evidence of the extent to which each of the appellants individually instigated the attack on Jawala Singh. Such evidence could not possibly be given, considering the general confusion after the sudden shooting at the Sub-Inspector. Any person present who attempted to give more than a general account of what happened would certainly be drawing on his imagination, but it is clear enough that the whole of the appellants' party cheered each other on to further desperate violence as a means of avoiding capture, and only departed in a body when they found the Misriwala villagers coming out in force to help the Police. We cannot allow the contention of Counsel that the cries of "*maro, maro*" meant only that the Police party should be beaten, not killed. We take it that there was undoubted instigation to kill indiscriminately so far as might be necessary to overawe the Police party, and that the history of the affair justifies a finding that the appellants

are further liable as abettors in at least the murder of Jawala Singh.

We accordingly sum up this discussion of the legal-aspects of the case by holding that—

(1) in respect of Basharat Ali's murder all the appellants are guilty equally with the actual murderers under sections 302/149, Indian Penal Code;

(2) in respect of Jawala Singh's murder they are similarly guilty under section 302/149, with the addition that they are also guilty as abettors under section 109 and 111, though possibly under section 114;

(3) the appellant Jagat Singh in particular directly committed murder, and the remaining appellants are equally guilty of murder under the sections quoted.

Turning now to the cases of each appellant separately, it is only necessary to add a few words of explanation about them.

1. Kanshi Ram, *Brahmin*, aged 33, had recently returned from America. He gives a vague account of his wanderings from 3rd November onwards through many districts, ending up at Ferozepore, and professes to have intended returning home to Ambala from there. He says that he missed a train and so thought he would like to drive out to Ferozeshah to see the place, meaning to go on from there by train in the evening. We do not believe this story, and we have no doubt that he was one of the leading conspirators, actively associated both with Jawala Singh, the accomplice, witness No. 31, and with the man Dhian Singh on whose body the incriminating pamphlet was found.

2. Lal Singh, *Jat*, aged 32, represented that he had been originally for four years in the army, and that latterly he had been for a year in Shanghai, serving 10 months in the Police there. We have already noticed his plea that he was walking on foot and not one of the party in the *tumtums*, but as he varied his story about the direction in which he was going, whether towards Ferozeshah or back to Ferozepore, we cannot accept his bare assertions.

3. Dhian Singh, *Jat*, aged 35, says that he returned from China on the 11th November, and that he was on his way to Ferozepore to see the scene of the battle-fled. Very little can be made of his story.

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4. Bakhshish Singh, *Jat*, aged 20, has pleaded extreme youth, putting his age at 16. This is quite impossible, as he admits two years' residence in the Malay States and Hongkong. For the rest his only explanation is that he was on his way to Ferozeshah to enlist in the army.

5. Rahmat Ali, *Kureshi*, aged 28, the only Musalman, among the appellants says that he returned to India on the 1st November after eight years' absence in Manilla. He professes to have been on his way to Ghal to see a friend, and says that he was caught as a suspicious stranger at Misriwala half an hour after the murders. This is disproved by witness No. 26, and there is no doubt that his capture was really effected as he came out from the reeds where all the fugitives were hiding.

6. Jagat Singh, *Jat*, aged 24, says that he returned to India from China in September, and thence to Rangoon, returning to Calcutta on the 15th November. He professes to have been following the *tuntum* party in an *ekka* on his way to Ferozeshah to join a recruiting party with a view to enlistment. His story is very vague and may be safely disbelieved. We have no doubt that he took a leading part in the killing of Basharat Ali.

7. Jiwan Singh, *Jat*, aged 27, states that he returned to India on the 29th October after being ten years away in Shanghai and Manilla. He professes to have been returning home from Ferozepore and to have been arrested as an innocent traveller, because he declined to allow his name to be given as a witness after the murders. He does not say where he was arrested, and it is clear from the evidence of witnesses Nos. 28 and 29 that he was really caught outside the reeds, being the first of the appellants to surrender there.

The appellants have only themselves to blame for the brevity with which these explanations are given. With the exception of Rahmat Ali, they took up a defiant attitude in the Committing Magistrate's Court and confined themselves to putting in vaguely worded written statements unsupported by evidence. We can place no reliance on any of their explanations and must treat all the appellants alike as active members of the party, in view of the fact that all held together after the murders. We cannot distinguish the case of any one of them and we

hold that they were all rightly sentenced to death. We accordingly confirm all the capital sentences.

The circumstances of the case are such that we decline to interfere with the further sentences of forfeiture of property under section 62, Indian Penal Code. We are informed that Kanshi Ram is a well-to-do man with large sums at his credit in Bank deposits in India. There is no evidence on record to support this and we do not know how far it may be true. His father was present before us and stated that during Kanshi Ram's 12 years' absence from India he contributed nothing to the support of his wife or children, so that if he has any large sum of money at command, the inference would be that he was one of the treasurers of the funds with which these returning emigrants proposed to carry out their schemes, and the money may well be confiscated to Government. There is nothing to indicate what property may be in the possession of the other appellants besides the small sums found on their persons, and in their cases we understand that the forfeiture will be for the most part nominal, so that the orders may stand as a deterrent even if they do not imply much in respect of their ancestral land, if any. [*Sadhu Singh v. Secretary of State for India* (3).]

The whole of the appeals are dismissed.

Appeals dismissed.

(3) 18 P. R. 1908; 19 P. W. R. 1908; 156 P. L. R. 1908 (F. B.).

CALCUTTA HIGH COURT.

CRIMINAL REVISION No. 804 OF 1914.

July 23, 1914.

Present:—Mr. Justice Sharfuddin and

Mr. Justice Teunon.

GIRISH CHANDRA RAY—PETITIONER

versus

SARAT CHANDRA SINGH—

OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 195—Transfer of Deputy Magistrate—Successor-in office.

Where there are many Deputy Magistrates and one of them is transferred, the Deputy Magistrate who comes to fill the gap is not the successor-in office of the Deputy Magistrate who has been transferred, and is not, therefore, the proper officer to grant sanction for prosecution in respect of the us

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of a forged document in the proceedings under section 107 of the Criminal Procedure Code before the Deputy Magistrate transferred. [p. 744, col. 2.]

Criminal revision against the order of the Deputy Magistrate of Comilla, dated the 18th April 1914.

Mr. Jacob (with him Babus Manmatha Nath Mukherjee and Jatindra Mohan Ghose), for the Petitioner.

Mr. E. H. Monnier, for the Crown.

JUDGMENT.—The petitioners applied to this Court for a Rule to quash the proceedings now pending against them and, on their application, we ordered, on the 18th of May last, that a copy of the petition should be forwarded to the District Magistrate with a request that he should state whether and in what sense Babu Khirode Lal Mukherjee was the successor-in-office of Babu Harendra Kumar Ghose. A long letter was received by this Court from the Magistrate giving us all information tending to show that Babu Khirode Lal Mukherjee was the successor-in-office of Babu Harendra Kumar Ghose. Then we issued the present Rule, on the 10th of June, on the District Magistrate and on the opposite party, to show cause why the proceedings preliminary to the granting of sanction should not be quashed on the ground that Babu Khirode Lal Mukherjee was not the successor-in-office of Babu Harendra Kumar Ghose.

Now, the whole matter has been argued before us. The case stands thus. There was a case under section 107 of the Criminal Procedure Code in which a certain document, namely, a *pottah* was used by the petitioners; and the present proceedings are to determine whether sanction should or should not be given for the prosecution of the petitioners for their use of that *pottah*, which is alleged to be a forged document, as a genuine document in the said case. Now, that case was disposed of by Babu Harendra Kumar Ghose. The application for sanction was put in before Babu Khirode Lal Mukherjee. The question is whether Babu Khirode Lal Mukherjee is the successor-in-office of Babu Harendra Kumar Ghose or not. On behalf of the opposite party a lengthy argument has been placed before us in order to show that Babu Khirode Lal Mukherjee is the successor-in-office of Babu Harendra Kumar Ghose. We are, however, of opinion that in the present case Babu Khirode Lal Mukherjee cannot be said to be the representative-in-office of Babu

Harendra Kumar Ghose. In the case of *Mohesh Chandra Saha v. Emperor* (1), it has been held that where there are many Deputy Magistrates and one of them is transferred, the Deputy Magistrate who comes to fill the gap is not the successor-in-office of the Deputy Magistrate who has been transferred. Under the circumstances we hold that Babu Khirode Lal Mukherjee is not the proper officer to grant sanction for the prosecution of the petitioners in respect of their use of the document in the proceedings under section 107 of the Criminal Procedure Code before Babu Harendra Kumar Ghose.

Now, the present proceedings are under section 195 of the Criminal Procedure Code. Under clauses (b) and (c) of sub-section (1) of that section the proper Court to give sanction is either the Court where the offence is said to have been committed or the Court to which such Court is subordinate. Sub-section (7) of section 195 of the Criminal Procedure Code clearly lays down that "for the purpose of this section every Court shall be deemed to be subordinate only to the Court to which appeals from the former Court ordinarily lie." The proceedings in the course of which the offence is said to have been committed were before Babu Harendra Kumar Ghose. It is not for us to do more than point out the law on the subject, and it is for the parties, if they are so advised, to act under the sub-sections and clauses to which we have referred. The Rule is, therefore, made absolute and the proceedings quashed.

Rule made absolute.

(1) 35 C. 457 at p. 460; 12 C. W. N. 416; 7 Cr. L. J. 220; 7 C. L. J. 488.

LOWER BURMA CHIEF COURT.

CRIMINAL REVISION No. 340B OF 1914.

February 4, 1915.

Present:—Mr. Justice Parlett.

M. P. Y. VAIDAYNATH IYER—

APPLICANT

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 437
—Further inquiry—Notice.

In re KANAKASABHAI.

Where a man has been discharged after full inquiry by a competent Court, a Revisional Court will exercise proper discretion in allowing him an opportunity of showing cause before ordering a further inquiry or before directing a re-opening of the case, it being a principle of British Criminal Law that an order to a man's prejudice should not be made without due notice to him.

Where a Court is given a discretion, it is bound to exercise it judicially and fairly.

Application to revise the order of the Sessions Judge, Tenasserim Division, passed under section 437 of the Criminal Procedure Code, directing a further inquiry by the District Magistrate, Thaton, in a case in which petitioner was discharged by the Headquarters Magistrate, Thaton.

Mr. *Campagnac*, for the Applicant.

ORDER.—On 27th February 1914 one Grote, employed by the Burma Rice and Trading Company, lodged information against the applicant of criminal breach of trust in respect of Rs. 2,500. After investigation the case was thrown out as being of a civil nature. Subsequently on 15th April Mahomed Sayed, a sub-broker of the same Company, to whom the money was advanced by them, filed a complaint against the applicant. After an exhaustive inquiry, the Magistrate on 1st July discharged the applicant. On 20th July complainant's lawyer filed a lengthy application to the Sessions Judge, to order further inquiry. He was heard and on 14th October further inquiry was ordered without applicant having been given any opportunity of showing cause against it. He now seeks to get it reversed.

Subject to section 439 (2), Criminal Procedure Code, no Court is bound to hear any party when exercising revisional powers. Nor does section 437, like sections 436 and 439, compel the issue of a notice to the accused. But in these, as in all cases where a Court is given a discretion, it is bound to exercise it judicially and fairly. It is a principle of British Criminal Law that an order to a man's prejudice should not be made without due notice to him. There is abundant authority that where a man has been discharged after full inquiry by a competent Court, a Revisional Court will exercise a proper discretion in allowing him an opportunity of showing cause, before directing the case against him to be re-opened. More especially in cases like the present, when the evidence is voluminous and by no

means wholly consistent and when the nature of the inferences to be drawn is so important, one would expect a Court to welcome the fullest comment and explanation on both sides to assist it in reaching a sound decision. The omission to hear the accused throws upon this Court a large part of what is properly the duty of the Court below, namely, to consider the matter from the accused's point of view as well as from that of the prosecution. The frequency with which instances of such omission come before this Court indicates the need for amending section 437 in clear and unmistakable terms, and it is to be hoped that this will ere long be done. The present case, however, is far different, inasmuch as the prosecution was heard and the defence was not. I feel no doubt whatever that no such *ex parte* hearing against an order of discharge is contemplated by section 440, Criminal Procedure Code, it being contrary to principles of common fairness.

I have now heard both sides and cannot but feel that if the Sessions Judge had done the same, he would not have passed the order he did.

[Note.—The rest of the judgment is not material for report.—*Ed.*]

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 607 OF 1915.

CRIMINAL REVISION PETITION No. 487
OF 1915.

CRIMINAL MISCELLANEOUS PETITION No. 424
OF 1915.

September 17, 1915.

Present.—Mr. Justice Seshagiri Aiyar.

In re KANAKASABHAI AND ANOTHER—

ACCUSED NOS. 1 AND 2—PETITIONERS.

Revision.—Dismissal of petition—Another petition on same matter, if can be entertained.

Once a criminal revision petition is dismissed on the merits by a High Court, the rules of equity, justice and good conscience require that no other petition on the same matter should lie. [p. 746, col. 1.]

Ranga Row v. Emperor, 16 Ind. Cas. 518; 23 M. L. J. 371; 13 Cr. L. J. 710; (1912) M. W. N. 982; 12 M. L. T. 350, followed.

Petition, under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the

In re ABUL KALAM AZAD.

Court of the Chief Presidency Magistrate, Egmore, Madras, in Calendar Case No. 12188 of 1915, and petition praying that the petitioners be released on bail.

Messrs. K. Ramachandran and T. Gopala Desikachary, for the Petitioners.

ORDER.—In this case, an application was made to me on 14th. September 1915 while I was sitting in the Admission Court to admit a criminal revision petition and to release the accused on bail. I granted both the prayers. Immediately after and before the order was transcribed, it was brought to my notice that Sir William Ayling, J., had the matter before him some days back and that he dismissed the petition. This was not brought to my notice as it ought to have been when I passed orders. I am asked to treat the dismissal by Ayling, J., as one for default of appearance. One of the Vakils was present before the learned Judge and though he says he represented his inability to go on with the case as the papers were with the other Vakil, I see no reason to think that Ayling, J., did not deal with the petition on its merits. The decision in *Ranga Row v. Emperor* (1) shows that the High Court has no power to restore a petition once dismissed for default. It is argued that that decision does not preclude the filing of a fresh petition for the same relief. Although the principle of *res judicata* is not applicable to criminal cases, I think that on grounds of justice and equity, Courts should discourage the agitation of the same matter once again before another Judge. If the dismissed petition cannot be restored, there is stronger ground for holding that a new petition will not lie. There has been no considered decision on the question. The fact that notice was issued in Criminal Revision Case No. 126 of 1914 on a similar application is not an indication that the learned Judge came to the conclusion that such a petition can be entertained. Moreover, I think that in this case Ayling, J., must be deemed to have disposed of the case on the merits. I, therefore, refuse to admit the petition and to grant bail.

The petitions are dismissed.

Petitions dismissed.

(1) 16 Ind. Cas. 518; 12 M. L. T. 350; 23 M. L. J. 371; 13 Cr. L. J. 710; (1912) M. W. N. 982.

CALCUTTA HIGH COURT. SPECIAL BENCH.

ORIGINAL JURISDICTION.

January 11, 1915.

Present:—Sir Lawrence Jenkins, Kt.,
Chief Justice, Mr. Justice Wooroffe and
Mr. Justice Holmwood.

In re ABUL KALAM AZAD—PETITIONER.

Press Act (I of 1910), s. 4 (1)—Order made by Governor-General in Council in Delhi—Local Government—Jurisdiction of High Court of Calcutta.

The Governor-General in Council in pursuance of section 4 (1) of the Press Act, 1910, declared all copies of the issue of the newspaper called *The Comrade* bearing the date the 26th of September 1914 and published in Delhi, wherever found to be forfeited to His Majesty. This order was served on the person concerned. A recipient of a copy of the newspaper in Calcutta applied to the High Court to have the order of forfeiture set aside:

Held, that the High Court had no jurisdiction to interfere with the order made by an authority exercising at Delhi the powers of a Local Government. [p. 747, col. 1.]

Mr. B. Chakravarti, for the Petitioner.

The Advocate-General, for the Crown.

JUDGMENT.

JENKINS, C. J.—Without in any way assenting to the proposition that Abul Kalam Azad is a person having an interest in any property in respect of which the order of forfeiture has been made and so entitled to come before any High Court under section 17 of the Indian Press Act of 1910, it appears to me that there is another and absolutely fatal objection to this application. It appears, though the petition is not in order on this point, that on 2nd November 1914 the Governor General in Council in pursuance of section 4 (1) of the Press Act, 1910, declared the security of Rs. 2,000 deposited in respect of "The Comrade and the Hamdard Press, Kucha-i-Chelan, Delhi" and all copies of the issue of the newspaper called the *The Comrade*, bearing the date the 26th of September 1914, wherever found to be forfeited to His Majesty and this order was served on the person concerned, presumably the keeper of the printing press, on the 3rd of November 1914. The Governor-General in Council in so acting was exercising a power conferred under the Delhi Laws Act of 1912, so that for the purposes of this application we must treat the order as though made by a Local Government under the Indian Press Act. The complaint of the petitioner is that 'he as a recipient' of a copy of *The Comrade* in exchange for his newspaper *Al Hilal* became the owner of that

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newspaper. I suppose he means of a *copy* of the newspaper and that he held possession thereof. He appears to consider that the order of forfeiture affects him in Bengal. But whether it does or does not—a point on which I express no opinion—it was made by the local authority I have described, and not by the Government of Bengal. There has been no order made by the Government of Bengal and no action by it or by any of its officers of which the petitioner can complain. According to the scheme of the Indian Press Act and its several provisions, it is abundantly clear that we have no jurisdiction in this case. Moreover, our rules only provide for a notice being served on the Government of Bengal. We are, however, asked to interfere with an order made by an authority exercising at Delhi the powers of a Local Government, without having that authority before us, and without having any means of compelling its attendance.

It is not as though the petitioner has no remedy. There is a High Court to which he could have gone, and, therefore, it cannot be said that justice is denied him by our holding, as we do, that we have no jurisdiction to interfere in this case.

The application is, therefore, dismissed.

WOODROFFE, J.—I agree.

HOLMWOOD, J.—I agree.

Application refused.

PUNJAB CHIEF COURT.

CRIMINAL REVISION PETITION No. 365 of 1915.

June 18, 1915.

Present:—Sir Donald Johnstone, Kt., Chief Judge.

MOHABLI *alias* MUBBA AND ANOTHER—

CONVICTS—PETITIONERS

versus

EMPEROR—COMPLAINANT—RESPONDENT.

Conviction—First report—Story told in Court—Striking discrepancies, effect of.

Where there are striking discrepancies between the first report and the story told by prosecution witnesses in Court, a conviction cannot be maintained.

Petition, under section 439 of the Criminal Procedure Code, for revision of the order of the District Magistrate, Jhang, dated the 20th January 1915, affirming that of the

Magistrate, second Class, Chiniot, dated the 22nd December 1914, convicting the petitioners.

ORDER.—(*April 10th, 1915.*)—There are certainly striking discrepancies between the first report and the story told in Court, *e. g.*, the names in the report of the persons said to have been seen going along with the animals are not the three accused's names, and again the story in the first report of Alwal and another going security for the return of the missing buffaloes has been altered into a tale that two of the accused handed over two of their own buffaloes as security, Alwal and the other surety being dropped. These things throw some doubt on the prosecution.

Notice to District Magistrate and complainant: bail may be taken to satisfaction of District Magistrate.

Mr. *Tag-ud-Din*, for the Petitioners.

JUDGMENT.—The reasons given by me in my admitting order of 10th April for issuing notice and allowing bail prove on further examination fully justified. It seems to me impossible to maintain the convictions of the accused in the face of the extraordinary changes the case for the Crown has undergone since the first report was made. In that we find that, when the trackers met Alwal, he said he had seen Miava, Lala and Sardara going alone with the stolen buffaloes, while in Court he names Samandi, Mubba, and Sardara (the three accused). It is surprising that he should not have been questioned as to this and that the lower Courts should have overlooked this striking circumstance. Then in the first report the story of the measures for amicable recovery of the stolen animals differs widely and irreconcilably from the story told in Court. The former story is that Alwal and another stood security for its return, while in Court there is a tale of the surrender of two of accused's own buffaloes which I may note accused say were taken from them by force. No doubt the trackers went up to accused's house, but this is not conclusive, and the rest of the case against the accused must be wholly rejected. For these reasons I allow this petition and set aside convictions and sentences and acquit both petitioners.

Petition allowed.

In re RANGA GOWNDEN.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 867 OF 1914.

CRIMINAL REVISION PETITION No. 713
OF 1914.

April 22, 1915.

Present:—Mr. Justice Spencer.

In re RANGA GOWNDEN AND OTHERS—

ACCUSED NOS. 1 TO 10, 13 AND 14—

PETITIONERS.

Presumption—Possession—Rebutting of presumption—Compromise—Security for keeping the peace, order as to, cancellation of—Criminal Procedure Code (Act V of 1898), s. 106.

The presumption that possession is with that party who has sown crops on the land is rebutted when that party goes armed to attack the opposite party, in which case possession must be held to be with the party who was attacked.

Ram Khelawan Singh v. Emperor, 3 Ind. Cas. 96; 13 C.W.N. 827; 10 Cr. L. J. 245; 36 C. 827; *Silajit Mahoto v. Emperor*, 4 Ind. Cas. 19; 13 C. W. N. 801; 10 Cr. L. J. 471; 36 C. 865, distinguished.

Security to keep the peace taken from one of the parties should be cancelled when under a compromise between both parties one party is allowed to be in peaceable possession.

Petition, under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of the Sub-Divisional first Class Magistrate of Sankari Division, in Criminal Appeal No. 31 of 1914, preferred against that of the Court of the Stationary second Class Magistrate of Omalur, in Calendar Case No. 27 of 1914.

Mr. N. S. Rangasawmi Aiyangar, for the Petitioners.

Mr. P. R. Grant, for the Crown.

ORDER.—It is contended that because the lower Appellate Court observed in the judgment, "with regard to possession the balance of evidence appears to be in favour of the appellants," this was tantamount to a finding that the appellants were in possession at the date of the offence. I think the Deputy Magistrate was possibly referring only to the probability of the crop having been grown by the appellants.

It is unquestionable that when the appellants came in an armed body and attempted to prevent the respondents' party from cutting and carrying away the produce, actual possession must have been with the respondents' party. In this respect the facts differ from those to which the law as to the right of persons in possession to

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maintain their actual enjoyment undisturbed was applied in the decisions reported as *Ram Khelawan Singh v. Emperor* (1) and *Silajit Mahoto v. Emperor* (2). The view taken by the Sub-Magistrate in paragraph No. 10 of his judgment is sound and the convictions so far as they have been upheld in appeal were correct.

The order of the Appellate Court requiring the appellants to give security for keeping the peace appears to be now unnecessary, seeing that by agreement they have been since placed in enjoyment of the land. I direct it to be set aside. In other respects the petition is dismissed.

Order set aside; Petition dismissed.

(1) 3 Ind. Cas. 96; 36 C. 827; 13 C. W. N. 827; 10 Cr. L. J. 245.

(2) 4 Ind. Cas. 19; 36 C. 865; 13 C. W. N. 801; 10 Cr. L. J. 471.

PUNJAB CHIEF COURT.

CRIMINAL REVISION PETITION No. 513 OF 1915.

May 21, 1915.

Present:—Mr. Justice Rattigan.

Musammatt JATTO—ACCUSED—PETITIONER
versus

EMPEROR—PROSECUTOR—RESPONDENT.

Penal Code (Act XLV of 1860), s. 186—Process-server—Obstruction to attachment.

The persons seriously obstructing, insulting and jostling a process-server in the execution of his duty, are guilty of the offence under section 186, Indian Penal Code. [p. 749, col. 1.]

Case reported by the Sessions Judge, Gujranwala, with his No. 264, dated the 12th March 1915, under section 438 of the Criminal Procedure Code.

FACTS.—The accused on conviction by Pandit Pars Ram, exercising the powers of a Magistrate of the first Class in the Gujranwala District, were sentenced by order dated 22nd September 1914, under section 186 of the Indian Penal Code, to a fine of Rs. 20 each.

GROUND.—With the exception of Mohammad Bakhsh, the peon who complained of obstruction, no other witness speaks of any overt act on the part of the accused. *Queen-Empress v. Somnanna* (1) shows that merely to close the doors

(1) 15 M. 221; 1 Weir 133; 2 M. L. J. 120.

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of the house against the attaching officer is not voluntary obstruction within the meaning of section 186, Indian Penal Code, and I do not think mere abuse by Kanshi Ram would amount to this offence. Kanshi Ram was probably justified in objecting to the attachment of property which was not known to be the separate property of *Musammatt Jatto*, see *Prabh Dyal v. Emperor* (2). Resistance to public authority ought not to be encouraged, but I do not think the Magistrate's finding can be supported on the evidence. He seems to think that the fact that the peon came away unsuccessful is sufficient indication that he was improperly resisted. I forward the proceedings to the Chief Court with a recommendation that the conviction and sentence be set aside.

Lala Hukm Chand, for the Petitioners.

JUDGMENT.—I see no reason whatever for interference, as there is ample evidence to support the prosecution to the effect that the process-server was seriously obstructed, insulted and jostled in the execution of his duty and that Kanshi Ram and *Musammatt Jatto* took an active part in these proceedings.

I decline to take any action.

Revision dismissed.

(2)*49 P. R. 1905 Cr.; 164 P. L. R. 1905; 3 Cr. L. J. 75.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE NO. 298 OF 1915.

CRIMINAL REVISION PETITION NO. 244 OF 1915.

September 24, 1915.

Present:—Justice Sir William Ayling, Kt.

In re RAMA REDDI AND ANOTHER—ACCUSED
—PETITIONERS.

Penal Code (Act XLV of 1860), s. 339—*Elements necessary to find a person guilty under.*

To justify a conviction under section 339 of the Indian Penal Code a Court should find that the complainant had a right to proceed along the path and that he was obstructed by the accused from walking over it.

Petition, under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of the Sub-Divisional first Class Magistrate of Gopichettipalayam, in Criminal

Appeal No. 500 of 1914, preferred against that of the Court of the Taluq Magistrate of Bhavani, in Criminal Case No. 137 of 1914.

Mr. V. C. Seshachariar, for the Petitioner.

The Public Prosecutor, for the Government.

ORDER.—The judgment of the Appellate Court is defective. To justify the conviction it must be found (1) that prosecution witnesses Nos. 1 and 2 had a right to proceed along the path, (2) that they were obstructed from doing so, within the meaning of section 339 of the Indian Penal Code.

As regards the former the Magistrate merely calls it a *mamul* path—a very ambiguous phrase. As regards the obstruction he only refers to the path having been ploughed up. This would not in itself prevent people from walking over it. There is nothing to show whether he accepts the story of the use of physical force given by Prosecution Witness No. 1.

The order of the Sub-Divisional Magistrate is set aside and he is directed to restore the appeal to his file, re-hear it and dispose of it according to law.

Petition allowed; Order set aside.

MADRAS HIGH COURT.

CRIMINAL APPEAL NO. 383 OF 1915.

September 14, 1915.

Present:—Mr. Justice Sadasiva Aiyar and
Mr. Justice Phillips.

THE PUBLIC PROSECUTOR—

APPELLANT

versus

RAMARAZU VENKATAPPAYYA—

ACCUSED—RESPONDENT.

Penal Code (Act XLV of 1860), ss. 467, 471—*Evidence to prove charge of forgery insufficient—Knowledge that document is forged, whether sufficient to sustain conviction.*

Where a part of a document was altered and made with the intention of causing it to be believed that it was made at a time at which it was not really made and the accused used it knowing it to be forged:

Held, that an offence under section 471 of the Indian Penal Code was committed, although there was not sufficient evidence to prove a charge of forgery. [p. 750, col. 1.]

Appeal, under section 417 of the Code of Criminal Procedure, 1898, against the

MOHAMAD IBRAHIM SAHIB v. MUNICIPALITY OF ANAKAPALLI.

acquittal of the aforesaid accused by the Sessions Court of Guntur Division, in Sessions Case No. 7 of 1915.

The *Public Prosecutor*, for the Government.

JUDGMENT.

SADASIVA AIYAR, J.—Exhibit F even according to the defence is a forged document, as the defence was that the date "2nd October 1910" was dishonestly altered into 22nd October 1910 through the machinations of the prosecution 9th witness, in whose house the 1st accused alleges that he had left it for safe custody.

That Exhibit F was used by the 1st accused (respondent in this appeal) in the suit brought by him on it is clear. Unless the date "22nd October 1910" could be established for the pro-note, his suit brought on 22nd October 1913 would be barred.

It is impossible to believe his statement that he did not know of the alteration when he gave it to his Vakil (P. W. No. 2) to file a suit on the 21st October 1913. The learned Sessions Judge rightly disbelieved the defence story that prosecution 9th witness altered the date in collusion with prosecution 1st witness without the 1st accused's knowledge.

Though there may be no proof that Exhibit F was not executed by the deceased Pentareddi, part of the document (as it stands) was made with the intention of causing it to be believed that it was made "at a time at which" it was not really made and the 1st accused used it knowing it to be such a forged document. He is, therefore, clearly, guilty under section 471, Indian Penal Code, though there is not sufficient evidence to find him guilty under section 467 (the other count under which he was charged in the Sessions Court).

I would, therefore, allow the appeal and convict the 1st accused under section 471, Indian Penal Code.

As regards the sentence, there is nothing to show that the 1st accused is a confirmed criminal and his having become afraid to appear in Court and prosecute the suit brought on Exhibit F (which suit was dismissed for default) rather indicates the contrary.

I think that a sentence of two years' rigorous imprisonment might be held to be not inadequate in this case.

I would, therefore, sentence the 1st accused to two years' rigorous imprisonment, setting aside the acquittal.

PHILLIPS, J.—I agree, although I think the sentence is somewhat lenient considering that the serious offence of forgery is extremely frequent and rarely detected

Appeal allowed; Accused convicted.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 383 OF 1915.

CRIMINAL REVISION PETITION No. 304 OF 1915.

September 24, 1915.

Present:—Mr. Justice Ayling.

MOHAMAD IBRAHIM SAHIB—ACCUSED
—PETITIONER

versus

MUNICIPALITY OF ANAKAPALLI—

COMPLAINANT—RESPONDENT.

Madras District Municipalities Act (IV of 1884), ss. 103, 111, 147, 209, 218, 269—"Toll-gate kist," if tax—Non-payment of toll-gate kist—Prosecution, liability for.

A "toll-gate kist" is not an amount due on account of any tax within the meaning of section 103 of the District Municipalities Act, but it "is money due under a contract" dealt with in section 92, the non-payment of which is not penalized under section 269 of the District Municipalities Act. A prosecution for such non-payment will not, therefore, lie under section 111 of the Act. [p. 751, col. 1.]

Petition, under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Bench Court of Anakapalli, in Summary Trial No. 185 of 1915.

FACTS.—The petitioner was the toll gate contractor of Anakapalli Municipality for 1914-1915. He made default in payment of the contract amount to the extent of Rs. 300. The Municipality issued distress warrant and initiated criminal proceedings under sections 103 and 111 of the District Municipalities Act. The Bench Magistrates of Anakapalli convicted and sentenced him to pay a fine of Rs. 50 and directed him also to pay the contract amount. Hence this revision petition against the order of the Bench Magistrates.

In re SITHAYA NAIK.

Mr. B. Narasimha Rao, for the Petitioner, contended that the conviction was unsustainable, as it was not the amount due under any of the provisions of the District Municipalities Act.

The *Public Prosecutor*, argued *contra*.

ORDER.—The petitioner was a toll-gate contractor under the Anapalli Municipality. He has been prosecuted under section 103 and convicted under section 111 of the District Municipalities Act in consequence of his failure to pay what is called in the complaint “the toll-gate *kist*” for the second half of 1914-1915. This “toll-gate *kist*” is in fact the amount due to the Municipality from the petitioner, to whom the right of collection has been farmed out by the Municipal Council under section 92 of the Act.

The only question is whether it is an “amount due on account of any tax” within the meaning of section 103. On the face of it it is certainly not so, but the learned Public Prosecutor relies on section 269 which authorises the Municipal Council to collect certain sums due to them as if they were taxes. The suit amount does not, however, seem to fall under any of the headings dealt with in section 269. It cannot, in my opinion, be properly described as rent. It is a payment due under a contract. But the section only refers to contracts made under sections 147, 209 and, 218 not to contracts under section 92.

In my opinion the petitioner was not liable to prosecution for failure to pay amounts due by him under the toll-gate contract. I set aside the conviction and sentence and direct the fine, if paid, to be refunded.

Petition allowed; Conviction set aside.

MADRAS HIGH COURT.

CRIMINAL APPEAL NO. 415 OF 1915.

September 22, 1915.

Present:—Mr. Justice Spencer and
Mr. Justice Phillips.

In re SITHAYA NAIK.—PRISONER—

APPELLANT.

Penal Code (Act XLV of 1860), s. 471—Forged document mentioned in another document—Handwriting expert, evidence of—Comparison, when to be made in Court.

Where in order to support a false claim, a forged document is so mentioned in another document that it can be easily identified, it constitutes the offence of “using a forged document within the meaning of section 471 of the Indian Penal Code.”

To make the evidence of a handwriting expert admissible, it is not necessary that the handwriting should be actually compared in Court but it is enough if the documents admittedly in accused’s handwriting are shown to him in open Court and he expresses his opinion thereon.

Suresh Chandra Sanyal v. Emperor, 14 Ind. Cas. 753; 16 C. W. N. 812; 13 Cr. L. J. 289; 39 C. 606, referred to.

Appeal against the order of the Court of Session of the Madura Division, in Case No. 16 of the Calendar for 1915.

Mr. L. S. Veeraraghava Aiyar, for the Appellant.

Mr. M. H. Hakim, for the Government.

JUDGMENT.—Exhibit C has been clearly proved to be a forgery by the evidence to which the Sessions Judge has referred. This being so, there is no reason to assume that when the accused in Exhibit B spoke of the settlement of the claim under the decree and of satisfaction being recorded by the Court he was referring to anything else but Exhibit C. This use of Exhibit C to support a false claim did, in our opinion, constitute an offence under section 471, Indian Penal Code. It is urged that the Sessions Judge was not entitled to rely on the evidence of the handwriting expert, because the processes by which the handwritings were compared were not performed in open Court; but we do not consider that any such objection as was raised in *Suresh Chandra Sanyal v. Emperor* (1) can be supported when, as here, there are examples of the writer’s handwriting either proved or admitted to be genuine which can be used as standards of comparison and when the documents were shown to the expert in open Court and he pronounced his opinion thereon.

Another objection has been taken to the alteration of the charge. The charge as amended was based on evidence which was before the Committing Magistrate and the accused, therefore, could not reasonably plead that he was prejudiced by the correction of the date.

The appeal is dismissed and the conviction and sentence are confirmed.

Appeal dismissed.

(1) 14 Ind. Cas. 753; 16 C. W. N. 812; 13 Cr. L. J. 289; 39 C. 606.

EMPEROR V. GOVINDARAJULU.

MADRAS HIGH COURT.

CRIMINAL APPEAL No. 470 OF 1915.

September 29, 1915.

Present:—Justice Sir William Ayling, Kt.,
and Mr. Justice Phillips.

EMPEROR—APPELLANT

versus

GOVINDARAJULU—ACCUSED—

RESPONDENT.

Public place—"Place of public resort," meaning of—
Madras City Police Act (III of 1888), s. 75.

A legal right of access by the public is not necessary to constitute a public place. A public place is one where the public go, no matter whether they have a right to go or not.

Reg. v. Wellard, 14 Q. B. D. 63; 54 L. J. M. C. 14; 51 L. T. 604; 33 W. R. 156; 15 Cox. C. C. 559; 49 J. P. 296; *Kitson v. Ashe*, (1899) 1 Q. B. 425; 68 L. J. Q. B. 286; 80 L. T. 323; 63 J. P. 325; 19 Cox. C. C. 257; 15 T. L. R. 172, followed.

The harbour premises which respectable people and other people who have business are permitted to enter, are "places of public resort" within the meaning of section 75 of the Madras City Police Act.

Appeal, under section 417 of the Code of Criminal Procedure, 1898, against the acquittal of the aforesaid accused by the Third Presidency Magistrate, Georgetown, Madras, in Calendar Case No. 6575 of 1915 on his file.

FACTS.—The accused was charged by the Police for an offence under section 75 of the Madras City Police Act for disorderly behaviour. The Presidency Magistrate acquitted him, on the ground that the harbour is not "a place of public resort" within the meaning of section 75 of Act III of 1888. The Government appealed against the order of acquittal.

The Crown Prosecutor, for the Government:—The harbour is a place of public resort within the meaning of section 75 of the Madras City Police Act.

If the public are allowed to go and in fact go there, it is a place of public resort within the meaning of that section, no matter whether they have a legal right to go there or not.

JUDGMENT.—The accused in this case was prosecuted for disorderly behaviour in a place of public resort (to wit, the grounds of the Madras Harbour), an offence under section 75 of the Madras City Police Act. He has been acquitted on the ground that the harbour premises do not constitute a place of public resort.

In our opinion the Presidency Magistrate has taken too narrow a view of the law. It is true that the by-laws framed under

the Port Trust Act provide for prosecution as trespassers of persons who enter on the harbour premises without having business there or with the ships lying in the harbour: and from the Magistrate's judgment it appears that such people (as he says, mainly coolies, or up-country visitors) are actually prosecuted before him. But it is perfectly clear from the statement of objects and reasons for the amended by-laws printed in G. O. No. 341, Marine, dated 22nd October 1912, that By-law 22 which provides for the exclusion of the general public, was not intended to be enforced against respectable people. The trustees say:—

"We cannot pretend to keep respectable people entirely out of our premises during working hours, simply because it would be intolerable for them to be perpetually questioned. But at least we may say that they cannot claim admission, and this represents the position we take up better than the old words, *will not be admitted*."

We see no reason to doubt that the by-laws have been worked in principle on these lines; and that respectable members of the public have been freely allowed to enter the harbour premises, as well as the very large number of people who have business in the harbour premises or with the shipping.

In these circumstances the harbour premises must be considered a place of public resort. A legal right of access by the public is not necessary to constitute a public place. [Vide *Reg. v. Wellard* (1)]. In the words of Grove, J.,—"A public place is one where the public go, no matter whether they have a right to go or not." [See also *Kitson v. Ashe* (2)].

We set aside the order of acquittal, convict the accused of the offence charged and sentence him to simple imprisonment till the rising of the Court. As the accused has been already put to considerable inconvenience by this prosecution, we impose only a nominal sentence.

Appeal allowed; Accused convicted.

(1) 14 Q. B. D. 63 at p. 67; 54 L. J. M. C. 14; 51 L. T. 604; 33 W. R. 156; 15 Cox. C. C. 559; 49 J. P. 296.

(2) (1899) 1 Q. B. 425; 68 L. J. Q. B. 286; 80 L. T. 323; 63 J. P. 325; 19 Cox. C. C. 257; 15 T. L. R. 172.

CHINNAKARUPAN CHETTY v. MEYYAPPA CHETTY.

MAUNG PO SHIN v. MOHAMED THAMBI.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 592 OF 1914.

August 26, 1915.

Present:—Mr. Justice Seshagiri Aiyar.

A. L. M. S. S. CHINNAKARUPAN

CHETTY— PLAINTIFF— PETITIONER

versus

M. V. M. MEYYAPPA CHETTY—

DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 10, O. XLI, r. 32—Appeal in previously instituted suit pending—Subsequent suit, if to be stayed.

Where an appeal against a decree passed in a previously instituted suit is pending, the Court should under section 10 of the Code of Civil Procedure stay proceedings in the subsequently instituted suit, dealing with the same subject-matter, until that appeal is decided.

Kristnama Chariar v. Mangammal, 26 M. 91; *Pichuvayyangan v. Seshayyangan*, 18 M. 214; 5 M. L. J. 39, followed.

Petition, under section 115 of Act V of 1908, praying the High Court to revise the order of the Court of the Temporary Subordinate Judge, in Insolvency Appeal No. 463 of 1914, in Original Suit No. 34 of 1913.

Mr. A. N. Sitarama Sastri, for Mr. A. Krishnaswamy Aiyar, for the Appellant.

JUDGMENT.—It is to be regretted that the respondent is not represented before me, as the matter argued by the Vakil for the petitioner is one of some importance.

An application was made to the Subordinate Judge to stay proceedings in his Court as an appeal relating to the same subject-matter between the parties to the suit was pending in the Chief Court of Lower Burma at Rangoon. The Subordinate Judge considered that, as there was no evidence before him that an appeal had been filed before the suit in his Court was instituted, section 10 of the Civil Procedure Code had no application. I do not think that this view is correct. It was decided in *Pichuvayyangan v. Seshayyangan* (1) by a Full Bench of this Court that proceedings in appeal are only a continuation of the suit instituted in the first Court. That view was accepted in *Kristnama Chariar v. Mangammal* (2). Order XLI, rule 32, of the Code of Civil Procedure leads to the same conclusion: an Appellate Court in hearing the appeal is seized by the suit and has got powers either

to confirm, vary or reverse the decree which has been passed; the inference from the language of the rule is that the jurisdiction exercised by the Appellate Court is with reference to the further stage of the suit which was disposed of by the first Court. As undoubtedly the suit in the Myaungmya Court was instituted long before the plaint was filed in the Sivaganga Sub-Court, section 10 is applicable. I must reverse the order of the Subordinate Judge and direct him to re-take the petition on his file and to dispose of it according to law. Costs will abide the event.

Petition allowed; Order set aside.

LOWER BURMA CHIEF COURT.

CIVIL REVISION PETITION No. 42 OF 1915.

July 13, 1915.

Present:—Sir Charles Fox, Kt., Chief Judge.

MAUNG PO SHIN—PLAINTIFF—APPELLANT

versus

MOHAMED THAMBI AND ANOTHER—

DEFENDANTS—RESPONDENTS.

Landlord and tenant—Trespasser, remedy against—Lessor's rights devolving on another—Rule that tenant may not dispute his landlord's title, limitation of—Attornment by tenant, when necessary—Rent, suit for, whether amendable to suit for use and occupation—Provincial Small Causes Courts Act (IX of 1887), s. 23—Transfer of Property Act (IV of 1882), ss. 109, 111 (c).

A claim for use and occupation only arises where it is shown that the occupation was by permission or sufferance. No suit for use and occupation lies against a trespasser; the suit open to an owner against a trespasser is one for mesne profits. [p. 754, col. 2.]

The rule that a tenant may not dispute his landlord's title applies only to the title of the original landlord who let him into possession and not to that of an owner who has acquired the property by some title derived from the original lessor. [p. 755, col. 1.]

If a tenant disputes the title of the derivative owner who sues him for rent in a Small Causes Court in Lower Burma, due attention should be paid to the provisions of section 23 of the Provincial Small Cause Courts Act. [p. 755, cols. 1 & 2.]

Attornment by tenant is necessary only in certain cases. [p. 755, col. 2.]

There is no bar to a suit for rent being amended to a suit for damages for use and occupation. [p. 755, col. 2.]

Ramrick Dass v. Mohamed Yacubji Dudah, 2 L. B. R. 122, referred to.

Mr. Dhar, for the Appellant.

Mr. Agabeg, for the Respondent.

(1) 18 M. 214; 5 M. L. J. 39.

(2) 26 M. 91.

MAUNG PO SHIN v. MOHAMED THAMBI.

JUDGMENT.—The facts before the Court were as follows:—

The defendant occupied a room in a house which at one time belonged to A. Mohamed Eusoof. In a previous suit (No. 4324 of 1914) brought by the plaintiff against the first defendant for rent, one Andiappa Chetty produced a mortgage-deed by which this Eusoof purported to mortgage the house to M. V. E. V. E. Curpan Chetty, but as Andiappa Chetty said he was not in Rangoon at the time the mortgage was executed he did not prove that the mortgage had in fact been executed by Eusoof. Andiappa had the house sold by auctioneers under a power of sale contained in the mortgage. One Kadar Bacha bought the house thus sold. Subsequently Kadar Bacha sold the house to the plaintiff on the 24th April 1914. Several people were living in the house as tenants of Eusoof. The defendant was one of them. On the 27th April an Advocate on behalf of Eusoof sent the first defendant a letter requiring him to pay rent to him and to no other person. On the 1st June 1914 the plaintiffs through an Advocate gave notice to the tenants of their having purchased the house and requested them to pay rent for May. The letter also gave them notice to quit the house at the end of June, and warned them that if they did not comply with the demands against them, legal proceedings would be taken against them without further reference. On the 25th June another letter warned the tenants that if they did not quit the house before the 1st July they would be charged enhanced rents, and demand was also made for the rent of June at the rate at which they had been paying to Eusoof. On the 17th June the plaintiffs instituted Suit No. 4324 against the defendant for Rs. 9 as being due for the rent of the room he occupied in the house for the month of May 1914. This suit was dismissed, the learned Judge holding that a suit by the plaintiffs for the rent did not lie, because (1) they could not be regarded as having stepped into the shoes of the original lessor Eusoof, (2) the tenants have not attorned to them and their possession should not be treated as adverse to the new owners, (3) the lease was at an end when the interest of the lessor in the property terminated, (4) the suit

open to the plaintiffs was one for damages for use and occupation, and a suit for rent could not be allowed to be amended to one for damages for use and occupation.

On the 13th November 1914 the plaintiffs brought the suit (No. 8065) now being considered. They claimed Rs. 54 from the first defendant and his wife for use and occupation of the room they occupied in the house from the beginning of May to the beginning of November. The first defendant pleaded *inter alia* that he has been paying the rent of Rs. 9 a month all along to Eusoof, but he did not prove this. The amount claimed was decreed in favour of the plaintiffs. The first defendant seeks revision of the decree on the ground that it was contrary to law.

The two judgments contain much misconception of law applying to the rights of the plaintiffs as against the defendant if they in fact acquired the ownership of the house, and as to the nature of the suit for compensation for use and occupation. I will deal with this latter matter first. The learned Judge was no doubt right in holding that the case of *Ramrick Dass v. Mohamed Yacubji Dudah* (1) was distinguishable from the case before him. It was so, because the facts and the relations between the parties were entirely different. But the principle enunciated in the case, *viz.*, that a claim for use and occupation only arises where it is shown that the occupation was by permission or sufferance of the plaintiff, applied to the case, because according to the plaintiffs' case the tenancy of the defendant had terminated at the end of June, and from the 1st July he was a trespasser. No suit for use and occupation lies against a trespasser. The suit open to an owner against a trespasser who has occupied his land is one for mesne profits—*Vide* Wharton's Law Lexicon and the references in the Civil Procedure Code to such suits. The learned Judge appears to have thought that there were two sorts of suits for use and occupation, one founded on express or implied contract between the owner and the person who has used and occupies his property, and the other by the owner for damages for use and

(1) 2 L. B. R. 122.

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occupation against one who has wrongfully occupied his property. This is not so; in the 14th Chapter of Woodfall's Law of Landlord and Tenant the subject-matter of the particular form of suit is dealt with fully, and the form of plaint for such a suit given in Bullen and Leake's Precedents of Pleading; the note upon this form may usefully be referred to in order to ascertain the scope of such a suit.

In the present case the plaintiffs' suit for use and occupation did not lie in respect of anything being due for use and occupation between the 1st July and 1st November; because between those dates the defendant was a trespasser. It did not lie for the month of May, because the plaintiffs' proper suit in respect for that month was for rent. Assuming that the learned Judge adhered to his opinion that section 23 of the Provincial Small Cause Courts Act need not be acted on if the plaintiffs had proved their title in the first suit, the Judge's dismissal of that suit would have been wrong. He was in error in thinking that no one but the original lessor can sue a tenant for rent. Section 109 of the Transfer of Property Act was brought to his notice, and he was right in that the section did not apply to the case before him because it was not a case of a lessor having transferred the property leased. The section, however, does not contain the whole law as to the rights of an original lessor devolving on or being acquired by another. Such rights may be acquired by derivative title by any person who lawfully acquires or becomes entitled to the property leased. Some of the cases in which the rights of the original lessor devolve on others are dealt with in Chapter VII of Woodfall's Landlord and Tenant dealing with substitution of parties to the contract of tenancy. In view of the contention put forward by the defendant in the case, it may be noted that the rule that a tenant may not dispute his landlord's title, applies only to the title of the original landlord who let him into possession, and not to that of an owner who has acquired the property by some title derived from the original lessor, *Vide* Woodfall, pages 290 and 626.

If a tenant does dispute the title of a derivative owner who sues him for rent in a

Small Cause Court in this province due attention should be paid to the provisions of section 23 of the Provincial Small Cause Courts Act.

As these subjects were referred to in the first suit which is not being dealt with by me, I may remark that attornment by tenants is necessary in only the few cases referred to in Woodfall.

The learned Judge also misread section 111 (c) of the Transfer of Property Act, which did not in any way apply to the case before him.

Further, I may say that there is no bar to a suit for rent being amended to a suit for use and occupation.

For the reasons I have given I hold the decree impeached was wrong in law and I set it aside and dismiss the suit with costs.

The plaintiff must also pay the defendant's costs of this application—2 gold mohurs allowed as Advocate's fee.

Suit dismissed.

MADRAS HIGH COURT. FULL BENCH,

SECOND CIVIL APPEAL No. 2078 OF 1910.
August 12, 1915.

Present:—Sir John Wallis, Kt., Chief Justice,
Mr. Justice Sadasiva Aiyar
and Mr. Justice Srinivasa Aiyangar.
MACHIKANDI PARKUM MARA-
MITTATH THARUVIL MOOTHA
CHETTIAM VEETIL CHAKKARA
KANNAN—PLAINTIFF—APPELLANT

versus

VARAYALANKANDI KUNHI POKKER

AND OTHERS—DEFENDANTS—RESPONDENTS.

Marumakkathayam Law—Tavazhi—Gift to wife and children—Nature of property taken—Presumption that donees take with incidents of tarwad property—Rights of persons subsequently born—Rule of perpetuity.

Where properties are given by a person to his wife and children, or children alone, following the *Marumakkathayam* Law, the presumption is that the donees take the property with the incidents of *tarwad* property, including those mentioned; persons subsequently born into the *tavazhi* are entitled to be maintained, but not to claim partition, and an individual cannot alienate his share nor can it be attached and sold in execution of a personal decree against him. [p. 764, col. 2; p. 767, col. 2; p. 764, col. 1.]

Per Wallis, C. J.—Quære:—Whether a gift with the incidents of *tarwad* property could be made to

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the mother and some of her issue only, viz., those by a particular husband? [p. 764, col. 2.]

Per *Sadasiva Aiyar, J.*—The rule against perpetuities cannot be applied so as to defeat gifts made to all the persons who can naturally form a joint Hindu family, the gifted property to be held as joint family property, or to the whole of a group of persons following the natural law of *Marumakkathayam* forming a natural *tavazhi* group. [p. 764, col. 2.]

The result of a woman marrying another husband and begetting other children to the latter is that there will be two separate groups in the same *tavazhi*, holding separate *tavazhi* property, the senior male in each *tavazhi* group being the *karnavan* of that *tavazhi* group. [p. 765, col. 1.]

Per *Srinivasa Aiyangar, J.*—It is not the giving of properties by a person to his wife and children that constitutes them a *tarwad* or *tavazhi*, but that if properties are given to a wife and children following the *Marumakkathayam* Law, they as a *tavazhi* hold those properties with the incidents of *tarwad* property, and the right of management of the properties is vested in the senior male member of that *tavazhi*. [p. 767, col. 1.]

If the *tarwad* can purchase and hold properties with the incidents of *tarwad* property there is no reason why they should not take a gift and hold the properties with the incidents of *tarwad* property. The gift is made to the entity which is called the *tarwad* or *tavazhi* and the law governing the parties regulates the mode of succession and enjoyment. [p. 767, col. 2.]

Kurkacha Umma v. Kutti Mammi Hajee, 16 M. 201; 20 M. L. J. 226 (F. B.), affirmed and followed.

Thiruthipalli Raman Menon v. Variangattil Palisseri Raman Menon, 24 M. 73 at p. 76; 4 C. W. N. 10; 10 M. L. J. 245; 27 I. A. 231; *Sudarsanam Maistri v. Narasimulu Maistri*, 25 M. 149 at p. 155; 11 M. L. J. 353; *Koroth Amman Katti v. Perungottil Appu Nambiar*, 29 M. 322; *Pattatheruvath Pathumma v. Mannankunniyil Abdulla Haji*, 31 M. 22; 18 M. L. J. 16; 4 M. L. T. 82; *Mooriyat Putikayil Kuntinina v. Mooriyat Putikayil Kuntumbi*, 1 Ind. Cas. 195; 32 M. 315; *Katankandi Kona v. Thamburan Kandi Sivasankaran*, 4 Ind. Cas. 90; 20 M. L. J. 134; 6 M. L. T. 373; *Chakkantavida Chakkan Abdulla v. Thazhath Chekkootti*, 5 Ind. Cas. 9; 34 M. 245; 7 M. L. T. 180; 20 M. L. J. 368; (1900 M. W. N. 509; *Parvathi Kattilamma v. Ramachandra Ejaman*, 6 Ind. Cas. 1017; (910) M. W. N. 124; 7 M. L. T. 273; *Kunhi Raman v. Kunhi Parvathi*, 8 Ind. Cas. 367; (1910) M. W. N. 642; 9 M. L. T. 92; *Kallini Amma v. Govinda Menon*, 12 Ind. Cas. 492; 35 M. 648; 10 M. L. T. 399; (1911) 2 M. W. N. 487; 22 M. L. J. 23; *Ummanga v. Appadorai Patter*, 5 Ind. Cas. 671; 20 M. L. J. 268; (1911) M. W. N. 195; 34 M. 387; *Jogeswar Narain Deo v. Rama Chandra Dutt*, 23 C. 670; 23 I. A. 37; (P. C.); *Rai Bishen Chand v. Musamat Asmaida Koer*, 11 I. A. 164 at p. 179; 6 A. 560; *Meda Vengamma v. Mitia Chellamiah*, 15 Ind. Cas. 17; 36 M. 484; 12 M. L. T. 23; 23 M. L. J. 168; *Krishnan Nair v. Damodaran Nair*, 17 Ind. Cas. 769; 13 M. L. T. 166; 24 M. L. J. 240; 38 M. 48 (F. B.); *Govindan Nair v. Sankaran Nair*, 2 Ind. Cas. 183; 6 M. L. T. 106 (F. B.); 19 M. L. J. 350; 32 M. 351, referred to.

Bai Devuli v. Patel Bachardas, 26 B. 445; 5 Bom.

L. R. 102; *Kishori Dubain v. Mundra Dubain*, 10 Ind. Cas. 565; 8 A. L. J. 757; 33 A. 665, distinguished.

Second appeal against the decree of the Court of the Subordinate Judge of Tellicherry, North Malabar, in Appeal Suit No. 241 of 1909, preferred against that of the Court of the District Munsif of Payoli, in Original Suit No. 333 of 1908.

This second appeal coming on for hearing on 24th April 1913, the Court (Sankaran Nair and Tyabji, JJ.) made the following

ORDER OF REFERENCE.

SANKARAN NAIR, J.—The suit out of which this second appeal arises was brought by the plaintiff-appellant for partition and possession of the interest of the 1st defendant, which he had purchased in execution of a money-decree obtained by him. The 2nd and 3rd defendants are respectively the brother and niece of the first defendant, and they contend that the first defendant had no such interest in the property as could be attached and sold. Their case is that the property is held by them with the incidents of *tarwad* property. Both the lower Courts have dismissed the plaintiff's suit.

One Pakran made a gift of certain properties to his two sons, the 1st and 2nd defendants, and a daughter, Pathumma whose daughter is the 3rd defendant. The question for decision is whether they took the property as joint tenants or tenants-in-common or whether they took it only as members of the *tarwad*, none of them having any interest liable to be attached and sold. The material portion of the instrument of gift runs thus: "I have settled by this that the properties..... .. and all dealings in my name and all moveables are to be enjoyed by me till my death according to my pleasure, and after my death they are to belong to my children, Ammadkutti (2nd defendant), Kunhi Pokker (1st defendant) and Pathumma (the mother of the 3rd defendant), and that no one else has any right to my properties. Properties and dealings which I may acquire in future also are for the said children. After my death the above-mentioned persons, who are my children, are to collect all outstandings due to me and arrears of rent and the

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assessment which was in my name has to be transferred in the names of my children and *patta* obtained, and they are to hold the same in the same way I was holding them, paying the *porappad* due to the *jenmies* and getting renewals in their names." Now there can be scarcely any doubt that, if we look to the terms of the instrument alone, the three donees therein named took an absolute interest and so far as their right of alienation is concerned it makes no difference whether they are tenants-in-common or joint tenants as in either case any of them could alienate his interest in the property. But it is contended, and the contention has a good deal of force in it, that the decisions have laid down the principle that the donees in such cases must hold the property with the incidents of *tarwad* property and that, therefore, Kunhi Pokker, the 1st defendant and one of the donees and the judgment-debtor, had no saleable interest in it.

The case that is mainly relied upon is that of a Full Bench in *Kunhacha Umma v. Kutti Mammi Hajee* (1). There were a series of decisions before that on the question of the liability of the interest of one of the donees to be attached and sold—some of them, following the case *Narayanan v. Kannan* (2), which was a decision to the contrary and others not apparently following it. Many of them will be found reported in the foot-notes to the Full Bench judgment in *Kunhacha Umma v. Kutti Mammi Hajee* (1). *Kunhacha Umma v. Kutti Mammi Hajee* (1) was a case in which the properties were given after a person's death by his legal representatives to his widow and her children in accordance with his orally expressed wish, and the question was whether the interest of one of the children could be attached and sold. Mr. Justice Best was of opinion that they held the property as joint tenants under English Law, as there were all the four unities of a joint tenancy, that is (1), of possession, (2) of interest, (3) of title and (4) of the commencement of such title, and, therefore, the interest of the judgment-debtor who had died could not be attached and sold. This

view cannot be accepted. See the Privy Council decision in *Jageswar Narain. Deo v. Ram Ohandra Dutt* (3). Mr. Justice Subramania Aiyar contented himself with saying that there was a conflict of decisions and the question was, therefore, one that should be decided by a Full Bench. The Full Bench delivered the following judgment: "In the case before us the donor expressed no intention as to how the properties should be held by the donees, and in the absence of such expression, the presumption is that he intended that they should take them as properties acquired by their branch or as the exclusive properties of their own branch, with the usual incidents of *tarwad* property in accordance with *Marumakkathayam* usage which governed the donees. This view is in accordance with the principle laid down by the Privy Council in *Sreemutty Soorjeemoney Dossee v. Denobundoo Mullick* (4) and *Mahomed Shumsool Hooda v. Shewakram* (5)" and they expressed the opinion that the decision above referred to, *Narayanan v. Kannan* (2), is in conflict with the rule of construction indicated by the Privy Council. Now, it will be observed that in the Full Bench case the judgment-debtor had died, and the question whether he left any interest liable to be sold is very different from the question which arises here. Again, there was no instrument of gift and the intention was imputed to the donor only in the absence of any expression of his intention while in the case before us there is an expression of the donor's intention. The Privy Council judgments have application only to gifts to a Hindu woman who generally takes only a life-interest. It is the other way in the case of a Malayala woman, the theory of the *Marumakkathayam* law being that the property is vested only in the females, the males having only the right of maintenance. For these reasons I should have held without hesitation that the present case is not governed by the Full Bench decision but for the reason that the later decisions of this Court have apparently included within its scope cases of this kind. It

(3) 23 C. 670; 23 I. A. 37.

(4) 6 M. L. A. 526; 4 W. R. 114 (P. C.); 1 Ind. Jur. (N. S.) 37; 1 Boulr. Rep. 223; 1 Satr. P. C. J. 291; 1 Sar. P. C. J. 583; 19 E. R. 198.

(5) 2 I. A. 7; 22 W. R. 409; 14 B. L. R. 226

(1) 16 M. 201; 2 M. L. J. 226.

(2) 7 M. 315; 8 Ind. Jur. 243.

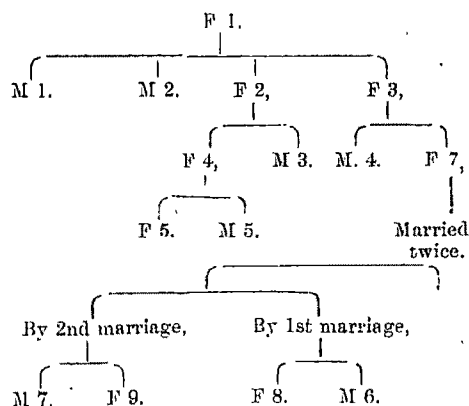
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becomes necessary, therefore, to consider the question more fully.

If it is to be held that the three donees in the case before us held the property with the incidents of *tarwad* property and that any one of them could not convey his interest, then it would be directly contradicting the terms of the instrument Exhibit I, because Exhibit I distinctly recites that the donees were to hold the property 'in the same way I was holding them,' or, in other words, those three persons could alienate it even if such alienation may not be in the interests of the branch to which they belong, which would include the 3rd defendant, a daughter of Pathumma. The Will states that no one else besides the three donees named has any right to the properties, whereas, if they belonged to the branch, the descendants of Pathumma born before or after the death of the testator would be entitled to them in their own right and not as representatives of any donee, so that, if we were to decide the case on the construction of the instrument of gift alone, I should have little hesitation in holding that I must give effect to the terms of the instrument and should not import any artificial intention into the case. But the decisions that I have referred to have no doubt held that in such cases the properties must be deemed to be held with the incidents of *tarwad* property.

The rule of decision is that indicated by their Lordships of the Privy Council in *Jogeswar Narain Deo v. Ram Chandra Dutt* (3), in which they expressed their dissent from a decision of the Madras High Court reported as *Vydinada v. Nagammal* (6), to the effect that, where a Hindu testator devised certain properties to his nephew and his wife, they took them as joint tenants and the nephew could not sever the joint tenancy by an alienation by him alone to a creditor. The Judicial Committee pointed out, 'the principle of joint tenancy appears to be unknown to Hindu Law except in the case of coparcenary between members of an undivided family,' and in the second place, even if it is a joint tenancy under English Law, that joint tenancy could be severed by a conveyance or an equivalent of conveyance. According to this, therefore, it is where a co-

parcenary might exist according to the rules of the *Marumakkathayam* Law that the property given to certain members of a *Marumakkathayam* family may be deemed to be held by them as co-parceners. Under that law it is only *tarwad* property or the property of a branch who hold certain properties as their branch property in the same way as a *tarwad* with their own *karnavan*, etc., that is really held in co-parcenary right. As in my view the right decision of the question mainly depends upon an appreciation of what properties are held as co-parcenary property, I will explain it in some detail.



M1, the senior male member would be the *karnavan* of the entire *tarwad* and in management of all its properties. He is the guardian of the infants or children born to any of the female members: he is bound to look after them, maintain them in the *tarwad* house and give them the education customary among such *tarwads*. Any female and her children form a *tavazhi* or branch. *Tavazhi* literally means *tayar*, mother, and *vazhi*, line, that is mother's line. Very often a woman and her descendants live apart from the *tarwad* house in a house of their own with properties belonging exclusively to their branch, the senior member amongst them having all the rights and obligations of the *karnavan* of an ordinary *tarwad*. Such a branch or *tavazhi* is constituted or created by gifts from the father of the woman or by gifts from a favourite brother or maternal uncle, or, it may be, by the self-acquisition of any member of that branch which he would often reserve for the sole benefit of the members of his branch. The *karnavan* of the main *tarwad* does not

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exercise his rights over the members of this branch or interfere in the management of the exclusive properties of that branch. In all such cases what the interests of that branch are in the main *tarwad* and its properties has often been discussed. If they wish to preserve their rights, which carry with them their obligations in the main *tarwad*, then the senior member of that branch when he becomes the senior of the main *tarwad* also assumes the headship or *karnavanship* of the main *tarwad*. Failure to assume the *karnavanship* of the main *tarwad* when by seniority in age it comes to a member of this *tavazhi* or branch, is usually taken as an indication that it has become a distinct branch without any co-parcenary interests in the main *tarwad*. Whether the branch members retain their interests in the main *tarwad* or not, so long as they have a *karnavan* exercising over them the ordinary *karnavan's* rights, they form a branch *tarwad*. I take no exception to the Full Bench judgment in *Kunhacha Umma v. Kutti Mammi Hajee* (1) if it goes only to that extent; it was on that footing that the case was argued by me before the Division Bench; the reference to a Full Bench was rendered necessary by a decision which was supposed to throw doubt even on that doctrine.

But let us take a case where a female and her children remain in the *tarwad* house under the control of their *karnavan* and certain properties are given to them by their father. Now they are four possible views. (1) One view is that they constitute a *tarwad* by themselves with reference to that property. (2) Another view is that those members hold the property in the same way, for instance, as the members of a *Mitakshara* family do in Bengal, substituting females for males, that is they may be entitled to partition but before partition their interests are not liable to be attached and sold. (3) A third possible view is, that they hold in the same way as the properties held by a *Mitakshara* family according to the Madras decisions, that is, they are entitled to partition but their interest also is liable to be attached and sold during their life-time but not after that. (4) Another view is that it may be attached and sold even after death.

I have already stated that, if the Indian Law Reports 16 Madras case is to be

understood as applying to the members of a *tarwad* who live apart from the main *tarwad* house holding their own property and having their own *karnavan*, I accept that decision. Mr. Justice Moore and I have also followed that decision, nor do I see any reason to question it in so far as it holds that the interest of a member cannot be attached and sold after his death.

But, it is said that, according to that decision, even if the members do not form a separate *tavazhi* holding separate property, they hold the properties gifted to them (we will say), by the husband of the woman, with all the incidents of a *tarwad*, etc. Now, what is the position of that group of members? Take it in the table above given, the husband of F7 gives certain property to her and to her children F8 and M6. It cannot be contended for a moment that they are constituted into a separate *tarwad* or a separate *tavazhi*, with the *tarwad* incidents, by themselves, for M1, the *karnavan* of the entire *tarwad*, does not lose his rights over the children F8 and M6 if minors, and even F7 if she is a minor, or any children that may be hereafter born to F7 and F8. Nor do they lose their corresponding rights in the *tarwad* house and its property. For the same reason the senior male in that group cannot displace the old *karnavan* and succeed to his rights over the other members. This view, which Mr. Justice Moore and myself put forward in *Koroth Amman Kutti v. Perungottil Appu Nambiar* (7), has been accepted in the subsequent cases which have reference to that doctrine. Now, if they do not constitute by themselves a separate *tarwad* or *tavazhi*, is there any reason why to the donor must be imputed an intention that they should hold the property with the incidents of *tarwad* property? This would lead to startling results. Supposing F7 marries again after the divorce by or of the first husband or after his death. Then the children that might be born to her by the second husband M7 and F9, would also form the members of the *tavazhi* to which their mother and her children by her first husband belong, because the mother is the root of the *tavazhi* and the father has no place in the system, and they

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(i. e., the children by the 2nd husband) would acquire an interest in the property given by her first husband. It is obvious that we cannot impute to the first husband an intention that the children born to his wife by another person should benefit in the gift which he made for her and her children's use. Once it is recognised that a woman and her children by one husband are incapable of forming a *tavazhi* or joint family by themselves only, to the exclusion of the children that may be born or have been born to her by another husband, it seems necessarily to follow that they do not take as a *tavazhi* or as co-parceners according to the Privy Council decision in *Jogeswar Narain Deo v. Ram Chandra Dutt* (3) already referred to. Even in cases of inheritance it has been held by a Full Bench of this Court that the co-parcenary principle does not generally apply: *Karuppai Nachiar v. Sankaranarayanan Chetty* (8); *a fortiori*, therefore, in cases of gifts which stand in this respect on the same footing as Wills. This is in accordance with the Privy Council decision in *Jogeswar Narain Deo v. Ram Chandra Dutt* (3), that in the absence of anything to the contrary the donees take as tenants-in-common. Again, the husband may himself be a follower of the Muhammadan Law or of the Hindu Law called in Malabar the *Makkathayam* Law of inheritance, and in Indian Law Reports 16 Madras itself the donor was probably a follower of Muhammadan Law. The Chief Justice and Mr. Justice Wallis in *Pattatheruvath Pathumma v. Mannamkunniiyil Abdulla Haji* (9) assumed it to be so and applied it to a case where the father followed the Muhammadan Law of inheritance. Now what reason is there to impute to him an intention that his children should be governed by the incidents of the *Marumakkathayam* Law? If the intention is to be presumed from the general inclination of a person towards a particular system of inheritance, then it is almost impossible to presume such intention in the case of a Muhammadan donor, and the reason that I suggest next would show that such a presumption ought not to be made even in any other case.

How does it stand on principle? Ordinarily

a *karnavan's* rights are commensurate with his obligations. He has the custody of the entire property in which all the members of the *tarwad* are interested, to hold it for the benefit of them all, to maintain them in the family house and to educate them. Now, if the properties gifted by a father are to be held with the incidents of *tarwad* property and the senior male member amongst them is to hold it without any right of the other members for partition, what is the result? They are not maintained out of it, because living in the *tarwad* house they get their maintenance from the *karnavan* of the entire *tarwad* and the senior male of their branch has no control in the *tarwad* house. They are not educated by the senior male of their branch, because the obligation to educate them is on the *karnavan* of the *tarwad*. The guardianship of the infants is also in the *karnavan* of the entire *tarwad*. I cannot imagine that a person should be in the possession of the property of others in which they are all jointly interested without any obligations towards those others—the only obligation in this case which would be recognised, if this contention is upheld, being that he has to hold it during his life-time as *karnavan* to be handed over after his death to the next man to be held in the same way, no other member getting any benefit out of it. I can hardly conceive that any donor would intend that his property should be enjoyed only by the senior male amongst his descendants to the exclusion of others. That senior male might be—and it has often turned out to be—the son of one of the daughters; and his own sons, who might be junior in age to his grandson by one of the daughters, get no benefit in any form whatever, or again, if the donor has only daughters, the property will be held by one of their sons to the exclusion of them all. I do not think that such a result as this is ever contemplated by the *Marumakkathayam* Law which, in theory, vests the property in females only. It follows from what I have said that we should not uphold the impartibility of such property nor the absolute right of the senior male member to manage the property to the practical exclusion of the others, as in an ordinary *tarwad* property. Such impartibility without any right of the other members to participate in the enjoyment of its income is undoubtedly

(8) 27 M. 300; 13 M. L. J. 398.

(9) 31 M. 228; 18 M. L. J. 16; 4 M. L. T. 82.

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against the general feeling of the people. If the decision in *Kunhacha Umma v. Kutti Mammi Hajee* (1) leads to this conclusion, then I am of opinion that it should be reconsidered. I think myself that it does not.

Let us see how far the Privy Council case that is relied upon is against this view. That was the case of a gift by Will to a daughter-in-law. Their Lordships of the Privy Council made the following observations: "In construing the Will of a Hindu it is not improper to take into consideration what are known to be the ordinary notions and wishes of Hindus with respect to the devolution of property. It may be assumed that a Hindu generally desires that an estate, especially an ancestral estate, shall be retained in his family; and it may be assumed that a Hindu knows that, as a general rule, at all events, women do not take absolute estates of inheritance which they are enabled to alienate" [*Mohamed Shamsool Hoda v. Shervukram* (5)]. As their Lordships point out, a Hindu desires that the estate should be retained in his family. In the case before us there is no such presumption if the donor follows the *Marumakkathayam* Law of inheritance, as he is giving the property to strangers to his *Marumakkathayam* family. If he is a follower of the Muhammadan or Hindu Law, the presumption would be exactly the other way, i.e., that the donees should not enjoy it as a *Marumakkathayam* family. Then, their Lordships say that the donor must be taken to have known that the donee, in that case, a woman, cannot, as a general rule, take an absolute inheritance. That presumption does not apply, as I have already pointed out, to Malabar. On the other hand, no presumption ought to be drawn that his sons other than the senior male are to get scarcely any benefit out of it. I do not think, therefore, the Privy Council decision compels us to impute any artificial intention to the donor, and in particular, when there is an instrument of gift, I am satisfied that we ought to go upon the words of the instrument. It does not, of course, follow from this that one of these donees may either sell his share or a creditor may attach and sell his interest in execution of a decree. If we follow the Madras decisions in reference to the *Mitakshara* family, he would be so entitled to do, but if we follow the Bengal decisions, which proceed perhaps upon the true theory of Hindu co-parcenary law, he will not be entitled

to do so. Where certain members of a Hindu family earn property, there is no presumption that they hold it as co-parcenary property.

Similarly it has been held that in the case of followers of *Marumakkathayam* Law also there is no such presumption. See *Govindan Nair v. Sankaran Nair* (10).

It is desirable on account of the apparent conflict of opinion that the matter should be settled by a Full Bench. I would, therefore, refer the following questions to a Full Bench:—

(1) When properties are given by a person to his wife and children or children alone following the *Marumakkathayam* Law, do the donees constitute by themselves a *tarwad* or *tavazhi*, and if they do so, is the right of management of the properties forming the subject of the gift vested in the senior male member thereof?

(2) If the first question is answered in the affirmative, whether in such cases the other members of the *tavazhi*, including those who become members of it by birth, are entitled to maintenance, etc., out of such properties, in the same manner as they were entitled before the gift to receive maintenance out of the properties belonging to the main *tarwad*; and whether they are entitled to partition of the said properties?

(3) Can any one member of the *tarwad* or *tavazhi* so constituted alienate his share, or can his interest be attached and sold by a decree-holder in execution of a decree against any one of them?

I have not dealt separately with the following decisions: *Katankundi Kona v. Thamburan Kandi Sivasankaran* (11); *Chakkantuvila Chakkan Abdulla v. Thazhath Chekkocetti* (12); *Mooriyat Putikayil Kuntimina v. Mooriyat Patikayil Kuntambi* (13); *Parvathi Kattilammuk v. Ramachandra Ejaman* (14), as they all may be supported on the ground that the donees in those cases formed a *tavazhi* living separately from the *tarwad* under their

(10) 2 Ind. Cas. 183; 32 M. 351; 6 M. L. T. 106 (F. B.); 19 M. L. J. 350.

(11) 4 Ind. Cas. 90; 20 M. L. J. 124; 6 M. L. T. 873.

(12) 5 Ind. Cas. 928; 34 M. 245; 7 M. L. T. 180; 20 M. L. J. 368; (19 0) M. W. N. 509.

(13) 1 Ind. Cas. 195; 32 M. 3 5.

(14) 6 Ind. Cas. 1017; (19 0) M. W. N. 124; 7 M. L. T. 273.

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own *karnavan* as practically a distinct *tarwad*. There is at any rate nothing in the judgments that they were not living as a *tarwad* by themselves under their own *karnavan*.

TYARJI, J.—I agree that the questions mentioned by my learned brother should be referred to a Full Bench.

The case of *Kunhacha Umma v. Kutti Mammi Hajee* (1), as I understand it, decided, so far as is at present material, that where the donees are governed by a law under which property must be, or usually is, held with the incidents of *tarwad* property, there a gift will be presumed, at least in the absence of circumstances showing a contrary intention, to be held by the donees, impressed with such incidents.

I had occasion recently to take part in a decision in which a point similar to that with which we have now to deal arose. (See Second Appeal No. 1415 of 1910.) In that appeal what I intended to take part in laying down was that, when the donor and the joint donees are all governed by the same system of law, *viz.*, the *Marumakkathayam*, a gift will presumably be governed, and the subject of the gift will, in the hands of the donees, continue to be affected, by the incidents of that law, provided, of course, that if that law permits of property being held in two or more different ways, then it will be a question to be determined under which of the various recognised modes of holding property the donees are to hold the subject of gift; the answer to such question necessarily depending on the construction that has to be placed on the terms of the gift. In Second Appeal No. 1415 of 1910 I understood that the learned Pleader who appeared for the appellant before us conceded, *first*, that the donor and the donees were alike governed by the *Marumakkathayam* Law, *secondly*, that under that law property had necessarily to be held with the incidents of *tarwad* property, *thirdly*, that, assuming that the law in question recognises the holding of property without the incidents of *tarwad* property, that mode of holding property was rather unusual, and there was nothing to indicate that the subject of gift in that particular case was intended to be held with incidents other than those of *tarwad* property.

However, my learned brother, to whose experience and knowledge of the subject I need not allude, in his judgment mentions considerations which would throw great doubt on the permissibility of postulating those propositions which form the basis of the judgment in Second Appeal No. 1415 of 1910. For I gather from the judgment of my learned brother that under *Marumakkathayam* Law itself not only is there no necessity for holding property with the incidents of *tarwad* property, but that property cannot be so held unless it is given to or acquired by a *tarwad* as such, or, in other words, unless, prior to the gift or acquisition, the donees or persons acquiring constitute a *tarwad* or a *tavazhi*. I see also the difficulty in holding that a new *tarwad* or *tavazhi* should come into being by the mere fact of a gift being made to several persons as joint donees; or that a gift can by itself constitute the donees into a *tarwad* or a *tavazhi*. Again, it is not very probable that there should be any intention on the part of the donor—especially when he is a Musalman—of so constituting the donees into a *tarwad* or *tavazhi*, even where the donees are related to each other by being the wife and the children of the donor: where the donees are members of different *tarwads* and bear no relationship to each other, the improbability of there being any such intention would be still greater; further, the question whether, even assuming that the donor intends so to constitute the donees into a new *tarwad* or *tavazhi*, the law empowers him to do so, requires careful consideration. The question may also arise, when the rights of the parties have to be determined with reference to a set of circumstances which do not seem to have been contemplated at the time when the well-recognised rules of custom arose, nor to have been specifically provided for by rules of custom which are known to prevail, whether in such matters effect ought to be given to "logical conclusions which may seem to an acute modern dialectician to follow" from the rules imposed by ancient customs [cf. *Baqar Ali Khan v. Anjuman Ara Begam* (15)]. It may be that in such (15) 25 A. 236; 7 C. W. N. 465; 5 Bom. L. R. 410; 30 I. A. 94 (P. C.).

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matters effect ought to be given rather to the ordinary notions and wishes of the parties, even though such notions and wishes may not in strict logic be in conformity with the prevailing customs nor have taken a shape sufficiently definite to be considered as embodying an independent rule of customary law, but may only furnish indications of what justice, equity and good conscience would require.

On many of the matters involved in this reference (to some of which I have alluded above) I feel that there are not sufficient materials at present available which would enable me to express an opinion.

I, therefore, agree that the questions mentioned in my learned brother's judgment be referred to a Full Bench.

This second appeal coming on for hearing as per above order of reference, upon perusing the said order of reference, and upon hearing the arguments of Mr. T. R. Ramachandra Aiyar, for the Appellant, and of Mr. J. L. Rosario, for the 2nd and 3rd Respondents, and the 1st and 5th Respondents not appearing either in person or by Pleader, and the 4th Respondent having died and no legal representatives having been brought on record within the time allowed by law, and the questions having stood over for consideration the Court expressed on the 12th August 1915 the following

OPINION.

WALLIS, C. J.—It seems desirable at the outset to point out that the decision of the Full Bench in *Kunhacha Umma v. Kutti Mammi Hajee* (1) which is questioned in the reference merely decides that among the followers of the *Marumakkathayam* Law, when a gift is made by the father to the mother and her children, there is a presumption that they are intended to take such properties as the exclusive properties of the branch or *tavazhi* consisting of the mother and her children, that is to say, with the usual incidents of *tarwad* property. In the absence of express provision, the presumption is that the property is to be enjoyed by the mother and her issue in the way in which property is customarily

held and enjoyed among followers of the *Marumakkatha am* Law. The decision proceeded on the authority of two decisions of their Lordships of the Judicial Committee, which laid down that the law governing the parties is one of the circumstances to be taken into consideration in ascertaining the intention of the donor. As pointed out in the judgment of one of the Judges who made the reference to the Full Bench, the presumption was arrived at in consideration of what were known to be the notions and wishes of persons in the position of the donor and also of the ordinary incidents of property in the district. This view was accepted by the Full Bench of four Judges two of whom, Muthusawmy Aiyar and Wilkinson, J.J., were well acquainted with Malabar, and that it was well founded is suggested by the fact that the decision has not only been accepted, but has been given a considerable extension in the neighbouring State of Travancore, as pointed out during the argument by my learned brother speaking from his experience as Chief Justice of that State. It has also been followed, as I shall show, in numerous cases in this Court, and was not questioned before *Ummanga v. Appadorai Patter* (16), a decision of Sir Arnold White, C. J., and Sankaran Nair, J., in 1910 and it may be taken that many transactions have proceeded on the footing that it was correct. In these circumstances, notwithstanding the respect which I feel for the opinion of Sankaran Nair, J., especially in a matter affecting his own community, I think we should be very slow to differ from the decision of the Full Bench unless we are absolutely obliged to do so, more especially as that decision merely relates to a presumption which it is always in the power of a donor to negative, if so minded, by express provision. If any change is to be made it should, it seems to me, be made by the Legislature.

As regards the authorities, the decision in *Kunhacha Umma v. Kutti Mammi Hajee* (1) was not only not questioned

(16) 5 Ind. Cas 671; 34 M. 387; 20 M. L. J. 268; (1910) M. W. N. 195.

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but, as pointed out in subsequent cases, was accepted in *Koroth Anuman Kutti v. Perungottil Appu Nambiar* (7), to which Sankaran Nair, J., was a party. It was followed in *Pattatheruvath Pathamma v. Mannamkunnayil A. I. H. Haji* (9), *Maoriyat Puttikayil Kuntimina v. Mooriyat Patikayil Kuntambi* (13), *Katankandi Kona v. Thamburan Kandi Sivasankaran* (14), *Chakkantavida Chakkan Abdulla v. Thazath Chekkootti* (12) and *Parvathi Kattilammah v. Ramachandra Ejaman* (14). Lastly in *Kalliani Amma v. Govinda Menon* (17), which was subsequent to *Ummanga v. Appadorai Patter* (16), it was again accepted and acted on by Abdur Rahim and Sundara Aiyar, JJ., in a careful judgment in which all the authorities were examined. In this state of things it seems to me that it is not now open to us to question the decision of the Full Bench, even if we saw reasons to doubt that it had been correctly decided. With reference to the observations of their Lordships of the Judicial Committee in *Jogeswar Narain Deo v. Ramachandra Dutt* (3), which are referred to by Sankaran Nair, J., that the principle of joint tenancy appears to be unknown to the Hindu Law except in the case of a co-parcenary between members of an undivided family, it may be observed that these observations of their Lordships were made with reference to ordinary Hindu Law and not to the peculiar *Marumakkathayam* system, which was not under their Lordships' consideration. But even taking them to be applicable, I cannot see how a gift to a female and all her descendants in the female line can be held to infringe the principle, for that is the kind of joint family known to the *Marumakkathayam* system. On the other hand, the propriety of such a gift would appear to be recognised by their Lordships in *Rai Bishen Chand v. Musammal Asmaida Koer* (18) in the passage cited by Benson and Sundara Aiyar, JJ., in *Meda Vengamma v. Mitta Chellumiah* (19). The question whether a gift with the incidents of *tarwad*

property could be made to the mother and some of her issue only, *viz.*, those by a particular husband, does not arise in this particular case, as the gift is to the children of the donor by a deceased wife and it is not suggested that she left any other children. It is, therefore, unnecessary to express any opinion on this point, or to refer to the authorities which are collected in the judgment of Benson and Sundara Aiyar, JJ., just mentioned.

Following the decision of the Full Bench in *Kunhacha Umma v. Kutti Mammi Hajee* (1) and the course of subsequent decisions I would answer the question in the reference as follows: (1) The presumption is that the donees take the property, with the incidents of *tarwad* property including those mentioned. (2) Persons subsequently born into the *tavazhi* are entitled to be maintained, but not to claim partition. (3) An individual cannot alienate his share, nor can it be attached and sold in execution of a personal decree against any of the members.

SADASIVA AIYAR, J.—I am prepared to follow the decision in *Kunhacha Umma v. Kutti Mammi Hajee* (1), which is in conformity (so far as I find) with the views universally held by the communities following the ordinary *Marumakkathayam* Law, and with the intentions of a father (who might even belong to a *Marumakkathayam* community) who consorts with a lady belonging to a *Marumakkathayam* community and who makes or arranges a gift to his children born of his said *Marumakkathayam* wife.

The objection, based on the rule of perpetuity, to the validity of such gifts has been considered elaborately by Sundara Aiyar, J., in *Meda Vengamma v. Mitta Chellumiah* (19), and I respectfully agree with his opinion that that rule cannot be applied so as to defeat gifts made to all the persons who can naturally form a joint Hindu family, the gifted property to be held as joint family property, or to the whole of a group of persons following the natural law of *Marumakkathayam* forming a natural *tavazhi* group.

The objection based on the woman (whose husband makes a gift to his children by her)

(17) 12 Ind. Cas. 492; 35 M. 648; 10 M. L. T. 399; (1911) 2 M. W. N. 487; 22 M. L. J. 23.

(18) 11 I. A. 164 at p. 179; 6 A. 560.

(19) 15 Ind. Cas. 17; 36 M. 484; 12 M. L. T. 293; 23 M. L. J. 168.

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marrying another husband and begetting other children to the latter and on these children also belonging to her *tavazhi* along with her children by the 1st husband is not, in my opinion, insuperable. The result of that state of facts will only be that there will be two separate groups in the same *tavazhi* holding separate *tavazhi* property, the senior male in each *tavazhi* group being the *karnavan* of that *tavazhi* group. For instance, take the case of a woman and her children who form a *tavazhi* within a *tarwad*. Two of her daughters might form two different groups in the same *tavazhi* and their respective husbands might give properties to their respective children. Then, all these children would belong to the *tarwad* of their great-grandmother, would again belong to their grandmother's *tavazhi* and would also belong to the groups or sub-*tavazhis* of their respective mothers and hold those respective group properties separately. Just as there can be *tavazhis* within a *tarwad*, there can be group-*tavazhis* and sub-*tavazhis* in the same *tavazhi*. If two groups or sub-*tavazhis* springing from two daughters who from a *tavazhi* can have separate sub-*tavazhi* properties, there is nothing startling in two branch *tavazhis* springing from the same lady (through her marrying two successive husbands) and holding separately their respective branch *tavazhi* properties. A *tavazhi* consists, no doubt, of the descendants of a single woman (I do not think that it includes the woman herself etymologically) but there is nothing to prevent the existence in that same *tavazhi* of two groups each of which might form a separate unit for the purpose of holding particular properties as if it was a separate *tarwad* and with the incidents of *tarwad* property. It cannot be said to be an unnatural separation between the two groups, unnatural in the sense of repugnance to the habits, practices and sentiments of the community. I agree to the answers proposed by my Lord.

SRINIVSA AIYANGAR, J.—In India it is not uncommon for groups of persons, though not incorporated, to hold properties as if they were corporate entities. Castes and sub-castes hold property as such, so also village communities. But the more common and familiar instances of such groups in South-east India are the joint Hindu family govern-

ed by the *Mitakshara* Law, the Nambudri Illom governed by the *Makkathayam* Law, the Nayar *tarwad* governed by the *Marumakkathayam* Law, and the Aliyasantan family of South Canara. The Moplas of North Malabar generally follow the *Marumakkathayam* system and the parties to this suit are governed by that law. The incidents of such group holding are now well settled. In the case of Malabar *tarwads* such incidents include the impartibility of the property, the right by birth of persons born in the *tarwad*, and the management of the properties by the senior male member of the *tarwad*, who is styled the *karnavan*.

The constitution of a *Marumakkathayam tarwad* is well known and is concisely stated in the extract from the report of the Malabar Marriage Commission printed at page 16 in I. L. R. 24 Madras [*Thiruthipalli Raman Menon v. Variangattil Palisseri Raman Menon* (20)]. The constitution of a joint Hindu family governed by the *Mitakshara* Law furnishes a very close parallel [see the description of such a family by Bashyam Iyengar, J., in *Sudarsanam Maistri v. Narasinhulu Maistri* (21)]. These groups cannot, of course, be created by agreement of parties. The *tavazhis* or the subordinate groups constituting the *tarwad* are, I think, capable of holding properties as corporate units with the incidents of *tarwad* property, at the same time retaining their joint interest in the properties of the main *tarwad*, just as branches and sub-branches in a *Mitakshara* joint Hindu family are capable of holding properties with the incidents of joint Hindu family property. I am also of opinion that some only of the members of a *tavazhi* cannot form a corporate unit capable of holding property as such. The husbands of the female members and the children of the male members of a *tarwad* are not members of the *tarwad*. It is not uncommon for them to make gifts of properties to their wives, daughters or sisters and their children, and such properties are called *Puthravakasam* properties. The question is whether, in the absence of express words in the grant, the *tavazhi* holds them as a corporate unit with the incidents of impartibility and right by birth,

(20) 24 M. 73 at p. 76; 4 C. W. N. 510; 10 M. L. J. 246; 27 I. A. 281.

(21) 25 M. 149 at p. 156; 11 M. L. J. 353.

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or whether the members of the *tavazhi* hold the property as co-owners *i. e.*, as tenants-in-common. I think these are the only two alternative views possible, and the second and third views mentioned in the referring order of Sankaran Nair, J., may be left out of consideration [*Jogeshwar Narain Deo v. Ram Chandra Dutt* (3)]. This question was answered by a Full Bench of this Court in *Kunhacha Umma v. Kutti Mammi Hajee* (1), and the answer was that such properties were held with the incidents of *tarwad* property. The basis of the decision was that was the usual mode of holding property by persons governed by *Marumakkathayam* Law; and that the donors presumably intended to benefit not merely the existing members of the family, but also those who may thereafter be born in the family. This decision was followed in a large number of cases in this Court, *viz.*, *Koroth Anuman Kutti v. Perungottil Appu Nambiar* (7), *Pattatheruvath Pathumma v. Mannamkunniyil Abdulla Haji* (9), *Mooriyat Patikayil Kuntimina v. Mooriyat Patikayil Kuntambi* (13), *Katankandi Kona v. Thamburan Kandi Sirasankaran* (11), *Chakkantardia Chakkan Abdulla v. Thazhath Chekooti* (12), *Parvathi Kattilanmah v. Ramachandra Ejaman* (14), *Kunhi Raman v. Kunhi Parvathi* (22) and *Kalliani Amma v. Govinda Menon* (17).

For the first time, in *Ummanga v. Appadorai Patter* (16), a suggestion was made that if a *tavazhi* had not become a distinct *tarwad* by division or relinquishment of its joint interest in the properties of the main *tarwad*, the property held by that *tavazhi* will not have the incidents of *tarwad* property; and the Full Bench decision in *Kunhacha Umma v. Kutti Mammi Hajee* (1) was explained as deciding only that the interest of a member of such a *tavazhi* lapsed to the other members of the *tavazhi* if that interest has not been alienated during his life-time. With the greatest respect to the learned Judges I am unable to accept this explanation. It ignores the fact that in properties held with the incidents of *tarwad* property no individual member has an alienable interest. It is to be observed that Sankaran Nair, J., who

was one of the Judges who decided that case, at that time seems to have been of opinion that it is only in cases where a *tavazhi* becomes a distinct *tarwad* by ceasing to have any interest in the properties of the main *tarwad*, that it can hold properties with the incidents of *tarwad* property; but in the order of reference the learned Judge concedes that the rule would apply even in cases where the *tavazhi* retains its interest in the properties of the main *tarwad*, provided that the members of the *tavazhi* live separately from the other members of the *tarwad*. He thinks that the case of *Kunhacha Umma v. Kutti Mammi Hajee* (1) was a case of that sort. In any case, he thinks that decision should not be extended to *tavazhis* whose members do not live separately with a separate *karnavan* of their own. In the Full Bench case of *Kunhacha Umma v. Kutti Mammi Hajee* (1), so far as one can gather from the report, the *tavazhi* do not seem to have been living separately with a separate *karnavan* of their own. In many of the cases which followed the Full Bench decision, the members of the *tavazhi* do not appear to have lived separately with a separate *karnavan*. I am unable to see how the fact of separate living by the members of a *tavazhi* without a separation in interest can possibly affect the capacity of the *tavazhi* to hold property or the incidents of the property held by them as such *tavazhi*. In *Krishnan Nair v. Damodaran Nair* (23), a Full Bench of this Court decided that where a female member of a *tavazhi* dies, her separate property is inherited by her *tavazhi* as such, *i. e.*, as a corporate unit. Though in *Govindan Nair v. Sankaran Nair* (10), it was held by two Judges of this Court, a third Judge dissenting, that the separate property of a male member of a *tavazhi* on his death lapses to the *tarwad* and not to the *tavazhi*, the opinions collected in the referring order in that case show clearly the consciousness of the people that the *tavazhi* was a separate entity which ought to inherit the property of both the male and female members of that *tavazhi*. In a case where the *tavazhi* succeeds to the property of a deceased

(22) 8 Ind. Cas. 367; (1910) M. W. N. 642; 9 M. L. T. 92.

(23) 17 Ind. Cas. 769; 38 M. 48; 12 M. L. T. 166; 24 M. L. J. 240.

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member, that property will be managed, I assume, by the senior male member of that *tavazhi* and the members of that *tavazhi* will have the additional advantage of participating in the income of that property. I see no difficulty in the *tavazhi* holding the properties to which it succeeded with the incidents of *tarwad* property.

Two points are taken by Sankaran Nair, J, in the order of reference. One, that a *tavazhi* which has not separated itself in the sense mentioned above cannot cease to be under the control of the *karnavan* of the *tarwad* and cannot have a *karnavan* of its own; and the other, that a *tavazhi* may consist of children of different fathers. In *Koroth Kutti Amman Kutti v. Perungottil Appu Nambiar* (7) Moore and Sankaran Nair, JJ., had no difficulty in holding that Puthravakasam property held by a *tavazhi* was held with the incidents of *tarwad* property, though the mere gift of property to a *tavazhi* did not constitute them a distinct *tarwad*. In *Kalliani Amma v. Govinda Menon* (17), all the previous cases were considered by Abdur Rahim and Sundara Aiyar, JJ., and the relation of the senior male member of a *tavazhi* managing the properties of the *tavazhi* to the other members of the *tavazhi* was indicated. They say: "there can be no doubt that he cannot have all the rights of a *karnavan* over the junior members of his *tarwad*. He is not their guardian and has no right of supervision or control over them. He is not responsible for their protection, education or maintenance. His right is confined to the management of the special property owned by him and the other members of his branch." I do not think that a *tavazhi* is not a separate *tarwad* with a separate *karnavan* of its own is an impediment to their holding property with the incidents of *tarwad* property. As regards the second point there is, of course, the possibility of a woman to whom properties are given by one husband marrying another and having children by him. All the children of that woman would form members of her *tavazhi*. It is certainly difficult to presume an intention in the first husband to grant the property to his wife's children by another husband. Such cases are likely to occur very rarely. After all the rule

is one of construction and even if the decision in *Kunhacha Umma v. Futti Mammi Hajee* (1) is open to question (I think it is not), we ought not to depart from it after it has been followed for such a long time.

It is now necessary to notice another contention of Mr. Ramachandra Iyer which does not seem to have been put forward before the referring Judges. He contends that no gift or grant of property can be made to a *tarwad* so as to enable it to hold that property with the incidents of *tarwad* property; such a grant, he contends, amounts to a grant in favour of unborn persons and, therefore, contrary to the decision of the Privy Council in *Jatindra Mohan Tagore v. Ganendra Mohan Tagore* (24). I understand him to concede that a *tarwad* could purchase properties and hold them with the incidents of *tarwad* property. If they can do that, I do not see why they should not take a gift and hold the properties with the incidents of *tarwad* property. The fallacy underlying the argument is that the grant is a grant made in favour of unborn persons. The gift is made to the entity which is called the *tarwad* or *tavazhi* and the law governing the parties regulates the mode of succession and enjoyment. Mr. Ramachandra Iyer relied on a *dicta* of the Bombay High Court in *Bai Dewali v. Patel Bachardas* (25) and on a case, *Kishori Dubain v. Mundra Dubain* (26). There is nothing in the Allahabad case to support his contention, and the passage in *Bai Dewali v. Patel Bachardas* (25) is only an expression of doubt. On the other hand, the decision in *Meda Vergamma v. Mitta Chellamiah* (19) supports the contrary conclusion.

My answer to the first question is that it is not the giving of properties by a person to his wife and children that constitutes them a *tarwad* or *tavazhi*, but that if properties are given to a wife and children following the *Marumakkathayam* Law, they as a *tavazhi* hold those properties with the incidents of *tarwad* property, and the right of management of the properties is vested in the senior male member of that *tavazhi*.

(24) 9 B. L. R. 377 (P. C.); 18 W. R. 359; Sup. Vol. I. A. 47; 2 Suth P. C. J. 692; 3 Sar. P. C. J. 85.

(25) 26 B. 44; 4 Bom. L. R. 102.

(26) 10 Ind. Cas. 565; 33 A. L. J. 757.

THANGACHI AMMAL v. VAITHINATHA IYER. SANKATA PARSHAD v. DEPUTY COMMISSIONER OF KHERI.

I answer the first part of the *second* question in the affirmative, and second part in the negative.

I answer the *third* question in the negative.

Reference answered.

Gujar v. Isakbhai Tanaji (2), and, in our opinion, is unsustainable.

We will protect the appellant's rights to be safeguarded against the possibility of nuisance by ordering that the drain throughout its course should be covered over so as to prevent any nuisance to the plaintiff.

With this modification, the second appeal is dismissed with costs.

Appeal dismissed.

(2) 2 Bom. L. R. 898; 25 B. 248.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 582 OF 1914.

April 14, 1915.

Present:—Mr. Justice Coutts-Trotter and
Mr. Justice Kumaraswami Sastri.

LOGAMBAL *alias* THANGACHI AMMAL

—PLAINTIFF—APPELLANT

versus

VAITHINATHA IYER AND ANOTHER—

DEFENDANTS—RESPONDENTS.

Injunction—Co-owners of lane—Drain constructed by one—Injunction, if issued—Nuisance, proof of.

Where one of two co-owners of a lane constructs a drain in it no injunction can be issued restraining him from doing so at the instance of the other, unless the latter proves the construction of the drain to be a nuisance to him.

Shamnugger Jute Factory Co. Ltd. v. Ram Narain Chatterjee, 14 C. 189; *Mohanchand Nemchand Gujar v. Isakbhai Tanaji*, 2 Bom. L. R. 898; 25 B. 248, followed.

Second appeal against the decree of the Court of the Temporary Subordinate Judge of Tanjore, in Appeal Suits Nos. 975 and 1004 of 1911, preferred against that of the Court of the District Munsif of Tanjore, in Original Suit No. 187 of 1910.

Mr. G. S. Ramachandra Aiyar, for the Appellant.

Mr. P. S. Vaidyanatha Aiyar, for the Respondents.

JUDGMENT.—The lower Appellate Court has found that no nuisance or inconvenience is caused to the plaintiff by reason of the drain constructed by the defendants. The contention that the construction of the drain was such a violation of the plaintiff's rights as co-owner of the lane marked "M" as would entitle him to an injunction independently of any proved nuisance, is in direct conflict with *Shamnugger Jute Factory Co. Ltd. v. Ram Narain Chatterjee* (1) and *Mohanchand Nemchand*

(1) 14 C. 189.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 9 OF 1915.

April 20, 1915.

Present:—Mr. Lindsay, J. C.

SANKATA PARSHAD AND ANOTHER—

DECREE-HOLDERS—APPELLANTS

versus

DEPUTY COMMISSIONER OF KHERI, AS
MANAGER, COURT OF WARDS, OEL
ESTATE—JUDGMENT-DEBTOR—RESPONDENT.

U. P. Court of Wards Act (III of 1899)—Personal decree against ward, effect of Execution—Collector, substitution of, in place of ward.

A ward personally is in the eye of law no body for the purposes of suits brought by or against him and, therefore, a personal decree obtained against him and not against any legal personality representing him is a nullity. [p. 769, col. 2.]

Such a decree cannot be executed by substituting the Collector for the ward. [p. 719, col. 1.]

Appeal against the order of the District Judge, Sitapur, dated 25th January 1915, upholding that of the Subordinate Judge, Kheri, dated 1st August 1914.

Babu Salig Ram, for the Appellants.

The Government Pleader, for the Respondent.

JUDGMENT.—This appeal arises out of proceedings in execution of decree. The facts may be briefly stated as follows. The appellants are the assignees of a decree which was obtained on the 6th of January 1904 against Raja Krishna Dat Singh of Oel. At the

BULUSU VENKATESWARUDU v. NIMUSHAKAVI BALA TRIPURASUNDARI.

time this decree was obtained, Raja Krishna Dat Singh was a person disqualified from managing his estate and his property was under the superintendence of the Court of Wards. According to the law in force at this time, namely, United Provinces Act III of 1899, this decree was improperly obtained. The suit was brought against the Raja personally, whereas under the law it was necessary that the Raja should be sued in the name of the Collector of the district representing the Court of Wards and representing his estate. Several attempts were made to execute the decree and it seems that from time to time certain sums were realized. The present case has arisen out of an attempt to execute the decree for the balance which is still said to be owing. First of all the appellants here took out execution against the Raja personally. This application for execution was finally refused by an order of this Court, in which it is pointed out that under the law no legal proceedings could be taken against the Raja except in the name of the Collector. After this decision had been given a fresh application was made, the name of the Collector of Kheri being substituted in the application for that of the Raja. The Courts below have rejected the application on the ground that the decree cannot be executed. The point taken is that, as the Collector was no party to the decree, it cannot be executed against him. It is contended here in appeal that the Collector really represents the Raja and that the validity of the decree could not be impeached in the Court below. In short, the case is that the Court was bound to execute the decree as it stands and to allow the realization of the decretal amount from the estate of the Raja, although such a course is absolutely forbidden by the law relating to the Court of Wards. The contention put forward here on behalf of the appellants cannot be maintained. It was clearly open to the Collector in these proceedings to plead that, as he had not been made a party to the original suit, he was in no way bound by the decree. It is argued here that the Collector really represents the ward and that the mere substitution in the proceedings of the name of the Collector in place of the ward, does not alter the situation so as to give the Collector any status to plead that the decree is not binding upon him. This is a curious argu-

ment to come out of the mouth of a decree-holder who sued the Raja and not the Collector. If, as is now pleaded, the Collector is the representative of the Raja, then the answer is that the decree-holder, before he got his decree, ought to have brought the suit against the Collector. The fact is that for the purposes of legal proceedings the Collector himself is the ward. There is no question of representation of interest in the ordinary sense. The law requires that the suit is to be brought in the name of the Collector. In other words, as the Judge of the lower Appellate Court puts it, the ward has no legal personality which the Court can recognise in the matter of suits or proceedings in execution of decree. The ward personally is in the eye of the law nobody for the purposes of suits brought by or against him, and in the present case the correct view must necessarily be that the decree which the appellants here possess is a nullity, as it was not obtained against any legal personality representing the Raja of Oel. The appeal fails and is dismissed with costs.

Appeal dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 2726 OF 1913.

August 31, 1915.

Present:—Mr. Justice Ayling and
Mr. Justice Tyabji.

BULUSU VENKATESWARUDU AND
OTHERS—PLAINTIFFS—APPELLANTS

versus

NIMUSHAKAVI BALA TRIPURASUNDARI AND OTHERS—DEFENDANTS—

RESPONDENTS.

*Transfer of Property Act (IV of 1882), ss. 83, 84—
Deposit—Application dismissed before notice to mortgagees—Withdrawal of application—Interest, if ceases to run.*

A deposit under section 83 of the Transfer of Property Act and the subsequent dismissal of the application before service of notice on the mortgagee, is in effect no tender even if the money remains in Court. The dismissal of the application is tantamount to a withdrawal of the money and interest does not cease to run under section 84 of the Transfer of Property Act. [p. 770, cols. 1 & 2.]

RAHAT HUSAIN v. ABDUL HAFEEZ.

Krishnaswami Chettyar v. Thippa Ramasawmi Chettyar, 8 Ind. Cas. 763; 9 M. L. T. 131; (1911) 1 M. W. N. 89; 35 M. 44, followed.

Second appeal against the decree of the District Court of Godavari at Rajahmundry, in Appeal Suit No. 14 of 1912, preferred against that of the Court of the principal District Munsif of Amalapuram, in Original Suit No. 364 of 1910.

Mr. B. Narasimha Rao, for the Appellants.

Mr. P. Narayanamurthy, for the Respondents.

JUDGMENT.

AYLING, J.—The question is whether the defendants are entitled to the benefit of section 83 of the Transfer of Property Act in respect of the sum deposited in Court by their father on 11th April 1908 with the petition, Exhibit I. This petition was dismissed at the depositor's own request on 23rd November 1908 before notice was served on B. Subba Rao, one of the mortgagee's heirs. Respondents' Vakil argues that as the money was still left in Court, it was at the disposal of the mortgagee's heirs, but it seems clear to me that after the dismissal of the petition on 23rd November 1908 none of the mortgagee's heirs could have obtained payment of the money and no Court would have ordered payment under such circumstances. The dismissal of the petition was, therefore, tantamount to the withdrawal of the money and following the ruling of *Krishnaswami Chettyar v. Thippa Ramasawmi Chettyar* (1), I must hold that the defendants are not entitled to claim cessation of interest.

I may add that even apart from this ruling, regarding the correctness of which my learned brother and I are not entirely at one, I fully agree with the reasons assigned by him for coming to the same view as myself in the present case.

TYABJI, J.—In this case it seems to me that interest did not cease to run under section 84 of the Transfer of Property Act, for this reason that the mortgagors did not do all that had to be done by them to enable the mortgagee to take the amount out of Court. The original mortgagee had died before the deposit was made, leaving four sons as his heirs. The mortgagors brought the

money into Court and after notice, had been sent to three of the sons but before the fourth had received notice, they requested the Court to dismiss their petition in which they had prayed that the mortgagees should be asked to take the money in payment of the mortgage amount. The withdrawal of this petition was withdrawal of proceedings under section 83 of the Transfer of Property Act. The mortgagors thus did not complete what they had to do under section 83. In short the purport of sections 83 and 84 seems to me to be that when the mortgagor tenders through the Court the money due on the mortgage, he is relieved from payment of further interest because the mortgagee was in a position to receive the mortgage money and has refused to take it. Here there was no refusal because there never was any proper tender. For the tender (through Court) consists at least of deposit with notice to the persons entitled to withdraw the money and though the money was here deposited, there was no notice.

The result will be that interest on Rs. 593-2-0 at 10½ per cent. per annum from 12th May 1908 to 14th January 1912 will be added to the amount decreed with costs here and in the lower Courts with further interest at 6 per cent. per annum up to date of payment. Time for payment is extended by three months.

Appeal allowed.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

REVENUE REVISION PETITION NO. 12 OF
1910-11 OF ALLAHABAD DISTRICT.

August 1, 1912.

Present:—Mr. Baillie, S. M.

Sheikh RAHAT HUSAIN AND OTHERS—
DEFENDANTS—APPLICANTS

versus

Shah ABDUL HAFEEZ AND OTHERS—
PLAINTIFFS—RESPONDENTS.

Agra Tenancy Act (II of 1901), ss. 25, 66—Sub-letting from year to year extending over five years, if illegal—Failure to consider applicability of s. 66—Material irregularity—Section 66 considered but not applied, if material irregularity—Revision.

(1) 8 Ind. Cas. 763; 35 M. 44; 9 M. L. T. 131; (1911) 1 M. W. N. 89.

KRISHNIENGAR v. VIRARAGHAVATHATHACHARIAR.

Where the sub-letting is from year to year extending over a period exceeding five years, each sub-letting is in contravention of section 25 of the Tenancy Act.

A failure to consider whether section 66 should apply is a ground for revision but if the point was considered and the benefit of that section refused, there is no ground for revision.

Application for revision of the order of the Commissioner of the Allahabad Division, dated the 30th October 1911, confirming that of the Assistant Collector of Allahabad, in a case of ejectment.

JUDGMENT.—This case, a comparatively simple one, has been unduly prolonged by the extraordinary prolixity of the judgment of the lower Court. Whilst I entirely disagree with the view taken by the lower Court in regard to the way in which section 66 should be regarded, I am unable to say that ground for revision has been disclosed before me.

It has been argued, *first*, that inasmuch as this sub-letting had commenced before the Tenancy Act came in force it cannot be held to be contrary to the provisions of the Tenancy Act. It has been well recognised of late that when the sub-letting is from year to year and extends over a period exceeding five years' each sub-letting is in contravention of section 25. The case of applicant in this, therefore, fails.

The *second* ground urged before me was that the order refusing to apply the provisions of section 66 should be revised. Were the case before me in appeal I should not hesitate to amend the decree as I think the action of the lower Courts was harsh, but I am unable to say that there has been in their proceedings anything that could be called irregularity. In a previous decision it was held that the failure to consider whether section 66 should apply was ground for revision. In the present case it was considered whether section 66 should apply and for reasons given and given at extraordinary length, it was considered that they should not be applied. Whilst I disagree in principle, I do not think that the decision of the lower Court can be considered irregular.

A *third* objection in revision relates to an alteration made by way of review in the decree originally given. The lower

Court states that owing to its failure to observe an entry in the *patwari's* list showing that certain numbers had been sub-let after the suit had been filed, he omitted to include these numbers amongst those for which a decree for ejectment was given. I think that in the circumstances he was entitled to review his previous order. The inclusion of the numbers in question amongst those from which ejectment was decreed was in accordance with the principles laid down in the original judgment.

The case for the applicant fails. The cross-application also fails. I have no hesitation in dismissing them. The lower Court in fact, in my opinion, went far too much against the respondent. I think it unnecessary to allow costs.

Application dismissed.

MADRAS HIGH COURT.

APPEAL AGAINST ORDER No. 228 OF 1913.

July 13, 1915.

Present:—Mr. Justice Oldfield and
Mr. Justice Sadasiva Aiyar.

KRISHNIENGAR—PETITIONER—

APPELLANT

versus

Sri VIRARAGHAVATHATHACHARIAR,

TRUSTEE OF NACHIAR KOVIL

DEVASTANAM AND ANOTHER—DEFENDANTS
RESPONDENTS.

Execution—Trust—Decree directing trustees to perform some festival—Direction to trustees to perform same, if can be issued—Jurisdiction.

Where a decree directed certain trustees of a Hindu temple to perform a festival, it is not competent to the Court to issue any direction to the trustees to perform the same. [p. 772, col. 1.]

Appeal against the order, dated 10th March 1913, of the Court of the Temporary Subordinate Judge of Ramnad at Madura, in Execution Petition Revision No. 6 of 1912, in Original Suit No. 5 of 1905 on the file of the District Court of Tinnevely.

FACTS.—The holder of a decree directing the trustees of a certain Hindu temple to perform a festival moved the Court to

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execute the decree by directing the trustees to perform the festival which was approaching. The lower Court dismissed the petition. The decree-holder appealed.

Mr. T. Rangaramanujachari, for the Appellant:—The lower Court ought to have executed the decree by issuing the necessary directions. The very object of the suit was to compel the performance of the festival and that would be defeated by the refusal to issue the direction prayed for.

Mr. M. A. Tiunarayanachari, for the Respondent, was not called upon.

JUDGMENT.—Petitioner holds a decree directing certain trustees to perform a festival. In the petition under disposal he moved the Subordinate Court to issue a direction to the trustees to perform the festival, the time for which was approaching. Neither that Court nor this has any power under the Code to issue such a direction in the circumstances. The appeal against order is dismissed with costs.

Appeal dismissed.

LOWER BURMA CHIEF COURT. FULL BENCH.

CIVIL REFERENCE NO. 2 OF 1915.

July 9, 1915.

Present:—Sir Charles Fox, Kt., Chief Judge,
Mr. Justice Ormond and Mr. Justice Twomey.

In re MAUNG NAW—DEFENDANT—

APPELLANT

versus

MA SHWE HMAT AND ANOTHER—

PLAINTIFFS—RESPONDENTS.

Lower Burma Land and Revenue Act (II of 1876), ss. 19, 56—Jurisdiction of Civil Courts—Disputes between private persons and claims against Government distinguished.

In a suit between private individuals for possession of land in respect of which there is no grantee, lessee or person having a status of landholder, the jurisdiction of the Civil Courts is not ousted by section 56 of the Lower Burma Land and Revenue Act when the plaintiff bases his claim upon a title to possession by virtue of his having paid land revenue to Government under the rules made under section 19 of the Act and also upon the fact that he was in possession and was dispossessed by the defendant within 12 years before the institution of the suit. [p. 774, col. 2; p. 775, col. 1.]

Mg. San Paing v. Shwe Hlaing, 1 L. B. R. 277, disapproved.

Krishnarav Yashvant v. Wasudev Apaji, 8 B. 371; *Ismail Arif v. Mahomed Ghous*, 20 C. 834; 20 I. A. 99; *Gobind Prasad v. Mohan Lal*, A. W. N. (1901) 204; 24 A. 157, referred to.

The following Order of Reference was made by the Hon'ble Mr. Justice Ormond to a Full Bench under section 11, Lower Burma Courts Act:—

The plaintiffs sued for a declaration that a strip of land belonged to them, for possession of the same and for Rs. 400 damages against the defendant for cutting *dhane* trees belonging to the plaintiffs on that strip of land.

Both the Lower Courts have found that the plaintiffs were in possession of this strip of land, that they had planted the *dhane* trees which the defendant destroyed and that the defendant had encroached on the plaintiffs' land. After the evidence had been taken as to whether the plaintiffs had been dispossessed by the defendant in respect of this strip of land, by consent a surveyor was appointed to investigate and report; and after his report has been received the defendant's Advocate asked the Court to frame an additional issue as follows:—Have the plaintiffs acquired the status of a land-holder or the title of a grantee to the disputed portion of land, and is not the jurisdiction of this Court barred by section 56 of the Lower Burma Land and Revenue Act?

The Township Court refused to go into the question of jurisdiction. The defendant appealed to the District Court on the question of jurisdiction only and the present appeal by the defendant is only on the question of jurisdiction. It is contended that section 56 of the Lower Burma Land and Revenue Act ousts the jurisdiction of a Civil Court in a suit of this nature. In their plaint the plaintiffs state that they are absolute owners in possession of this strip of land and the evidence shows the 1st plaintiff has paid revenue in respect of this strip of land for four years preceding the institution of this suit. Reliance is placed on the case of *Mg. San Paing v. Shwe Hlaing* (1), where it was held by a Bench of this Court (White and Irwin, JJ.) that if the

(1) 1 L. B. R. 277.

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plaintiff has neither a grant nor the status of a land-holder, his claim must come under section 19 of the Act, and the Civil Courts have no jurisdiction to determine it. Mr. Justice Twomey in the case of *Arunachallam Chetty v. Veerappa Chetty* (2) and in the case of *Maung Po Chit v. Periacurpen Chetty* (3) was of the same opinion. On the other hand, there is a Bench ruling of *Maung Yat v. Maung Tarok* (4) by Copleston, C. J., and Fox, J., where it was held that section 56 of the Act bars the jurisdiction of the Civil Court only if the plaintiff claims to occupy merely under section 19 of the Act; and in the case of *Saya Hlaing v. Mg. Lu Gyi* (5) Mr. Hosking, the Judicial Commissioner, held that the words "Claims to occupy or resort to lands under sections 19, 20 and 21" in section 55 (b) of the Act refer to claims against the Government, and not to claims between private individuals. Section 56 (a) of the Act bars the jurisdiction of Civil Courts as to *inter alia*:—"Claims to occupy or resort to lands under section 19 and disputes as to the use or enjoyment of such lands between persons permitted to occupy or resort to the same."

The last part of the clause (a) of section 56 could only apply to the present case if both parties had in fact the permission of Government to occupy the land in dispute.

As to the first part of clause (a) of section 56:—Section 19 merely empowers the Local Government to frame rules. A "claim to occupy lands under section 19" must, therefore, mean a claim to occupy land under such rules. The rules prescribe the manner in which a license or title to occupy certain lands can be obtained from the Government and the conditions under which such license will be granted; and they empower any Revenue Officer to eject (on behalf of the Government) any person occupying any such lands in contravention of such rules. "A claim to occupy or resort to lands under section 19" means a claim against Government, to be granted under its rules a license to occupy certain

lands; or a claim to be recognised by Government as its licensed occupier of such lands. If these words are intended to include a claim by a licensee of Government for possession against a private individual, the last part of clause (a) is necessary. If A obtains a license from Government to occupy certain lands in accordance with the rules (whether by payment of revenue or otherwise), he thereby obtains a title to such lands for the time being. If, relying upon his title, he sues B for possession, he cannot be said to be preferring a claim under the rules which authorised his title to be made.

Still less can it be said that A is preferring a claim under section 19, if, when suing B for possession, he does not allege any title derived from the owner, that is, any right to occupy the land under Government; but relies solely upon the fact that within 12 years before suit he was in possession and he was dispossessed by B. A and B may have been both trespassers, yet A in such a case is entitled to a decree unless B has a title.

If neither A nor B have any title to occupy the land under Government the Revenue Officer has, no doubt, power to eject either of them; but neither of them has the right to have the other ejected by the Revenue Officer. And if A is the licensed occupier of land under Government and B trespasses or encroaches on his land: there is nothing in the Act or in the rules under section 19 which empowers the Revenue Officer to eject B, either of his own motion or at the instance of A. In my opinion, not only does section 56 (a) of the Act not oust the jurisdiction of the Civil Court in this case, but the Revenue Officer would have no power to eject the defendant.

In view of the above divergent rulings, I refer for the decision of a Bench or Full Bench, as the Chief Judge may think fit, the following question:—

In a suit between private individuals for possession of land in respect of which there is no grantee, lessee or a person having a status of land-holder, is the jurisdiction of the Courts ousted by section 56 of the Lower Burma Land and Revenue Act.

(2) 10 Ind. Cas. 864; 4 Bur. L. T. 117.

(3) 12 Ind. Cas. 22; 4 Bur. L. T. 215.

(4) 1 L. B. R. 16.

(5) P. J. L. B. 436.

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when the plaintiff bases his claim upon a title to possession by virtue of his having paid land revenue to Government under the rules made under section 19 of the Act and also upon the fact that he was in possession and was dispossessed by the defendant within 12 years before the institution of the suit?"

JUDGMENT OF THE FULL BENCH.

Fox, C. J.—Under section 9 of the Civil Procedure Code, the Civil Courts have (subject to provisions in the Code itself) jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred.

To answer the question referred, it must be determined whether section 56 (a) of the Lower Burma Land and Revenue Act, 1876, read with section 55 (a) of the same Act, expressly or impliedly bars the jurisdiction of a Civil Court to entertain and try a suit of the description stated in the question.

The effect of the sections is to bar the jurisdiction of the Civil Courts when a suit is a claim to occupy or resort to land under sections 19, 20 or 21 of the Act, or when it involves a dispute as to use or enjoyment of land which Government has not made a grant or a lease of or over which a right has not been acquired in one of the modes specified in the Act between persons permitted to occupy or resort to the same. In a suit of the description mentioned in the reference the plaintiff cannot be said to be making a claim to occupy or resort to land under section 19 of the Act. The basis of his claim has nothing to do with the Act. Sections 20 and 21 are not applicable. "Claim" in clause (b) of section 55 must mean claims advanced to Government or to some Government Officer.

Neither the plaintiff nor the defendant in the suit could be rightly classed as a person permitted to occupy or resort to land sued for, unless it were proved that they had been expressly permitted by a Revenue Officer to occupy the land. Rule 51 (a) of the rules under the Act does not contemplate any permission being required to enter on or remain in occupation of waste or uncleared land for purposes of cultivation. In a suit based upon plaintiff having been once in possession and having been dispossessed otherwise than in due course of law, it may be assumed that the plaintiff does not sue as one

permitted to occupy or resort to the land. The latter part of clause (b) of section 55 would apply to such a case and the jurisdiction of the Civil Court would not be barred by section 56 (a).

Irwin, J.'s ruling in *Mg. San Paing v. Shwe Hlaing* (1), in so far as it held that if it appears at the hearing that the plaintiff has neither a grant nor the status of a landholder his claim falls under section 19 of the Lower Burma Land and Revenue Act and the jurisdiction of the Civil Court is ousted by section 56 read with section 55 (b) of that Act, appears to me to be erroneous. Although neither party may have a right or title to the land as against Government, in a suit under section 9 of the Specific Relief Act previous possession merely is sufficient to support a claim for possession against one who has dispossessed the plaintiff, and it is also sufficient in an ordinary suit for possession when the defendant who has dispossessed the plaintiff is a wrong-doer and has no title himself—vide *Krishnarav Yashvant v. Vasudev Apaji* (6) and *Ismail Ariff v. Mahomed Ghous* (7).

In *Gobind Prasad v. Mohan Lal* (8) it was held that a person in possession of land without title has an interest in the property which is heritable and good against all the world except the true owner, an interest which, unless and until the true owner interferes, is capable of being disposed of by deed or Will or by execution sale, just in the same way as it could be dealt with if the title were unimpeachable.

In view of this principle of law the opening words of the section 6 of the Lower Burma Land and Revenue Act must be taken to mean that no right of any description as against the Government shall be deemed to have been or shall be acquired over land to which the part applies, except in the modes specified in the section. Read in this way, this section affords no bar to a Court giving a plaintiff a decree in a suit of the description mentioned in the reference. I would answer the question referred in the negative.

ORMOND, J.—I concur in the judgment of the learned Chief Judge for the reasons

(6) 8 B. 371.

(7) 20 C. 834; 20 I. A. 99.

(8) 24 A. 157; A. W. N. (1901) 204.

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stated therein and for the reasons stated in my reference, I would answer the question referred in the negative.

TWOMEY, J.—As regards the first part of section 55 (b), I agree in thinking that the *claims* here contemplated are claims addressed to Government and not claims as against private persons, though it is apparently assumed in the directions issued under the Act (*vide* page 88 of the Land Revenue Manual) that “claims between private individuals” are included. The word “claims” in the first part of the section appears to have been used advisedly in contradistinction to the word “disputes” in the latter part. “Disputes” is the more appropriate term when there is a conflict of private interests. “Claims” is the word used in section 56 (b), (c) and (d) where it is quite clear that only claims against Government are contemplated.

The latter part of section 55 (b) can only refer to *disputes* between two or more persons jointly permitted

(i) to resort to the same grazing ground or the same *taungya* area, or

(ii) to occupy the same piece of waste land temporarily under rules issued in pursuance of section 19.

But as the existing rules under section 19, *viz.*, rules 51 and 52 do not require a cultivator to obtain permission before occupying such land, it follows that there can be no disputes of class (ii) in regard to land occupied for purposes of cultivation. The case under reference clearly does not fall under class (i). I concur in answering the question referred in the negative.

Reference answered.

ALLAHABAD HIGH COURT.

EXECUTION FIRST APPEAL NO. 96 OF 1914.

May 28, 1915.

Present:—Mr. Justice Chamier and
Mr. Justice Piggott.

DAMBAR SINGH—DECREE-HOLDER—
APPELLANT

versus

MUNAWAR ALI KHAN AND ANOTHER—
JUDGMENT-DEBTORS—RESPONDENTS.

Res judicata—Execution proceedings—Two inconsistent orders—Later to prevail against earlier.

A decree for possession of property and costs was passed against several persons. On an application for execution of this decree a compromise was entered into between the decree-holder and some of the judgment-debtors, who had been *pro forma* defendants by which the decree-holder admitted that he had no claim against these judgment-debtors. The decree-holder sold the decree and the transferee applied for execution against these judgment-debtors as well. They objected and it was decided that they were no longer liable. The transferee in an another application for execution again joined these judgment-debtors and attached their property. They made an objection but they allowed it to go by default. In another application for execution against them they again made the same objection:

Held, that the later of the two inconsistent decisions in the proceedings must prevail against the earlier and that the objection was barred by the rule of *res judicata*. [p. 776, col. 1.]

Mallu Mal v. Jhamman Lal, 1 A. L. J. 416; *Rai Sham Kishore v. Ugrah Narain Singh*, 6 A. L. J. 49 Notes, referred to.

Execution first appeal against the decree of the Subordinate Judge of Meerut.

Mr. P. L. Banerjee, for the Appellant.

The Hon'ble Mr. Abdul Raoof, for the Respondents.

JUDGMENT.

CHAMIER, J.—One Sri Kishan Das obtained a decree for possession of property and costs against several persons including the respondents. When execution was taken out in 1905, the respondents protested that they had never been anything but *pro forma* defendants and that the decree should not be interpreted as making them jointly liable for costs alone with other defendants who had contested the suit. A petition of compromise was filed on April 20th, 1906, in which the decree-holder admitted in express terms that he had no claim against the respondents under the decree, and this compromise was made the basis of an order of the Court releasing the property of the respondents from attachment. Shortly after that the decree-holder sold the decree to the appellant, who in 1907 took out execution against the respondents. They put in an objection and the Court decided that the respondents were no longer liable under the decree. The appellant brought the case before this Court on appeal, and this Court held expressly that there had been a complete adjustment of the decree as between the original decree-holder and the respondents and that the appellant was bound thereby. Notwithstanding the decision of this Court the appellant

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in April 1910 again took out execution against the respondents and attached a sum of Rs. 28-8-0, which happened to be in Court to their credit, and at the same time he asked for the attachment of a much larger sum as against the other judgment-debtors. The respondents put in a petition of objection pleading that they had been discharged from liability under the decree, that property attached previously had consequently been released, and that the application for execution was contrary to previous orders passed by the Court. But the respondents allowed their objections to go by default, with the result that the application for execution was allowed and the money attached was paid out of Court to the appellant. The present application for execution was presented in June 1913. The respondents objected on the ground that it has been held more than once during the course of the execution proceedings that they are no longer liable under the decree. The appellant's contention was and is that the Court's order dismissing the respondents' objection in 1910, coupled with its order allowing the decree to be executed against the money belonging to the respondents, has the effect of wiping out the previous decisions passed in favour of the respondents, and on the principle of *res judicata* debars the respondents from pleading that the decree has been adjusted so far as they are concerned. It is conceded that the later of two inconsistent decisions in the course of execution proceedings must prevail against the earlier. *Mallu Mal v. Jhamman Lal* (1) and *Rai Sham Kishore v. Ugrah Narain Singh* (2). The question is whether the order passed against the respondents in 1910 should be regarded as a decision that the decree had not been adjusted so far as the respondents are concerned and that they were still liable for the balance of the costs decreed. The respondents' contention is that the order of the Court decided no more than that the respondents were in 1910 liable for a sum of Rs. 28-8-0. I am unable to accept this contention. The respondents' petition of objection distinctly raised the question whether they were liable under the decree or had been discharged from liability by the orders previously passed. No question of the extent

of the respondents' liability was before the Court. The dismissal of their objections resulted no doubt in the sum of Rs. 28-8-0 only being paid out of Court to them, but the Court did not apply its mind to the question of the extent of the respondents' liability. It must, in my opinion, be taken to have decided that the decree had not been adjusted as alleged by the respondents, consequently execution might proceed as against them. It was also suggested that the appellant's application for execution, directed as it was against other persons than the respondents, was calculated to put them off their guard and to lead them to suppose that as only a small sum of money belonging to them had been attached and a much larger sum had been attached as against other persons, they had only to allow the small sum of Rs. 28-8-0 to be paid to the respondents in order to be rid of the whole business. The answer to this is that respondents were in no way misled by the appellant's application. They came in at once with a petition of objections and their failure to press it is not explained.

I am reluctantly driven to the conclusion that the decision of 1910 neutralised the previous decisions and left the respondents liable for the balance of the decree for costs. I would, therefore, allow this appeal, set aside the order of the Court below dismissing the application for execution, and direct that the application be restored to the pending file and disposed of according to law. Costs of this appeal should be costs in the cause.

PIGGOTT, J.—I concur.

BY THE COURT.—The order of the Court is that the appeal is allowed, the order of the Court below is set aside with this direction that the application for execution be restored to the pending file and disposed of according to law.

Appeal allowed.

(1) 1 A. L. J. 416.

(2) 6 A. L. J. 49 Notes.

SUBRAMANIAM CHETTIAR v. SOMASUNDARAM CHETTIAR.

KESAR KUNWAR v. KASHI RAM.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 957 OF 1914.

August 31, 1915.

Present:—Mr. Justice Spencer and
Mr. Justice Phillips.N. P. R. V. A. R. SUBRAMANIAM
CHETTIAR, AND OTHERS—DEFENDANTS
Nos. 1 to 4—APPELLANTS

versus

A. R. A. R. S. M. SOMASUNDARAM
CHETTIAR EXECUTOR OF A. P. R.
ARUNACHALAM CHETTIAR'S ESTATE,
BY MAYANDI CHETTIAR, AGENT—

PLAINTIFF—RESPONDENT.

*Limitation Act (IX of 1908), s. 20—Transaction
adding interest to the principal, if amounts to pay-
ment.*

A transaction between the parties whereby the interest up to a certain date is calculated and added to the principal, thus wiping out the debt on account of interest, is a "payment" which saves limitation under section 20 of the Limitation Act.

Kriyappa v. Rachapa, 24 B. 493; 2 Bom. L. R. 378;
Mylan v. Annari Madan, 16 M. L. J. 99; 29 M. 234,
followed.

Second appeal against the decree of the Court of the Subordinate Judge of Tinnevely, in Appeal Suit No. 141 of 1913, preferred against that of the District Munsif of Tinnevely, in Original Suit No. 360 of 1911.

Messrs. M. A. Thirunarayanachariar and V. S. Kalatiram Aiyangar, for the Appellants.

Mr. C. S. Venkatachariar, for the Respondent.

JUDGMENT.—On the authority of *Kriyappa v. Rachapa* (1), *Mylan v. Annari Madan* (2) and Original Side Appeal No. 20 of 1905 (unreported), we think that the transaction in this case evidenced by the accounts both of plaintiff and defendants, whereby the interest due up to October 25th was calculated and added to the principal, thus wiping out the debt on account of interest, was a payment which saved limitation under section 20 of the Limitation Act. An objection has been taken that the defendants were prejudiced by the frame of the plaint, which did not give the defendants notice that the plaintiff intended to rely on this payment to save limitation.

An issue was framed on the question of limitation, and the parties having gone to trial on the subject, we cannot allow the

(1) 24 B. 493; 2 Bom. L. R. 378.

(2) 19 M. 234; 16 M. L. J. 99.

appellants to raise this plea in the arguments in second appeal, especially when it has not been stated as a ground of second appeal. As regards the arguments (1) that the 5th defendant had no authority to make payments on behalf of defendants Nos. 1 to 4 and make them liable by his acts and (2) that interest at Nadappu rates should not have been allowed, the Subordinate Judge has recorded findings in plaintiff's favour on these two points and as those findings are findings of fact and there is some evidence to support them, we cannot interfere. The second appeal is dismissed with costs.

Appeal dismissed.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 931 OF 1914.

July 1, 1915.

Present:—Sir Henry Richards, Kt.,
Chief Justice, and Mr. Justice Piggott.

KESAR KUNWAR—DEFENDANT—

APPELLANT

versus

KASHI RAM—PLAINTIFF—RESPONDENT.

Mortgage—Usufructuary mortgage—Subsequent simple mortgage—Covenant to pay money due under second mortgage first—Second mortgage barred by limitation, effect of.

A simple mortgage was executed in favour of the mortgagee of the same property under a previous usufructuary mortgage with a covenant that the mortgagor would pay the money due under the second bond first and then that due under the usufructuary mortgage. The mortgagor brought a suit to redeem the first mortgage at a time when a suit to recover the money due under the second bond was barred by limitation:

Held, that the mortgagor was entitled to recover possession of the property without paying the money due under the second mortgage. [p. 778, col. 2.]

Second appeal from a decree of the Subordinate Judge of Aligarh.

Mr. Sarat Chandra Chaudhri, for the Appellant.

The Hon'ble Dr. Tej Bahadur Sapru, for the Respondent.

JUDGMENT.—This appeal arises out of a suit, brought to redeem certain property which was made the subject of a usufructuary mortgage, dated the 13th of February 1880. The principal sum

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secured was Rs. 900, and the mortgage-deed expressly provided that the usufruct was to go against the interest and that the mortgagor should not be entitled to an account from the mortgagee of the profits. The defence to the suit was that there had been a subsequent mortgage dated the 7th of July 1882, and that under the terms of this mortgage plaintiff could not succeed in the present suit without first paying off the amount due for principal and interest under the last-mentioned mortgage. The first Court gave effect to the defence and dismissed the suit. The lower Appellate Court allowed the appeal.

The second mortgage was for a sum of Rs. 95, re-payable with interest at the rate of thirty per cent. per annum. The deed after reciting the facts that the property had been previously mortgaged contains the following provisions: "It is further stipulated that I should first pay the money due under this bond, and after that I should pay the mortgage-money." It is clear from the terms of this mortgage, taken in conjunction with the fact that the whole usufruct was to be applied to the keeping down of interest upon the first mortgage, that the second mortgage was in fact a simple mortgage. So long as it remained unpaid the interest would accumulate at the rate of thirty per cent. per annum, and according to the covenant the money due thereunder for principal and interest must be paid before the mortgagor redeemed the first mortgage. No principal or interest had ever been paid upon foot of this second mortgage. At the date of institution of the present suit a suit to enforce payment of the second mortgage would be barred by limitation, unless it can be said that on the true construction of the deed it was not open either to the mortgagor to pay off the amount due, or to the mortgagee to bring a suit, until such time as the mortgagor was ready to redeem the earlier mortgage. It seems to us absolutely clear that if the mortgagor, a year after the execution of the second mortgage, had tendered the sum of Rs. 95, plus a year's interest thereon, the mortgagee would have been legally bound to accept the same. He certainly could not have refused the tender by reason of the stipulation in the second bond that the mortgagor should pay

the money due thereunder before he paid the mortgage on the earlier bond. Just in the same way we consider that if the mortgagee had brought a suit to enforce the second bond, the mortgagor could not have successfully pleaded that such suit was premature. The result is that we must take it that had a suit been brought on the 8th of August 1912 (that is, the day on which the written statement was filed) on the second mortgage, the same would have been barred by limitation. We will assume that had the plaintiff brought the present suit before the second mortgage was barred by limitation and had the defendant pleaded that the first mortgage could not be redeemed until after the second had been paid off, the plea would have been a good one. The question remains whether such a plea is still good notwithstanding that the defendant is barred from maintaining any suit to enforce the second mortgage. In effect the defendant is asking the Court to enforce against this property a claim which is barred by time. We think that this cannot be done and that the plaintiff is now entitled to recover possession of the property upon payment of the amount secured by the original mortgage. We dismiss the appeal with costs.

Appeal dismissed.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 332 of 1914.

August 27, 1915.

Present:—Mr. Justice Seshagiri Aiyar.
THIRUVENGADASWAMI IYENGAR—
DEFENDANT No. 1—PETITIONER

versus

VEERA PILLAI AND OTHERS—PLAINTIFFS
AND DEFENDANTS NOS. 2 TO 3—RESPONDENTS.
Trustee of temple—Money borrowed on promissory note—Co-trustee not consulted—Personal liability.

Where the trustee of a temple borrows on a promissory note money for the benefit of the temple without consulting his co-trustees, he makes himself personally liable. [p. 779, col. 1.]

Petition, under section 25 of Act IX of 1887, praying the High Court to revise the decree of the Court of the Subordinate Judge

PARSOTAM DAS v. DAVID.

of Negapatam, in Small Cause Suit No. 2383 of 1913.

Mr. A. Srirangachari, for the Petitioner.

Mr. S. Muthiah Mudaliar, for the Respondents.

JUDGMENT.—The plaintiff in this case is content with a personal decree against the 1st defendant and has not chosen to come to this Court in revision. The finding of the lower Court is that there was no necessity for borrowing the money although the amount of the note was spent for the benefit of the temple. It has not been shown before me that the necessity was so urgent as to compel the 1st defendant to borrow even without the consent of his co-trustee from a third party. I express no opinion as to whether the 1st defendant will not be entitled to recover this money from the trust funds as admittedly the money has been spent for the benefit of the temple. I think the conclusion come to by the Subordinate Judge is right. The 1st defendant who executed the promissory note without consulting his colleague has rendered himself personally liable. On that simple ground I think that the decree of the Subordinate Judge should be upheld.

The petition is dismissed with costs.

Petition dismissed.

ALLAHABAD HIGH COURT.

FIRST APPEAL FROM ORDER NO. 70 OF 1915.

July 2, 1915.

Present:—Mr. Justice Tudball and

Mr. Justice Rafique.

PARSOTAM DAS AND ANOTHER—APPLICANTS
—APPELLANTS

versus

E. V. DAVID—OPPOSITE PARTY—

RESPONDENT.

Provincial Insolvency Act (III of 1907), ss. 31, 34—Property sold in execution of decree before adjudication—Secured creditor, right of.

P obtained a decree against E. In execution of the decree he attached certain property of E and put it to sale. After the realization of the sale-proceeds, the judgment-debtor was declared insolvent.

Held, that P was entitled to recover his debt out of the sale-proceeds. [p. 781, col. 1.]

B brought a suit against E and attached certain property of E before judgment. He obtained an *ex parte* decree against the defendant. The property so attached was sold in execution of another decree

and certain sale-proceeds were realized. In the meantime the Subordinate Judge had set aside the *ex parte* decree on the condition that a certain portion of the sale-proceeds would stand security for any decree that might be passed in the suit in favour of B. Subsequently the judgment-debtor was declared insolvent. Ultimately a decree was passed in favour of B:

Held, that B was a secured creditor and he was entitled to draw out the money which stood security for his claim against E. [p. 781, col. 2.]

First appeal from an order of the District Judge of Cawnpore.

Mr. Kailas Nath Katju, for the Appellant.

Mr. A. P. Dube, for the Respondent.

JUDGMENT.—These two appeals Nos. 70 and 71 of 1915 arise out of the same insolvency proceedings. The facts are simple. One George Edwards has been adjudicated an insolvent on the 5th of January 1915 by the District Judge of Cawnpore on an application made by him himself on the 16th of November 1914. Parsotam Das, one of the appellants before us, claims to be a person whose circumstances fall within the terms of section 34 of the Provincial Insolvency Act, and demands a right to certain money realised in execution of his decree against the insolvent by sale before the date of the order of adjudication. Beharilal, the other appellant, is a person who claims to be a secured creditor within the meaning of section 31 of the Act in respect of the sum of Rs. 1,100. It appears that some two or three decrees had been obtained in the Court of the Munsif of Cawnpore against the insolvent early in the year 1914. Among these was that of Parsotam Das, the appellant, who obtained his decree on the 14th of January of that year.

He applied for attachment and sale of certain property in execution of his decree in the Court of the Munsif. There were other decrees obtained against the insolvent in the Court of Small Causes but we are not concerned with them. In June 1914, Beharilal brought a suit in the Court of the Additional Subordinate Judge against the insolvent and he applied for attachment before judgment of part of the property which Parsotam Das had already attached in execution of his decree. The Court ordered attachment as prayed and then on the 15th of July 1914, it gave a decree *ex parte* against the insolvent in favour of Beharilal. Beharilal then applied in the Court of the Subordinate Judge for execution of his decree. This was on the 24th of July 1914. He also applied to the Subordinate Judge point-

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ing out that the property of the judgment-debtor had been attached in execution of the decrees in the Munsif's Court, and he asked the Subordinate Judge to take action under, section 63 of the Code of Civil Procedure. It appears that all the decree-holders and certainly Beharilal, in order to save time and trouble, agreed that the Munsif should carry on the execution of the decrees of his Court, more especially the decree of Parsotam Das, that he should sell the property and remit the assets so obtained to the Subordinate Judge so as to enable the latter Court to distribute the sale-proceeds rateably among the decree-holders. Accordingly the property was actually sold in execution of the decree of Parsotam Das by the Munsif, and the sum of Rs. 3,961 was transferred on the 19th of August 1914 to the Court of the Subordinate Judge, to which all the other decrees were also transferred for satisfaction. On the 4th of August 1914, the judgment-debtor applied, in the suit brought by Beharilal, to have the *ex parte* decree set aside. Notice was issued, and on the 24th of October 1914, an order was passed in favour of the judgment debtor, setting aside the *ex parte* decree and granting a re-hearing of the suit. Up to that time the sale proceeds, Rs. 3,961, had not been rateably distributed among the various decree-holders. It was stated in the Court of the Subordinate Judge that the amount which would approximately fall to the share of Beharilal's decree out of the sum of Rs. 3,961, which was in Court, would be Rs. 1,100. Thereupon the Court passed an order on the 24th October 1914, as mentioned above, setting aside the *ex parte* decree. The grounds given in the order were, that the application was supported by an affidavit; that the sum of Rs. 1,100 was stated to be the approximate amount out of the Rs. 3,961 which on rateable distribution would fall to the lot of Beharilal, and as that sum was in Court as security and it was only deficient to the extent of Rs. 300 as compared with the claim of Beharilal, therefore, the application for re-hearing was granted. On the 11th of November 1914 the Court passed another order on an application of Beharilal, which clearly shows the meaning of its order passed on the 24th of October 1914. In this order it distinctly states that the sum of Rs. 1,100 was security, and should remain as such security

until the decision of the suit. We again note here that on the 27th of October 1914, Parsotam Das applied to the Munsif to have the sum which had been recovered by sale distributed among the other judgment-creditors other than Beharilal. The Munsif sent on the application to the Subordinate Judge, who stated that he would distribute the money himself and keep all the execution cases pending in his Court. On the 17th of November, the day after the application for insolvency had been made, the District Judge sent an order to the Subordinate Judge directing him to stay his hands and not to distribute the Rs. 3,961 among the creditors whose decrees were in process of execution. On the 17th of December 1914, Beharilal's suit was again decreed on a compromise, and on that very same date he applied for payment of the Rs. 1,100 which was deposited in Court. The Subordinate Judge sent on this application to the District Judge, who directed the Subordinate Judge not to pay the money.

These are the circumstances of the case, and the two points for decision are, *first* of all, whether the amount which Parsotam Das claims as payable to him himself is liable to distribution among the creditors or is money which falls within the meaning of section 34 of the Insolvency Act. The *second* point is, whether Beharilal is or is not a secured creditor within the meaning of section 31 in respect of the Rs. 1,100 mentioned above. The learned District Judge appears to have held that the sale of the property by the Munsif was not a sale legally held in execution of Parsotam Das's decree. He points out that under section 63 of the Code of Civil Procedure it was only the Subordinate Judge who ought to have put these decrees into execution, and that, therefore, in his opinion the sale by the Munsif was either an invalid sale or was a sale carried out by the Additional Subordinate Judge himself through the Munsif. The actual fact is as we have already pointed out. The Munsif with the consent of all the decree-holders sold the property which had been attached in execution of Parsotam Das's decree, and the assets were realized in the execution of that decree. They were in deposit in Court. That sale clearly was neither illegal nor invalid. All the parties agreed to it, and moreover

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clause 2 to section 63 clearly shows that there was nothing invalid in that sale. The simple fact, therefore, remains that after the execution of Parsotam Das's decree against the property of the judgment-debtor, assets had been realized by sale of the property before the date of the order of adjudication. The learned District Judge's order, therefore, in respect of Parsotam Das is clearly wrong and must be set aside, and we hold that Parsotam Das, when he proves his debt, is entitled to recover that debt out of the Rs. 3,961 which had been realized by sale in execution of his decree.

The case in regard to Beharilal is a little different. The contention on his behalf is that the sum of Rs. 1,100 was directed by the Court of the Subordinate Judge to be held as security for any sum which might be finally decreed to him, and when the case was decided and a decree was finally passed, that money, which was in deposit and stood as security, became the money of Beharilal himself and he was entitled to recover it at once by application, such as he made on the 17th of December 1914. On behalf of the Receiver it is maintained that this sum was never ordered to be a security as pleaded by Beharilal. The decision of the question depends on the meaning of the order passed by the Subordinate Judge on the 24th October 1914; that is, the order which was passed on the application of the judgment-debtor to have the *ex parte* decree set aside. We have already noted that order. In view of its language and in view of the language of the order of the 11th of November 1914, we have not the slightest doubt that the learned Subordinate Judge intended that the sum of Rs. 1,100 was to remain as security, in part at least, for whatsoever might be decreed to Beharilal on the re-hearing of the case. Such an order was a valid order, which the Court was clearly entitled to pass at the time of granting the re-hearing of the case under Order IX, rule 13. Money which is deposited as security in obedience to an order passed by a Court under Order IX, rule 13, is similar to money which is deposited under the Rules of the Supreme Court in England under Order XIV on an application for leave to defend. In the case of *In re Ford, Ex parte the Trustee* (1), it was held that money of

(1) (1900) 2 Q. B. 211; 60 L. J. Q. B. 690; 48 W. R. 868; 82 L. T. 625; 16 T. L. R. 399; 7 Manson, 281.

this description must be treated as money paid in to abide the event, and is a security to the plaintiff for the sum for which he may obtain judgment at the trial. In the judgment in that case it is laid down as follows—
“The order must be treated as an order that the right to the money when paid into Court shall abide the event: see *Bird v. Barstow* (2), where the order appears to us to have been in the same form as in this case; and it is settled that where money is ordered to be paid into Court to abide the event it must be treated as a security that the plaintiff shall not lose the benefit of the decision of the Court in his favour.” It seems to us quite clear that when a decree was passed in favour of Beharilal, the sum of Rs. 1,100 which stood as security was his, and he was entitled to draw it out from Court and appropriate it to his own use. The application of the 17th of December 1914 ought to have been granted. It is suggested that the District Judge's order might be treated as an order passed by him under section 13, clause 3, of the Insolvency Act. In the *first* place, it was clearly not an order for attachment at all and in the *second* place, the money was not under the control of the debtor. We think there is no doubt that Beharilal was a secured creditor in respect of the sum of Rs. 1,100 mentioned above.

We, therefore, set aside the order of the District Judge. We declare Beharilal a secured creditor to the extent of Rs. 1,100 and that he is entitled to recover that sum as against the Receiver. Each of the appellants will recover their costs as against the Receiver out of the estate of the insolvent.

Appeal dismissed.

(2) (1892) 1 Q. B. 94; 61 L. J. Q. B. 1; 65 L. T. 656; 40 W. R. 71; 56 J. P. 196.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 240 OF 1915.

February 18, 1915.

Present:—Mr. Justice Sankaran Nair and Mr. Justice Oldfield.

In re SUBBA NAIKER, MINOR, by his MOTHER AND NEXT FRIEND, KICHIAMMAL—PLAINTIFF
—APPELLANT.

Hindu Law—Joint family—Gift by managing member of one-tenth of joint family properties to his daughters on occasion of their marriage—Gift, validity of.

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A gift of one-tenth of the joint family properties made by the manager of a joint Hindu family, consisting of himself and his nephew, in favour of his daughters on the occasion of their marriage is perfectly legal and valid and binding on the joint family.

Ramasami Ayyar v. Vengidusami Ayyar, 22 M. 113; *Kudutamma v. Narasimha Charyulu*, 17 M. L. J. 528; *Anivilla Sundararamayya v. Cherla Sitamma*, 10 Ind. Cas. 56; (1911) 1 M. W. N. 422; 9 M. L. T. 469; 21 M. L. J. 695 at p. 704; 35 M. 628 and *Pugalia Vettorammal v. Vettor Goundan*, 13 Ind. Cas. 475; (1912) M. W. N. 89; 11 M. L. T. 103; 22 M. L. J. 321, followed.

Second appeal against the decree of the Court of the Subordinate Judge of Tuticorin, in Appeal Suit No. 58 of 1914, preferred against that of the District Munsif of Tuticorin, in Original Suit No. 116 of 1912.

FACTS.—The 3rd defendant in the case, who was the manager of a joint Hindu family consisting of himself and his nephew, made a gift of a portion of the landed property belonging to the joint family in favour of his daughters on the occasion of their marriage. The nephew sued for a declaration that the gift was not binding on him and that it was in any case unreasonably large in proportion to the joint family property. The District Munsif, Tinnevely, found that, though the properties gifted constituted nearly a fourth of the immoveable properties of the joint family, it was not unreasonable and upheld the gift relying on the cases reported as *Ramasami Ayyar v. Vengidusami Ayyar* (1); *Kudutamma v. Narasimha Charyulu* (2); *Anivilla Sundararamayya v. Cherla Sitamma* (3); and *Pugalia Vettorammal v. Vettor Goundan* (4). On appeal the Subordinate Judge found, however, that the properties gifted were only about a tenth of the joint family property, but otherwise agreed with the District Munsif and held that the cases above-mentioned were conclusive on the point.

Mr. K. R. Rangaswami Iyengar, for the Appellant.—The finding of the lower Appellate Court that the properties gifted were only about 1/10th of the joint family property is based on a misconception. Even assuming that it is correct, the gift cannot bind the plaintiff, who is a co-parcener, and not the son and

grandson of the donor. The test of the binding character of an alienation by a father as against his son is not always the same as it is in the case of an alienation by a co-parcener, who is not the father of the person whom it is sought to bind. In all the cases relied on by the lower Courts the gift was by the father of the person making the gift and the texts cited were those which were only applicable to cases of "father and son." This important distinction between the two cases is clearly pointed out by Krishnaswami Aiyar, J., in *Anivilla Sundararamayya v. Cherla Sitamma* (3). See also *Bachoo Harkisondas v. Mankorebai* (5).

JUDGMENT.—It is argued that though the gift may be binding on the son of the donor, or on a reversioner when made by a widow, it is not binding on the other co-parceners. We are of opinion that this contention cannot be sustained. According to the authorities cited in the decisions referred to by the lower Appellate Court, the gift is binding on the joint family.

There is no other question of law. The second appeal is dismissed.

Appeal dismissed.

(5) 29 B. 51 at pp. 61, 62; 6 Bom. L. R. 268.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 492 OF 1914.

June 1, 1915.

Present:—Justice Sir George Knox, KT.

SHOHRAT SINGH—PLAINTIFF—

APPELLANT

versus

JHAGRU AND OTHERS—DEFENDANTS—

RESPONDENTS.

Landlord and tenant—Abadi land, owner of—Presumption—Tenant in possession of abadi land—Ejection of tenant from holding—Tenant, right of, to remain on abadi land—Burden of proof.

In the United Provinces ordinarily the *zemindars* are under Government owners of every inch of ground within a *mahal* whether that ground be cultivated or waste. If any one other than the *zemindar* seeks to establish a title to any portion of the land, the burden is on him to prove the special circumstances or special contract under which he claims title. [p. 784, col. 2.]

As long as the tenant cultivates the land in the village he will remain. If he abandons or is ejected from the tenancy then, unless there be some special

(1) 22 M. 113.

(2) 17 M. L. J. 528.

(3) 10 Ind. Cas. 56; (1911) 1 M. W. N. 422; 21 M. L. J. 695 at p. 704; 9 M. L. T. 469; 35 M. 628.

(4) 13 Ind. Cas. 475; 22 M. L. J. 321; (1912) M. W. N. 89; 11 M. L. T. 103.

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custom or contract to the contrary, the site reverts to the *zemindar* and the tenant who built the house at his risk has to remove his materials and vacate the site. [p. 785, col. 1.]

Second appeal from the decree of the Additional Subordinate Judge of Gorakhpur.

Mr. Ramakant Malaviya, for the Appellant.

Mr. Nihal Chand, for the Respondents.

JUDGMENT.—The plaintiff in the Court of first instance is, admittedly, the *zemindar* of Mauza Kataila. According to him the defendants were non-occupancy tenants who have been recently ejected from their cultivatory holdings in Mauza Kataila. He says that the defendants in the time of his predecessor and with the permission of his predecessor built a dwelling house and a cattle-shed for the purpose of agriculture. As the defendants have been ejected from all the cultivatory holdings, he contends that they have no longer any right of residence on the land in dispute. He asked them on several occasions to quit but they have failed to do so. His prayer to the Court was that he might be given a decree for possession of 5 *biswas* of *pukhta* land as set out in the plaint and the defendants be directed to remove their materials from the land.

The defendants in their written reply took up the position that the house built by them was built for all purposes for which a house could be used. It had been in existence for more than 12 years, indeed for many generations, hence the plaintiff is not entitled to recover possession. The Court of first instance had no hesitation in awarding the plaintiff a decree. It held that the house was appurtenant to the agricultural holding and that when a tenant ceases to have any holding, his right of occupation in the *abadi* ceases,—this, of course, in the absence of a special contract to the contrary and in this case no special contract was pleaded. It accordingly gave the plaintiff a decree for ejectment.

The defendants went in appeal and their contention in appeal was practically the same as in the Court of first instance, with this addition that there can be no presumption in law regarding the house of a tenant that that house was built merely

for agricultural purposes. They laid stress upon the house being a very big one, consisting of three sections, defendants had always considered it their place of residence, made additions to it from time to time, and the suit was time-barred. It will be noted in these pleadings that no suggestion has been made at any stage of the case that the defendants are possessed of more than one house in the *abadi*. The lower Appellate Court held that there were two points before it for determination; the *first* point that it laid down was whether the house in dispute was or was not appurtenant to the agricultural holding. *Secondly*, it said that there was absolutely no evidence on the record to show that the house-site was an appurtenance to the agricultural holding. There was no presumption in law that the house occupied by a tenant was of necessity an appurtenance to the cultivatory holding. The learned Subordinate Judge said that he could find no precedent to this effect. On the contrary, he referred to the case of *Moti Ram v. Munna Lal* (1) and to the case of *Net Ram v. Tej Ram* (2). As he understood these judgments he held that there was no presumption that a site occupied by a dwelling house of every agricultural tenant was necessarily an appurtenance to the agricultural holding. The question was a question of fact and not of law and it rested with the plaintiff *zemindar* to prove that the house was the appurtenance of the tenancy. In the present case there was no evidence that the defendants held the site as an appurtenance, they must be held to have occupied the site adversely to the plaintiff and his predecessor and they are now owners.

This a startling proposition. It amounts to this that when the *zemindar* wishes to eject a tenant, who has been ejected from his tenancy, from the house occupied by him he must come into Court prepared with the proof that at the beginning of their relations the *zemindar* granted the respondent tenants their position in the *abadi* as appurtenant to their holding. If the *zemindar* cannot prove

(1) S. A. No. 1119 of 1911 decided on the 28th October 1912.

(2) 20 Ind. Cas. 260; 11 A. L. J. 445.

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this, the tenants must be held to have occupied the site adversely to the *zemindar* and if they had been in possession long enough, to be the owners of the house in dispute. The *zemindar* has come to this Court in appeal and has taken five pleas. *First*, that the Court below has erred in holding that the sites are not appurtenances to the holdings from which the tenants have been ejected. *Secondly*, that the Court is in error when it says that as there is no evidence that the tenants held the sites as appurtenances they must be held to have occupied the sites adversely to the plaintiff and his predecessors and have now become owners; *thirdly*, that it was for the defendants to prove that they occupied the land adversely to the *zemindar*. The remaining two pleas do not call for any notice. It must be remembered that throughout the present case there is no suggestion that the defendants have been occupying more than one house. The judgment speaks of sites, but on looking at the plaint I find that the plots are a house and a cattle-shed. There is no suggestion, moreover, from first to last that there was any special contract made between the original tenants and the original *zemindar* at the time of their entering into possession. It is the ordinary case of a site in the village *abadi*. The cases on which the learned Subordinate Judge has relied are not precedents that can be followed in the present case. The circumstances in each case were different from the circumstances here. In *Moti Ram v. Munna Lal* (1), the house in dispute was admittedly a house built and tenanted for agricultural purposes and the contention was that by a special custom prevailing in the village such a house could be sold. It is true that the learned Judge of this Court before whom the case came used these words: "There is no legal presumption that every dwelling house belonging to an agriculturist is appurtenant to his holding. A house may or may not appertain to the holding, and the fact whether it does appertain to the holding must be established in each case upon the evidence." But the learned Judge never went on, as the learned Subordinate Judge in this case, to lay down that if a plaintiff failed to prove that the defendant held the house as appurtenance, the defend-

ant must be held to have occupied the house adversely and to be the owner thereof. In *Moti Ram v. Munna Lal* (1), the *zemindar* was not a party to the suit; the contending parties were the mortgagees of a grove and of the house in the *abadi* and the defendants were the mortgagors. In *Net Ram v. Tej Ram* (2), the contention was that the land in dispute was a piece of waste land in the *abadi* which the co-sharers of the village had permitted the defendants to use for stacking manure and keeping cattle and the house occupied by the tenant was not in dispute at all. The learned Judge in his judgment says: "In the *abadi* of a village, the house of a tenant is the only thing that can be said to be an appurtenance to his holding." What is an appurtenance to the holding of an agricultural tenant, he held, must be decided according to the circumstances of each case. In the case before him the defendants had got a large area of land to cultivate, for which they required a number of bullocks and other accessories they must have a piece of land for their cattle and manure. And if the plot in suit had been allowed to remain in their possession for more than 20 years by the *zemindars* of the village for the use of cattle and manure, the plots had become an appurtenance to the agricultural holding of the defendants. In this case, too, the extraordinary decision was not arrived at that if the plaintiff did not prove that the land in dispute was an appurtenance, the defendants, if they held possession for more than 12 years, had acquired a title by adverse possession and had become owners of the property in dispute. It seems to me that a decision of this kind shows a complete ignorance of the ordinary position in these Provinces of *zemindars* and tenants with reference to a site in the *abadi*. Ordinarily the *zemindars* are under Government owners of every inch of ground within a *mahal*, whether that ground be cultivated or waste. If any one other than the *zemindar* seeks to establish a title to any portion of this land, the burden is on him to prove the special circumstances or special contract under which he claims title. There are, undoubtedly, cases in which it can be established and is established that adverse possession has been held and maintained for a sufficient number of years and that proprie-

LAKSHUMANAN CHETTY v. MUTHIAH CHETTY.

torship has passed away from the *zemindar*, but the presumption is the other way. The *zemindar* admits a tenant into the village and in order to keep him contented and happy grants him a portion of the land within the so-called *abadi* and in some cases no doubt gives him permission to use other portions of the *abadi* for other purposes, but the tenant comes in as a tenant of the *zemindar* both as regards the cultivatory land and the site or sites in the *abadi*. It is contrary to common sense that the *zemindar* would let a person occupy any portion of the land in a *nahal* except for purposes connected with the village. If the person in possession sets up a title adverse to the *zemindar*, it is for him to prove how he acquired the title. The learned Munsif was quite right in holding that the presumption was in favour of the site occupied being an appurtenance to the tenancy. Circumstances are quite different if it be the case that more than one site is held by the contesting quondam tenants, but I need not discuss that question in this judgment for that is not the case before me. The contention that the house was built for every purpose for which a house can be built is not entitled to much weight. The *zemindar* knows that the site in the *abadi* is his by right and that the tenant must know the same. If the tenant chooses to build on the site allotted to him by the *zemindar* a three storeyed house or some house out of the common, the *zemindar* is not bound to go and expostulate with him for having built such a house. As long as the tenant cultivates the land in the village he will remain. If he abandons, or is ejected from the tenancy, then unless there be some special custom or contract to the contrary, the site reverts to the *zemindar* and the tenant who built the three storeyed house at his risk has to remove his materials and vacate the site. This is the general law of the land in my opinion.

The result, then, is that I allow the appeal, set aside the decree of the lower Appellate Court and restore that of the Court of first instance with costs in all Courts.

Appeal decreed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 115 OF 1913.

July 28, 1915.

Present:—Mr. Justice Spencer and
Mr. Justice Coutts-Trotter.

RANA LANA VANA RAVANNA
MANA LAKSHUMANAN CHETTY —
PLAINTIFF—APPELLANT

versus

RAVANNA MANA PANA MANA
MUNA MUTHIAH CHETTY AND OTHERS
—DEFENDANTS —RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 47—Suit, dismissal of, on ground that proper remedy was by execution, if legal—Court trying suit incompetent to determine matter in execution, whether sufficient reason for not treating suit as application—Specific Relief Act (I of 1877), s. 23—Specific performance, stranger to contract, whether entitled to—Practice—Costs—Negligent conduct of case in lower Court—Case not properly set out and proper evidence not produced—Success in appeal—Right to costs.

In the face of section 47 of the Civil Procedure Code, which permits suits to be treated as proceedings, the dismissal of a suit on the ground that the plaintiff must have applied for executing a decree and not have sued to enforce specific performance of a contract is bad in law. The mere fact that the Court which decided the suit would have had no jurisdiction to determine the matter in execution is not a sound reason for not treating the suit as an application in execution. [p. 786, cols. 1 & 2.]

A stranger to a contract is not entitled to enforce specific performance of the same. [p. 786, col. 2.]

Iswaram Pillai v. Taregan, 23 Ind. Cas. 951; 26 M. L. J. 127 and *Jamni Das v. Ram Autar Pande*, 13 Ind. Cas. 304; 16 C. W. N. 97; 11 M. L. T. 6; 9 A. L. J. 37; (1912) M. W. N. 32; 15 C. L. J. 63; 14 Bom. L. R. 1; 21 M. L. J. 115; 34 A. 63; 39 I. A. 7, followed.

An appellant, who, in second appeal, gains an advantage which he had lost by his negligence in the Courts below in not setting out his case properly and by not supporting it, in the first Court, by proper evidence, is not only not entitled to his costs of appeal but must pay the costs of the respondent. [p. 786, col. 2.]

Second appeal against the decree of the District Court of Ramnad at Madura in Appeal Suit No. 276 of 1912, preferred against that of the Temporary Subordinate Judge of Ramnad at Madura in Original Suit No. 128 of 1911.

FACTS of the case sufficiently appear from the judgment.

Mr. C. S. Venkatachariar, for the Appellant:—The dismissal of the suit is illegal. Section 47 of the Civil Procedure Code expressly empowers the Court to treat a suit as an application. The ground on which the learned District Judge based his decision is not sound. The suit was origin-

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ally instituted in the Permanent Sub-Court and the Temporary Sub-Court is only a relieving Court which tries suits transferred to it from the Permanent Court. Justice would have been advanced by the District Judge directing the suit to be treated as an execution proceeding and transferring the same to the file of the Permanent Sub-Court for disposal.

Mr. C. V. Ananthakrishna Iyer, for the Respondents:—The decision of the District Judge is correct, though the ground on which he put it cannot be supported. The contract of which specific performance was sought was between one Annamalai Chettiar and the respondents. The plaintiff was not a party thereto and he could not, therefore, sue for specific performance of that contract. *Iswaram Pillai v. Taregan* (1) and *Jamna Das v. Ram Autar Pande* (2).

Mr. C. S. Venkatachariar, in reply:—As regards the new ground suggested by the other side, the Subordinate Judge found that the plaintiff was the agent of Annamalai Chettiar and the District Judge has not dissented from that finding. So the suit was maintainable by the plaintiff.

JUDGMENT.—The District Judge in appeal has dismissed the plaintiff's suit on the ground that the plaintiff, instead of suing for specific performance of the contract, should have made his application in execution.

We think that the District Judge should not have dismissed the suit when section 47, Civil Procedure Code, permits suits to be treated as proceedings under this section.

The only reason given by the District Judge for this course is that the Court which decided the suit would have had no jurisdiction to determine the matter in execution. This is not in our view a sound reason. This suit itself, though tried by the Temporary Subordinate Court of Ramnad, was instituted in the Permanent Subordinate Court of Ramnad, before which proceedings in execution of Original Suit No. 166 of 1907 of the Chief Court of Rangoon were actually pending at the time of this suit, the decree having been

transferred to that Court for execution. The Temporary Subordinate Court is a relieving Court, trying such suits as are transferred to it from the Permanent Subordinate Court. It was quite within the power of the District Judge to do justice to the parties by directing the suit to be treated as a proceeding in execution and at the same time transferring it to the file of the Permanent Subordinate Court for disposal.

The respondents' Pleader now seeks to support the lower Appellate Court's order by arguing that the District Judge was wrong in thinking that the plaintiff could sue upon the contract entered into by the respondents with Annamalai Chettiar. On the face of it this contention is a good one, as the contract, Exhibit A, purports to be one only between Annamalai Chettiar and the respondent and a stranger would not be entitled to enforce it specifically. [See *Iswaram Pillai v. Taregan* (1) and *Jamna Das v. Ram Autar Pande* (2).] But the appellant's Pleader now maintains that Annamalai Chettiar was plaintiff's agent and that the Subordinate Judge found him in fact to be so. The District Judge pronounced no opinion on the question of fact whether Annamalai Chettiar was the plaintiff's agent or not. The plaintiff let in no oral evidence on the point and contented himself with relying on the documentary evidence of the *vartamanam* and *hundi*, the genuineness of which was not disputed.

We must set aside the District Judge's decree and direct him to take the appeal again on his file and to dispose of it in the manner we have indicated above. When the matter comes before the Court executing the decree, the question whether Annamalai Chettiar was the plaintiff's agent or not will be *res integra* so far as that Court is concerned and either party will thus be in a position to adduce evidence on the point, if so advised.

Though we have allowed the appeal, we recognise the fact that the appellant has secured an advantage which he lost by his negligence in not setting out his case properly and by not supporting it in the first Court by proper evidence. We do so by directing that in this Court he should bear his own and respondents' costs. The

(1) 23 Ind. Cas. 951; 26 M. L. J. 127.

(2) 13 Ind. Cas. 304; 34 A. 63; 16 C. W. N. 97; 11 M. L. T. 6; 9 A. L. J. 37; (1912) M. W. N. 32; 15 C. L. J. 68; 14 Bom. L. R. 1; 21 M. L. J. 1158; 39 I. A. 7.

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lower Court's order as to costs already incurred will stand.

Appeal allowed.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL No. 220 OF 1913.

June 1, 1915.

Present:—Sir Henry Richards, Kt., Chief Justice, and Justice Sir P. C. Banerji, Kt.
Agha Syed DAUD ALI SHAH AND OTHERS—
PLAINTIFFS—APPELLANTS

versus

Pandit RAM PRASAD AND OTHERS—

DEFENDANTS—RESPONDENTS.

Execution, application for, dismissed for default—Attachment, if continues—Civil Procedure Code (Act XIV of 1882), s. 276—Civil Procedure Code (Act V of 1908), O. XXI, r. 57.

A decree was passed against a certain person and his property was attached. While an appeal against this decree was pending in the High Court the application for execution (under the old Code of Civil Procedure) was struck off on account of the decree-holder's default in not paying the process fees. After this the judgment-debtor made a gift of the property:

Held, that under the old Code the attachment was not withdrawn by reason of the dismissal of the application for execution and the transfer made by the judgment-debtor was void. [p. 787, col. 2.]

First appeal from a decree of the Additional Subordinate Judge of Aligarh, dated the 18th March 1913.

Mr. A. E. Ryves (with him Mr. Iqbal Ahmad), for the Appellants.

The Hon'ble Dr. Sundar Lal and the Hon'ble Dr. Tej Bahadur Sapru and Mr. Lakshmi Narain, for the Respondents.

JUDGMENT.—The plaintiffs' predecessor-in-title obtained a decree for mesne profits against Hayat Ali Shah and others on the 28th of August 1905. On the 11th of June 1906, he applied for execution of the decree and on the 23rd of July 1906, certain property of the judgment-debtors was attached. The execution case was struck off on the 18th of April 1907 by reason of the decree-holder's default in paying certain requisite fees. Meanwhile an appeal from the decree was pending in the High Court. After the disposal of the appeal the decree-holders applied for the revival of the execution proceedings on the 16th of July 1909 and they prayed for the sale of the property which had already been attached. On the 18th of August 1908, Hayat Ali Shah made a gift of the attached property in favour of his

mother who, on the 16th of February 1909, sold the said property to the principal respondents. Upon the objection of those respondents the Court released the attachment and thereupon the suit, out of which this appeal has arisen, was brought by the plaintiffs for a declaration that they were entitled to proceed against the attached property on the ground that the gift and the sale were void as against them as the property had been attached on the 23rd of July 1906 and the transfers were made pending the attachment. The question to be considered is whether the property should be deemed to have been under attachment on the date on which the gift by Hayat Ali Shah in favour of his mother was made. On behalf of the defendants it is contended that the striking off of the execution proceedings should raise a presumption that the attachment had been withdrawn. Under the present Code of Civil Procedure if an application for execution is dismissed for default, it must be deemed that the attachment was withdrawn, but there was no such provision in Act XIV of 1882, which was the Code of Civil Procedure applicable at the time when the execution case was struck off on the 18th of July 1907. It has been held by this Court in a number of cases that unless there is a clear order withdrawing the attachment, the presumption will be that the attachment continues. No doubt in some cases the opinion has been expressed that the question is one of the intention of the Court and the parties. If we were to consider the case from that point of view, it is clear that the intention of the Court was to maintain the attachment, for we find that when an application was made to revive the execution proceedings, the Court held, on the 2nd of August 1909, that no further attachment was necessary and that the property was already under attachment. The delay which had taken place in following up the attachment is explained by the fact that an appeal was pending from the original decree in the High Court. We think the Court below was wrong in holding that the property was not under attachment when the gift in favour of the judgment-debtor's mother was made. That gift having been made during the pendency of an attachment was void against the attaching creditor and the sale made by the donee falls with it.

BAKHTAWAR KHAN V. NIAZ-UL-NISSA.

It was urged on behalf of Hayat Ali Shah that he was not a party to the original suit and that it was through an error that his name appears in the array of judgment-debtors. It is admitted that the decree for mesne profits was passed against him. We allowed him an opportunity of getting the decree amended if his statement was true but we are informed that the application made by him has been rejected. We must hold that Hayat Ali Shah was a person against whom the decree sought to be executed was passed. We allow the appeal, set aside the decree of the Court below and decree the plaintiffs' claim with costs in both Courts, including fees in this Court on the higher scale

Appeal allowed.

COURT OF THE BOARD OF REVENUE,
UNITED PROVINCES.

REVENUE REVISION PETITION NO. 43 OF
1912-13 OF MORADABAD DISTRICT.

December 18, 1913.

Present:—Mr. Baillie, S. M., and
Mr. Tweedy, J. M.

BAKHTAWAR KHAN—DEFENDANT—

APPLICANT

versus

Musammat NIAZ UL-NISSA—PLAINTIFF—

RESPONDENT.

Agra Tenancy Act (II of 1901), ss. 60, 185—Notice under s. 60—Time, from when runs—Omission to state date from which time is to run—Material irregularity.

In a notice issued under section 60 of the Agra Tenancy Act the time should run from the date of the issue of the notice and the notice should plainly state this. An omission to do so is a material irregularity. [p. 788, col. 2.]

Application for revision of the orders of the Collector of Moradabad, dated the 4th March 1913, confirming that of the Assistant Collector of Moradabad District, in a case of ejectment.

JUDGMENT.

TWEEDY, J. M.—(November 22nd, 1913).—A good deal of irrelevant matter has been introduced into this case by the Assistant Collector in his unnecessarily long judgment and the aspersions made in it and in the petitions of the applicant on the character of the respondent are unwarranted by the

evidence. The Collector has said all that can justifiably be said in the matter and there is no warrant whatever for supposing that the Tahsil authorities did anything but their duty in respect of the case. The applicants, accustomed to the procedure of our slow moving Courts, were taken by surprise and when they expected to get almost unlimited grace to pay in the decree money they found out too late that they were mistaken. The husband of the respondent was a member of the District Board and it is not surprising that the Tahsil authorities were more energetic about his case than is usual. The applicants are *Mewatis* and, from their attitude in this case, no doubt troublesome tenants whom the *zamindar* was glad to get rid of. But as the Collector has said, all this is obviously not a reason for interference unless there is some definite irregularity in the procedure which can be dealt with under section 185. The holding is a large one (122 *bighas* in extent) and the ejectment of occupancy tenants from such an extent of cultivation is (particularly in Amroha where there is so much friction between landlord and tenant) a serious matter.

I have been through the record with the utmost care and it seems to me that there was a material irregularity in the procedure which prejudiced the applicants. The notice issued under section 60 which directed the tenants to pay up within two months did not state from what date the two months should run. The time should run from the date of the issue of the notice, but the notice should plainly state this and it is quite likely that the applicants were misled by the omission. When the two months were up, the case was put up before the Tahsildar who (perhaps because he noticed this omission) ordered the issue of another *parwana* giving them an additional week. This was issued on 18th October and on 19th October the *chaprasi* returned to the Tahsil, saying the judgment-debtors (of whom there are four) fled away on seeing him so that he could not serve the notice on them. The case was put up on 26th October and the Tahsildar ordered ejectment to take place. This was carried out on the 28th October. On 31st October the applicants appeared in the Tahsil and gave a petition to the effect that they had attended on the 28th October to pay the money, but it had not been taken in the

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Tahsil. Whether this is true or not does not appear, for 28th and 29th October were holidays but the original notice was served on them on 25th August and if the two months' grace be counted from that date, they could pay up till 25th October so that were too late in any case. But the Tahsildar granted them an additional week from the 18th October, the date of the order, or else from the date of service—which, it does not clearly appear—and that notice was never served upon them. I do not believe the story of the *chaprasi* couched in rather vague language that the judgment-debtors "seeing him ran away". It is not likely that they were all four together and if they ran away, it was the *chaprasi's* duty to affix the notice on their house. But the story is most improbable. We find that the order was issued on 18th and that the *chaprasi* returned with his story on the 19th, although the village is several miles distant. I think this story is probably a flight of the imagination and that the applicants' story is true that they had no notice whatever after 25th August. This irregularity then seems to justify interference with the Assistant Collector's order. I think that, subject to due consideration of the landlord's rights, a further opportunity should be given to the applicant to pay in the amount due with all costs. I, therefore, would quash the order of ejectment and direct the issue of a fresh notice.

BAILLIE, S. M.—I concur.

*Application allowed.*COURT OF THE BOARD OF REVENUE,
UNITED PROVINCES.REVENUE PETITION No. 11 OF 1909-10 OF
FATEHPUR DISTRICT.

April 4, 1911.

Present:—Mr. Baillie, S. M.

DWARKA PRASAD—PLAINTIFF—

APPLICANT

versus

DIRGUJ SINGH—DEFENDANT—

RESPONDENT.

Agra Tenancy Act (II of 1901), s. 150—Land held free of rent with or without landlord's consent, distinction between—Ejectment—Remedy.

JANKI KUAR v. LACHMI NARAIN.

Where land is held free of rent, distinction must be drawn between cases where the land is so held (1) with consent and (2) without consent of the landholder. In the latter case Selected Decision No. 3 of 1910 will apply but not in the former case as he is not a tenant and the remedy of the landlord is to proceed by a suit under section 150, Act II of 1901.

Application for revision of the order of the Commissioner of the Allahabad Division, dated the 5th April 1910, confirming that of the Assistant Collector of Fatehpur District, in a case of ejectment.

JUDGMENT.—Even if it be assumed that the entry in the records regarding the field in question as free of rent is correct, I do not think that this case can be considered to be similar to that decided in Selected Decision No. 3 of 1910. In that case it was not doubted that the land was occupied without the consent of the landholder. In the present case the land has been for a very long period, including one Settlement recorded as part of the holding of the appellant. I cannot see that there is the slightest reason to believe that it is occupied without the landholder's consent. The applicant for revision is, therefore, in a dilemma. If the land is part of the holding and included in the rent of the holding, defendant has occupancy rights in it. If the land is held rent free, not being land occupied without the landlord's consent, the respondent is not a tenant and cannot be ejected by suit under section 58. The landlord can only proceed by suit under section 150 and as respondent's period of occupation is over 12 years, he would, even if rent were assessed, be declared to have acquired occupancy rights.

The application is dismissed with costs on applicant.

Application dismissed.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 458 OF 1914.

May 28, 1915.

Present:—Justice Sir P. C. Banerji, KT., and
Mr. Justice Rafique.

JANKI KUAR—PLAINTIFF—APPELLANT

versus

LACHMI NARAIN AND OTHERS—

DEFENDANTS—RESPONDENTS.

Fraud—Suit to set aside decree on ground of fraud—Nature of fraud—Perjured evidence—Suit, maintainability of—Res judicata.

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A suit brought to set aside a decree in a previous suit on the ground that the decree had been passed in contravention of the pleadings in that suit is barred by the principle of *res judicata*. [p. 790, col. 2.]

A suit to set aside a decree on the ground that the decree in the previous suit was obtained by perjured and false evidence, is not maintainable. [p. 791, col. 2.]

Nanda Kumar Howladar v. Ram Jiban Howladar, 23 Ind. Cas. 337; 18 C. W. N. 681; 19 C. L. J. 457; 41 C. 990; *Moruful Huq v. Surendra Nath Roy*, 15 Ind. Cas. 893; 16 C. W. N. 1002, followed.

Logadapatti Chinnayya v. Kotla Ramanna, 19 Ind. Cas. 579; (1913) M. W. N. 387; 13 M. L. T. 421; 25 M. L. J. 228; 38 M. 203; *Baker v. Wardsworth*, (1898) 67 L. J. Q. B. 301; *Patch v. Ward*, 3 Ch. App. 203; 18 L. T. 134; 16 W. R. 441; *Vadala v. Lawes*, (1890) 25 Q. B. D. 310; 63 L. T. 128; 38 W. R. 594; *Abouloff v. Oppenheimer*, (1882) 10 Q. B. D. 295; 52 L. J. Q. B. 1; 47 L. T. 325; 31 W. R. 57, referred to.

Venkatappa Naik v. Subba Naik, 29 M. 179; 16 M. L. J. 56, not approved of.

Second appeal from the decision of the District Judge of Cawnpore.

Mr. Kailas Nath Katju, for the Appellant.

Dr. S. M. Sulaiman, for the Respondents.

JUDGMENT.—This appeal arises out of a suit brought by the plaintiff-appellant for possession of two shops and the rooms on the upper storey of these shops and for a declaration that a decree, dated the 4th of June 1907, of the Court of the Additional Judge of Cawnpore is null and void and ineffectual. The property in question along with other property originally belonged to one Balak Ram. He made an endowment of portions of his property and left the remainder to his two widows. The survivor of them made a gift in favour of one Bindeshri Prasad in 1903. The plaintiff is the successor-in-title of Bindeshri Prasad. In the year 1907 the defendants, the trustees of the endowment, brought a suit against Bindeshri Prasad to set aside the gift, on the ground that the property comprised in it was part of the endowed property and that the donor had no power to make the gift. That suit related to a residential house and apparently to two shops situated in front of the house together with the loft or *bala khana* on the shops. There was a dispute also in that suit in regard to the passage leading to the residential house. On the 4th of June 1907 the Additional Judge of Cawnpore made a decree in favour of the plaintiffs to that suit in respect of the two shops and the loft on the top of them, and dismissed the remainder of the

claim. Subsequently to this the present plaintiff obtained an assignment from the son of Bindeshri Prasad and thus acquired title. He brought the suit, out of which this appeal has arisen, on two grounds. *First*, that the Court acted *ultra vires* in the former suit in deciding the question relating to the two shops, as there was no dispute in that suit in respect to them, and *secondly*, that the decree in the former suit was procured by fraud. The Court of first instance dismissed the suit and its decree was affirmed by the lower Appellate Court. The plaintiff has preferred this appeal and the contentions raised in the plaint have been reiterated in the appeal before us. The case has been argued ably on both sides and a large number of rulings, English and Indian, have been cited.

As regards the *first* ground stated above, we are of opinion that the plaintiff who stands in the shoes of Bindeshri Prasad, who was a defendant to the former suit, cannot set up a higher right than Bindeshri himself could have done. There can be no doubt that Bindeshri could not have maintained a separate suit to set aside the decree on the ground that the decree passed was in contravention of the pleadings and was, therefore, erroneous. His remedy was an appeal, and no appeal having been preferred, the decree, whether right or wrong, has become final between the parties and a fresh suit to set it aside on the ground that it was erroneously passed, offends against the well-known rules of *res judicata*. As regards the *second* ground, section 44 of the Evidence Act provides that a decree obtained by fraud is not binding. It may also be taken as settled by authority that a separate suit may be brought to set aside a decree on the ground of fraud. The question is, what is the nature of the fraud which the plaintiff must allege and establish in order to obtain relief? It is contended on behalf of the plaintiff-appellant, that a plaintiff can maintain his suit on the ground that the decree in the former suit was obtained by producing fabricated evidence, and in support of this contention the ruling in the case of *Venkatappa Naik v. Subba Naik* (1) was mainly relied upon. Other

(1) 29 M. 179; 16 M. L. J. 59.

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rulings also were cited. In the case mentioned above the head-note runs thus:—"A suit will lie to set aside a judgment on the ground that it was obtained by fraud committed by the defendant upon the Court by committing deliberate perjury and by suppressing evidence. The law on this point is the same in India as in England." The facts of that case are not fully stated in the judgment, but reliance is placed by the learned Judges on two English cases, namely, *Aboulouff v. Oppenheimer* (2) and *Vadala v. Lawes* (3). We may mention that those were cases in which a suit was brought either to enforce or to set aside a foreign judgment, and in both instances the ground upon which the judgment was sought to be set aside was the ground of fraud. As pointed out by Jenkins, C. J., in *Nanda Kumar Howladar v. Ram Jiban Howladar* (4), Sir John Rolt in *Patch v. Ward* (5) discussing what is meant by fraud when it is said that a decree may be impeached for fraud, said, "the fraud must be actual, positive fraud, a meditated and intentional contrivance to keep the parties and the Court in ignorance of the real facts of the case and obtaining that decree by that contrivance." Following these observations the learned Chief Justice remarked as follows:—"There is, however, no suggestion that the decree in the previous suit was fictitious or that the plaintiffs in this suit were prevented by any contrivance from placing before the Court in the former suit any materials relevant to the issue, nor has there been any subsequent discovery of evidence that goes to show fraud, or that the Court was misled in the former suit." He held that an error of fact or an error of law committed in the previous suit would not entitle a party to have the decree in that suit set aside on that ground. The same view was held by the same Court in *Moriful Hug v. Surendra Nath Roy* (6). In that case the learned Judges differed from the

decision of the Madras Court to which we have referred above, and held that a decree in a suit cannot be set aside in a subsequent action brought for that purpose on mere proof that the previous decree was obtained by perjured evidence. The learned Judges followed the case of *Baker v. Wardsworth* (7). We think that the weight of authority is in support of the view taken by the Calcutta High Court in the two cases mentioned above, and we are of the same opinion. The reasoning of the learned Judges in both these cases commends itself to us. In the present suit the only fraud alleged is that stated in paragraph 3 of the plaint, namely, that the defendants made alterations in the eleven shops and the stable appertaining to the *thakurdwar* in such a way that they converted two shops into one shop, and one shop into a staircase room, and that owing to this circumstance and to the false evidence which was adduced to prove it, the Court was misled into holding that the two shops now in dispute were part of the endowed property. The present suit, therefore, is a suit based on the ground that a decree in the previous suit had been obtained by perjured and false evidence. That, in our opinion, is not a sufficient ground which would justify a party, who or whose predecessor-in-title was a party to the previous suit, to bring a subsequent suit with the object of setting aside the decree in the former suit. It was open to the defendants to prove by evidence that the allegations made and the evidence adduced on behalf of the plaintiffs were untrue. Agreeing, as we do, with the view taken by the Calcutta High Court in the cases mentioned above, we do not feel ourselves justified in following the decision of the Madras High Court referred to above and we deem it unnecessary to refer to the various other rulings cited at the hearing. The learned Vakil for the appellant has very properly drawn our attention to the recent decision of the same Court in *Logadapatti Chinnayya v. Ketta Ramanna* (8), in which the view taken in that case does not appear to have been approved. It is true

(2) (1882) 10 Q. B. D. 295; 52 L. J. Q. B. 1; 47 L. T. 325; 31 W. R. 57.

(3) (1890) 25 Q. B. D. 310; 63 L. T. 128; 38 W. R. 594.

(4) 23 Ind. Cas. 337; 41 C. 990; 18 C. W. N. 681; 19 C. L. J. 457.

(5) 3 Ch. App. 203; 18 L. T. 134; 16 W. R. 441.

(6) 15 Ind. Cas. 893; 16 C. W. N. 1002.

(7) (898) 67 L. J. Q. B. 301.

(8) 19 Ind. Cas. 579; 38 M. 203; (1913) M. W. N. 387; 13 M. L. T. 421; 25 M. L. J. 228.

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that in the present case the plaintiff was not allowed to adduce evidence in regard to what was alleged by him to be fraud, but this is immaterial as, in our opinion, the allegations in the plaint as to the nature of the alleged fraud would not justify a Court in setting aside a decree passed between the parties in a previous suit, even if the allegations were established. We agree with the conclusion of the Court below and dismiss the appeal with costs.

Appeal dismissed.

COURT OF THE BOARD OF REVENUE,
UNITED PROVINCES.

REVENUE PETITION NO. 24 OF 1912-13
OF FARRUKHABAD DISTRICT.
December 6, 1913.

Present:—Mr. Baillie, S. M.

GAYA SINGH AND OTHERS—PLAINTIFFS—
APPELLANTS

versus

RAGGHA AND OTHERS—DEFENDANTS—
RESPONDENTS.

Ex-proprietary right, relinquishment of, not accompanied by surrender of possession—Relinquishment, effect of.

A relinquishment of ex-proprietary rights, not accompanied by the surrender of possession, is ineffective.

Second appeal from the order of the Commissioner, Allahabad, dated the 26th June 1913, reversing that of the Assistant Collector, Farrukhabad, in a case of ejectment.

JUDGMENT.—On the facts as found by the Commissioner, his decision must be upheld. The relinquishment given by the respondents was ineffective not only as against the pre-emptor as found by the Commissioner, but as against the original vendee if, as has been found, the vendors maintained their possession of their *sir* after the sale. The Commissioner finds that they did maintain their possession of the land which has been recorded as their ex-proprietary tenancy, and that they gave it to the appellant for cultivation. In these circumstances they are still ex-proprietary tenants and the appellant, in regard to this land, their sub-tenant. The fact that there are at the present moment no boudraie dividing the plots in question from the neighbouring plots is not ground for

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refusing to eject. The areas in which the respondents have ex-proprietary rights are definite parts of the fields and as the Commissioner remarks, the boundary can be restored in the ejectment proceedings.

The appeal is dismissed with costs on appellants.

'Appeal dismissed.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 1009 OF 1914.

July 7, 1915.

Present:—Sir Henry Richards, Kt., Chief Justice, and Mr. Justice Rafique.

RAMRATAN LAL AND OTHERS—DEFENDANTS
—APPELLANTS

versus

BHURI BEGAM AND ANOTHER—PLAINTIFFS
—RESPONDENTS.

Fraud—Suit to set aside decree on ground of fraud—Order for personal decree under s. 90 of Transfer of Property Act passed after notice to judgment-debtor, finality of—Transfer of Property Act (IV of 1882), s. 90.

A person who after due notice allows an order for personal decree under section 90 of the Transfer of Property Act to be made against him without opposition is in the same position as a person who had such order made against him after contest. He cannot maintain a suit to set aside such decree without proving positive fraud. [p. 793, col. 2.]

A neglect to inform the Court of the fact that there had been a previous attempt at another stage of the litigation to get a personal decree, even assuming that the neglect was wilful, cannot amount to "fraud" which would entitle the plaintiffs to set aside the decree which was obtained by the defendants under section 90 of the Transfer of Property Act. [p. 795, col. 1.]

Second appeal from a decree of Additional Judge of Farrukhabad.

Dr. Surendra Nath Sen, for the Appellants.
Dr. S. M. Sulaiman, for the Respondents.

JUDGMENT.

RICHARDS, C. J.—This appeal arises out of a suit in which the plaintiffs sought to set aside a decree, which the defendants had obtained under section 90 of the Transfer of Property Act, on the allegation that the same was obtained by fraud. The material facts are practically undisputed. The defendants or their representatives brought a suit upon foot of a mortgage dated the 25th of October 1893 and obtained a decree. They had asked in that suit not only for a decree for sale of the mortgaged

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property but also for a personal decree. This latter part of their claim was disallowed. Some years afterwards the decree-holders applied to the Court for a decree under section 90 of the Transfer of Property Act. Notice of the application was duly served on all the judgment-debtors.

They did not appear and the Court granted the decree, but limited it to the assets of the deceased mortgagor. This is the decree which it is sought in the present suit to set aside. Later on in execution of this decree a house of the judgment-debtors was attached. The male judgment-debtors objected that the house could not be sold on the ground that they were agriculturists. This objection was overruled. There was an appeal by the judgment-debtors which was dismissed. Both the Courts below have granted the plaintiffs a decree, setting aside the decree obtained by the defendants under section 90 of the Transfer of Property Act. The judgment of the Court of first instance is a little misleading unless one reads it as a whole, when carefully considered it is clear that the defendants practised no fraud on the plaintiffs to the present suit in respect of the service of notice of the application for the decree under section 90.

The plaintiffs are *pardanashin* ladies, and it is quite impossible for any litigant to serve process of the Court in any way which would violate the *pardah* of such ladies. When the Court of first instance says that these ladies knew nothing about the decree under section 90, it does not mean that the defendants in the present suit were in any way responsible for their want of knowledge. The ladies were duly served with the notice, so also were the male members of the family. No objection was taken to the granting of the decree under section 90 and no application was ever made to set it aside. The male members who were equally interested with the ladies in opposing the decree, evidently thought that there would be no chance of success. We find, however, when the house was attached in execution of that decree, they opposed the sale on the ground that they were agriculturists.

We now come to the only fraud which is suggested in the present case. The fraud is that the defendants (who then occupied the position of decree-holders) did not inform

the Court that when the preliminary decree was being granted on foot of the mortgage, they had asked for a personal decree and that this had been refused upon the ground that having regard to the date of the mortgage and the position of the judgment-debtors, a personal decree ought not to be granted. Two questions arise. *First*, whether it is open to a party to challenge an order which has been made between the decree-holder on the one side and the judgment-debtor on the other, even where no fraud is alleged or proved. It seems to me impossible to contend that, where (in the absence of fraud) a matter has been decided in execution proceedings relating to the satisfaction of the decree, it is open to the parties to re-open matters which have been so decided by an independent suit. This has been settled by numerous decisions of the various Courts in India and also by their Lordships of the Privy Council.

Some attempt has been made to distinguish between what is called an "*ex parte*" decree or order and a decree or order after contest. I do not think there is any just ground for such a distinction. Assuming a party to have been duly served with notice, if he neglects to come forward and avail himself of the opportunity of preventing a wrong order being made against him, I cannot conceive upon what possible ground he should be placed in a better position than the party who comes forward and informs the Court (in the manner provided by law) of his rights and prevents (so far as he can) a wrong order being made. In my judgment the party who after due notice allows the decree or order to be made without opposition is in the same position as a person who had a decree or order made against him after contest.

The next question is as to the nature of the fraud which must be alleged and proved in order to entitle the plaintiffs to have the decree set aside. On this part of the case Dr. Sulaiman admitted, as I think he was bound to admit, that he could not claim to have a decree under section 90 set aside on any ground of fraud which would not have been sufficient to have a decree in a suit set aside.

RAMRATAN LAL v. BHURI BEGAM.

A large number of cases have been cited on each side. On the part of the appellant the following cases were relied upon: *Mahomed Golab v. Mahomed Sulliman* (1), *Nilmadhub Rai v. Naba Das* (2), *Moruful Huq v. Surendra Nath Roy* (3), *Marochin v. Parsuram* (4), *Janki Kuar v. Lachmi Narain* (5) and *Nanda Kumar Howladar v. Ram Jiban Howladar* (6).

In the case of *Mahomed Golab v. Mahomed Sulliman* (1) Petheram, C. J., quotes at page 618 from the case of *Flower v. Lloyd* (7):—

"Assuming all the alleged falsehood and fraud to have been substantiated, is such a suit as the present sustainable? That question would require very grave consideration indeed before it is answered in the affirmative. Where is litigation to end if a judgment obtained in an action fought out adversely between two litigants *sui juris*, and at arm's length, could be set aside by a fresh action on the ground that perjury had been committed in the first action, or that false answers had been given to interrogatories, or a misleading production of documents, or of a machine, or of a process had been given? There are hundreds of actions tried every year in which the evidence is irreconcilably conflicting, and must be on one side or other wilfully and corruptly perjured. In this case, if the plaintiffs had sustained on this appeal the judgment in their favour, the present defendants, in their turn, might bring a fresh action to set that judgment aside on the ground of perjury of the principal witness and subornation of perjury; and so the parties might go on alternately *ad infinitum*."

In the case of *Nanda Kumar Howladar v. Ram Jiban Howladar* (6) Jenkins, C. J., quotes with approval Sir John Rolt, L. J., in the case of *Patch v. Ward* (8):—

"The fraud must be actual, positive fraud, a meditated and intentional contrivance to

keep the parties and the Court in ignorance of the real facts of the case and obtaining that decree by that contrivance."

In an earlier part of the judgment the learned Chief Justice says:—

"But it is a jurisdiction to be exercised with care and reserve, for it would be highly detrimental to encourage the idea in litigants that the final judgment in a suit is to be merely a prelude to further litigation. The fraud used in obtaining the decree being the principal point in issue, it is necessary to establish it by proof before the propriety of the prior decree can be investigated."

On the other side also a number of cases have been cited including a decision of their Lordships of the Privy Council in the case of *Rajmohun Gossain v. Gourmohun Gossain* (9). That was a case in which a party having expressly agreed not to appeal, in contravention of his agreement presented an appeal and obtained a decree, which he afterwards sought to set up against the other side. It is quite clear that this case was decided entirely upon its own facts and circumstances. The general law as to what constitutes sufficient allegation and proof of fraud to justify the setting aside of a decree in a previous suit was not discussed.

Special reliance was placed on a ruling of the Calcutta High Court in the case of *Lakshmi Charan Shaha v. Nur Ali* (10). This decision was cited with approval by another Bench of the Calcutta High Court in the case of *Kedar Nath Das v. Hemanta Kumari* (11). In this case a decree had been obtained against the plaintiff *ex parte*. The plaintiff succeeded in having the *ex parte* decree set aside but another *ex parte* decree was passed against him. The plaintiff then brought a suit to set aside that decree on the ground that the same had been obtained by means of false evidence. It would appear that the Court held that on the mere allegation that the decree was obtained by false evidence the plaintiff was entitled to re-open the litigation. If we assume that, no just distinction can be drawn between a person against whom

(1) 21 C. 612.

(2) 12 C. W. N. 28 note.

(3) 15 Ind. Cas. 893; 16 C. W. N. 1002.

(4) 10 Ind. Cas. 905.

(5) 30 Ind. Cas. 789; 13 A. L. J. 753.

(6) 23 Ind. Cas. 377; 41 C. 990; 18 C. W. N. 681; 19 C. L. J. 457.

(7) (1879) 10 Ch. D. 327; 39 L. T. 613; 27 W. R. 496.

(8) 3 Ch. App. 203; 18 L. T. 134; 16 W. R. 441.

(9) 8 M. L. A. 91; 4 W. R. 47 (P. C.); 1 Suth. P. C. J. 378; 1 Sar. P. C. J. 723; 19 E. R. 464.

(10) 11 Ind. Cas. 626; 38 C. 936; 15 C. W. N. 1010.

(11) 22 Ind. Cas. 709; 18 C. W. N. 447.

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a decree has been obtained without contest after due notice and a person who has appeared after notice and has been defeated after making the best fight he can. It seems to me that the decision of the learned Judges in the case cited omits to consider the great danger pointed out by Thesiger, L. J., in the case of *Flower v. Lloyd* (7). As the result of the decree of the learned Judges if the plaintiff had succeeded in setting aside the decree on the ground that the evidence advanced by the plaintiff in that suit was false, what was there to prevent the defeated defendant instituting another suit to set aside that decree on exactly similar grounds? This decision does not appear to have met with the universal approval of the Calcutta High Court [see *Moruful Huq v. Surendra Nath Roy* (3)].

I would here like to point out that it is open to question whether a decree or order which has been obtained after due notice is very accurately described as "*ex parte*." It is hardly necessary to remark that an order obtained after notice is very different from an order obtained without notice.

In the present case it seems to me that the neglect to inform the Court of the fact that there had been a previous attempt at another stage of the litigation to get a personal decree, even assuming that the neglect was wilful, could not amount to "fraud" which would entitle the plaintiffs to set aside the decree which was obtained by the defendants under section 90 of the Transfer of Property Act.

The present suit is in reality an "appeal" against the decree of the Court long after limitation. I would allow the appeal.

RAFIQUE, J.—I find that the questions argued at the Bar do not arise in this case. The arguments have proceeded on the assumption that a personal decree under section 90 of Act IV of 1882 was obtained by the defendant-appellant not against the plaintiffs-respondents. On reference to the record I find that no personal decree was passed against them, but a decree against them was passed in their representative capacity against the estate of Imtiaz Ali, deceased, one of the mortgagors. The contention for them challenging the decree as having been fraudulently obtained is based on the assumption of a personal decree and as no such decree was passed, their contention fails. I would, therefore, allow the appeal.

BY THE COURT.—The order of the Court is that the appeal is allowed, the decrees of both the Courts below are set aside and the suit is dismissed with costs in all Courts.

Appeal allowed.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

REVENUE PETITION No. 4 OF 1912-13 OF
ALLAHABAD DISTRICT.

April 24, 1913.

Present:—Mr. Baillie, S. M., and
Mr. Tweedy, J. M.

Musammât FAKHR-UN-NISSA BIBI AND
OTHERS—DEFENDANTS—APPELLANTS
versus

IMDAD ALI AND OTHERS—PLAINTIFFS—
RESPONDENTS.

Ejectment, suit for, against sub-tenant's sub-tenant, when maintainable—Sub-tenant made party after limitation, effect of—Civil Procedure Code (Act V of 1908), O. I, r. 10.

A suit for the ejectment of a sub-tenant's sub-tenant is not maintainable without the sub-tenant being made a party to the suit, and in such a case if the sub-tenant is joined after the expiry of the period prescribed for suits for ejectment, the entire suit still fails. [p. 795, col. 2.]

Second appeal from the order of the Commissioner of the Allahabad Division, dated the 2nd September 1912, reversing that of the Assistant Commissioner of Allahabad District, in a case of ejectment.

JUDGMENT.

BALLIE, S. M.—(April 17th, 1913.)—In the present case the suit was originally brought for the ejectment of Fakhrunnissa and others, who pleaded that they had received the land from one Zainul-abdin. Zainul-abdin was added as a party by order dated 7th October 1911. The Court of first instance dismissed the suit on the ground that it was against persons who were not the sub-tenants of the plaintiff, but the sub-tenants of the plaintiff's sub-tenant. The Commissioner pointed out that Zainul-abdin, the alleged sub-tenant, had been made a party and held that the suit should have been decided on the merits. He proceeded to consider the questions raised and decreed the ejectment. The Commissioner, however, overlooked the fact that Zainul-abdin was added as a defendant after the expiry of the period during which suits for ejectment can be brought. Under Order 1, rule 10, clause 5, the proceedings as against Zainul-

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abdin commenced when the summons was served on him and the suit was therefore, one which should have been dismissed as brought after the expiry of the period prescribed. The case was one in which the claim against the original defendants could not proceed without Zainul-abdin being joined as defendant. The entire claim, therefore, failed. The suit should have been dismissed.

I would allow the appeal and restore the order of the Court of first instance with costs on respondent throughout.

TWEEDY, J. M.—I agree.

Appeal allowed.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL NO. 909 OF 1914.

May 28, 1915.

Present:—Justice Sir Asutosh Mookerjee, KT.,
and Mr. Justice Roe.

LENGA LALUNG—PLAINTIFF—APPELLANT

versus

PENGURI LALUNGANI AND OTHERS—

DEFENDANTS—RESPONDENTS.

Marriage—Restitution of conjugal rights—Lalungs—Custom regarding the residence of son-in-law in father-in-law's house, validity of.

Even if it be assumed that *Lalungs* are Hindus, their marriage relation must be governed by custom which prevails amongst the tribe, provided that the custom is neither immoral nor opposed to public policy. [p. 797, col. 1.]

There is nothing opposed to 'public policy' or 'the policy of the law' or injurious to the public interests, that is, to the interests of the tribe of the parties, or immoral in a tribal custom which requires a son-in-law to reside in the family of his father-in-law, if he can have there free access to his wife. [p. 797, cols. 1 & 2.]

Appeal against the decree of the Subordinate Judge of Nowgong, dated the 15th January 1914, reversing that of the Munsif, Nowgong, dated the 20th September 1913.

Babu Jadu Nath Kanjilal, for the Appellant.

Babu Akhilbandhu Guha, for the Respondents.

JUDGMENT.—This is an appeal by the plaintiff in a suit which has been described as a suit for possession of a wife or for restitution of conjugal rights. The first defendant is the wife of the plaintiff and the second defendant is his father-in-law. The parties are *Lalungs*, a semi-aboriginal tribe who are governed by many customs peculiar to themselves. One of their marriage customs is that the parents of the girl find a husband for her and take him to their house as a member of their family: the offsprings of the marriage enter the clan of the mother. The defendants place reliance upon this custom and contend that the plaintiff is not entitled to a decree for possession of his wife and for her removal from the residence of her father, as it is incumbent upon him to reside in the family of his father-in-law. They allege that the plaintiff is always welcome in the household of his father-in-law where he may have free access to the society of his wife. The Subordinate Judge has held that this custom cannot be disregarded in a Court of law and that the plaintiff is consequently not entitled to succeed in this litigation. On the present appeal it has been argued that the *Lalungs* are Hindus governed by the Hindu Law, and that the plaintiff is, under that law, entitled to possession of his wife, regardless of the custom, which, it is said, is, if not immoral, at least clearly opposed to public policy, as it serves to restrict the personal liberty of the husband.

It is not disputed that as was ruled in the case of *Tekait Mon Mohini Jemadai v. Basanta Kumar Singh* (1), the duty imposed upon a Hindu wife to reside with her husband wherever he may choose to reside is a rule of Hindu Law and not merely a moral duty, and that, consequently, an ante-nuptial agreement on the part of the husband that he will never be at liberty to remove his wife from her paternal abode would defeat that rule of Hindu Law and is invalid on that ground as well as on the ground that it is opposed to public policy. It is also not disputed that under the Muhammadan Law a condition that the wife shall, though

(1) 28 C. 751; 5 C. W. N. 673.

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adult, be at liberty to live in the house of her parents is void, though this question is by no means settled by authority, as is clear from the decision in *Hamid-unnessa Bibi v. Zohir-ud-din Sheik* (2). But there is nothing to show that the *Lalungs* are governed by the Hindu Law, in all respects. Even if it be assumed, however, that the *Lalungs* are Hindus, their marriage relation must be governed by custom which prevails amongst the tribe, provided that the customs are neither immoral nor opposed to public policy. The case before us is clearly not of an immoral custom such as came before the Courts in *Reg. v. Karsan Goja*; *Reg. v. Bai Rupa* (3); *Reg. v. Manohar Raiji* (4); *Uji v. Hathi Lal* (5); *Khemkor v. Umiasankar Ranchhor* (6); *Narayan v. Laving* (7); *Koraga v. Queen* (8). We are also unable to accept the contention of the appellant that the custom alleged in this case is opposed to public policy. As Mr. Justice Burrough observed in *Richardson v. Mellish* (9) public policy is a very unruly horse and when once you get astride of it you never know where it will carry you. These weighty words were adopted and approved by Lord Esher, M. R. in *Cleaver v. Mutual Reserve Fund Life Association* (10). To the same effect are the observations of Cave, J., in *Official Receiver, Ex parte, Mirams, In re* (11). "Judges are more to be trusted as interpreters of the law than as expounders of what is called public policy." We do not see that there is anything opposed to "public policy" or "the policy of the law", as Kekewich, J., puts it in *Hope Johnstone v. Hope Johnstone* (12), in a tribal custom which requires a son-in-law to reside in the family of his father-in-

law; the plaintiff is also entitled to free access to his wife, if he chooses to go to the house of his father-in-law. It is worthy of note that the Courts have recognised the validity of a custom or contract whereby the wife is to remain in her parents' house till puberty is established; *Ka'eeram v. Gendhenee* (13); *Suntosh Ram Dass v. Gera Pattuck* (14); *In the matter of the petition of Dhuro'idhur Ghose* (15); *Surjyamani Dasi v. Kali Kanla Das* (16); *Arumuga Mudali v. Viraraghava Mudali* (17), though a different view is possibly indicated in *Dadaji Bhikaji v. Rukmabai* (18). We are clearly of opinion that the Court should not assist the plaintiff to violate the tribal custom and to remove his wife from the home of her father. We are not prepared to say that it is injurious to the public interests, that is, to the interests of the tribe to which the parties belong, nor is it in conflict with any express law of the Ruling Power: *Hirbae v. Sonabae* (19); *Howard v. Pestonji* (20); *Tara Chand v. Reeb Ram* (21); *Bhanu Nanaji Utpat v. Sundrabai* (22); *Mathura v. Esu* (23); and we are not bound by any rule of public policy to disregard this custom, subject to and with full knowledge of which the plaintiff married the first defendant.

The result is that the decree of the Subordinate Judge is affirmed and this appeal dismissed with costs.

Appeal dismissed.

- (2) 17 C. 670.
- (3) 2 B. H. C. R. 117 at p. 124.
- (4) 5 B. H. C. R. 17 Cr.
- (5) 7 B. H. C. R. 133.
- (6) 10 B. H. C. R. 381.
- (7) 2 B. 140; 2 Ind. Jur. 319.
- (8) 6 M. 374; 8 Ind. Jur. 35; 1 Weir. 560.
- (9) (1824) 2 Bing. 229 at p. 252; 9 Moore 435; 1 Car. & P. 241; R. & M. 66; 3 L. J. (o. s.) C. P. 265; 27 R. R. 603; 130 E. R. 542.
- (10) (1892) 1 Q. B. 147; 16 L. J. Q. B. 128; 66 L. T. 220; 40 W. R. 230; 56 J. P. 100.
- (11) (1891) 1 Q. B. 594; 60 L. J. Q. B. 397; 64 L. T. 117; 39 W. R. 464; 8 Morrell 59.
- (12) (1904) 1 Ch. 470; 73 L. J. Ch. 321; 90 L. T. 253; 20 T. L. R. 282.

- (13) 23 W. R. 178.
- (14) 23 W. R. 22.
- (15) 17 C. 298.
- (16) 28 C. 37; 5 C. W. N. 195.
- (17) 24 M. 255; 11 M. L. J. 69.
- (18) 10 B. 301.
- (19) (1847) Perry O. C. 110; 4 Ind. Dec. (o. s.) 100.
- (20) (1852) Perry O. C. 535; 4 Ind. Dec. (o. s.) 485.
- (21) 3 M. H. C. R. 50 at p. 56.
- (22) 11 Bom. H. C. R. 249.
- (23) 4 B. 545.

JASODA KUAR *v.* DALAIL SINGH.
COURT OF THE BOARD OF REVENUE,
UNITED PROVINCES.
REVENUE PETITION NO. 6 OF 1912-13
OF CAWNPORE DISTRICT.
December 4, 1913.
Present:—Mr. Baillie, S. M.
Musammat JASODA KUAR—DEFENDANT—
APPELLANT

versus
Kuar DALAIL SINGH—PLAINTIFF—
RESPONDENT.

Agra Tenancy Act (II of 1901), s. 11—Tenant's possession for over 12 years—Tenant, meaning of—Non-payment of rent for a number of years, effect of.

Occupancy rights are acquired by twelve years' possession as a tenant but the years in which there was no contract in regard to rent, will not count towards the acquisition of occupancy rights, whether he held with or without the consent of the land-holder.

Second appeal from the order of the Commissioner of the Allahabad Division, dated the 26th June 1913, reversing that of the Assistant Collector Cawnpore District, in a case of ejectment.

JUDGMENT.—The objection taken to the Commissioner's decision is that he has himself constructed for the plaintiff an entirely new case. The plaintiff did not rely on the subletting as curtailing a part of the period for which appellant has been in cultivating possession. It is, in my opinion, unnecessary to decide whether the Commissioner was entitled to take this matter into consideration or not, as the appellant's case completely fails on the grounds put forward by the plaintiff himself. Occupancy rights are acquired by twelve years' possession as a tenant and a tenant is a person who is liable to pay rent unless some contract, express or implied, is proved by which he is freed from payment. It is certain that in this case appellant held for a number of years in which there was no contract in regard to rent. Whether he held with or without the consent of the land-holder, he was not during that time a tenant.

The appeal is dismissed with costs on appellant.

Appeal dismissed.

MAHIM CHANDRA *v.* HARA KUMARI.
CALCUTTA HIGH COURT.
SECOND CIVIL APPEALS NO. 2597 OF 1910,
NO. 889 OF 1912 AND NO. 1318 OF 1913.
July 13, 1914.
Present:—Mr. Justice Holmwood and
Mr. Justice Chapman.
IN NOS. 2597 OF 1910 AND 889 OF 1912
MAHIM CHANDRA SARKAR—PLAINTIFF
—APPELLANT

versus
HARA KUMARI DASEE AND OTHERS—
DEFENDANTS—RESPONDENTS
IN NO. 1318 OF 1913
HEMANGINI DASEE AND ANOTHER—
PLAINTIFFS—APPELLANTS

versus
MAHIM CHANDRA SARKAR—
DEFENDANT—RESPONDENT.

Hindu Law—Will—Rules of construction—Bequest in favour of daughter—Absolute estate, subject to the sheba—Charge on property—Testamentary power—Gift by Hindu widow having absolute power of alienation—Gift in favour of daughter's daughter.

In construing the Will of a Hindu it is not improper to take into consideration what are known to be the ordinary notions and wishes of Hindus with regard to the devolution of property. It may be assumed that a Hindu generally desires that an estate, especially an ancestral estate, shall be retained in his family, and it may be assumed that as a general rule women do not take an absolute estate of inheritance which they are enabled to alienate. [p. 801, col. 1.]

But where the property in the Will was the separate property of the testator, and the major portion of it was not ancestral, and his object was to make provision for his daughter who, though married, was too young at the time to have children:

Held, that the testator, a Judge's *sheristadar*, by conferring an absolute power of alienation on the daughter subject to the keeping up and maintaining the *sheba*, must be presumed to have intended contrary to the general presumption and practice of Hindus to confer an absolute right of inheritance on the daughter; [p. 801, col. 2.]

that the provision for keeping up the *sheba* was merely a collateral charge on the property in whose hands it may be and did not affect the absolute character of the gift; [p. 802, col. 2.]

that a reversioner of the testator in face of the testator's daughter holding an absolute estate could not sue either herself or her heirs for administration of the property as trust property. [p. 802, col. 2.]

When their Lordships of the Judicial Committee speak of a general rule in connection with Hindus' knowledge that women do not take an absolute estate of inheritance which they are able to alienate, it cannot be held that they meant a rule of Hindu Law, since the rule of Hindu Law with regard to gifts to mothers and daughters is the reverse. [p. 801, col. 2.]

A daughter being a person to whom the testator can, under the Hindu Law, give an estate of inheritance, if the Will shows that it was intended that she should have the estate of inheritance, a benignant construction is to be used even if the language is ungram-

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matal or mistaken as to name or description, or in any other manner incorrect, provided it sufficiently indicates what was meant, that meaning shall be enforced to the extent and in the form which the law allows. [p. 801, col. 2; p. 802, col. 1.]

There is no universal presumption with regard to mother or daughter that in every case the estate she takes is less than would be taken by a male. [p. 802, col. 1.]

Decided cases, too numerous to be now questioned, have determined that the testamentary power exists and may be exercised at least within the limits which the law prescribes for alienation by gift *inter vivos*. [p. 802, col. 1.]

There is no application of the English Law of powers to Hindu Wills. [p. 803, col. 1.]

In ordinary life-estates of Hindu widows, the gift of a widow would be taken not from her but from the testator, but where the widow, under a Will by her husband, has absolute power of alienation in derogation of the rights of the sole reversioner—her daughter who is only entitled to the residue—a gift by the widow in favour of the daughter's daughters is valid and a reversioner of the testator in possession of the property cannot plead his right as reversioner against a suit by the donees, who are also heirs of the testator's daughter, to eject him as a trespasser, even though the gift by which they originally obtained title should fail. [p. 803, cols. 1 & 2.]

Second appeals against the decrees of the District Judge of Pabna, dated May 13th, 1910, affirming that of the Munsif, Pabna, dated August 24th, 1909.

Mr. B. Chakravarti (with him Mr. B. K. Lahiri and Babu Surendra Nath Ghosal), for the Appellant in No. 2597 of 1910, No. 889 of 1912 and Respondent in No. 1318 of 1913.

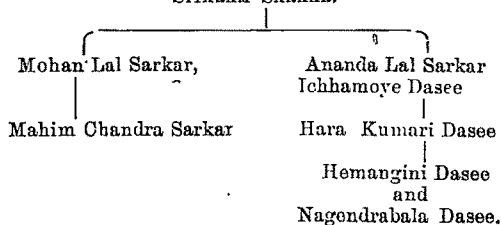
Mr. S. P. Sinha (with him Dr. Dwarkanath Mitra and Babu Tarakishore Pal Chowdhry), for the Respondents in No. 2597 of 1910.

Dr. Dwarkanath Mitra with him Babu Tarakishore Pal Chowdhry, for the Respondent in No. 889 of 1912.

Mr. M. M. Chakravarti, for the Appellants in No. 1318 of 1913.

JUDGMENT.—The question that arises in these three second appeals is principally one of interpretation of the Will of one Ananda Lal Sarkar, which has already been partially construed by a Bench of this Court in the case of *Hara Kumari Dasi v. Mohim Chandra Sarkar* (1). The position of the parties can be seen from the following genealogical table—

SITARAM SARKAR.



(1) 12 C. W. N. 412; 7 C. L. J. 540.

Ananda Lal Sarkar died on the 11th March 1866. His widow Ichhamoye died on the 30th September 1898. Mahim Chandra Sarkar filed a suit against Hara Kumari on the 19th July 1904 for the construction of the Will of Ananda Lal, after withdrawing his suit for revocation of Probate but still setting up very prominently that the Will was a forgery. Maclean, C. J., in the opening of his judgment said: "If the suit had come before me, I should have dismissed it summarily. But we are told that the appeal to this Court which was existing when the decision now appealed against was given, has since been withdrawn. So we will deal with the question of the construction upon the merits." He appears to have held that but for the gift over to Hara Kumari, the Will would have given the widow an absolute estate. Though there is no clear and absolute gift to the widow in the first portion of the operative clause of the Will, the words "you will have the right and power to alienate by gift or sale all the aforesaid moveable and immovable properties," would make it difficult to say that the widow did not take the property absolutely. The gift over to the daughter, however, follows in the following terms:—"my daughter Hara Kumari shall become entitled to and possessor of whatever property will remain after your death"—the words are *satyaban dakhalkar*, or literally, possessor with title—"and she shall enjoy the same keeping up and maintaining the aforesaid *sheba*, etc." Later on he says, "the said daughter shall have the same rights as you have (it should be equal rights), and he to whom my daughter may willingly give away those properties shall, while possessing the same and keeping up and maintaining the *sheba*, enjoy them." We have put this last clause rather more literally than in the translation in the report of the case in the books, because on this turns one of the main contentions that the whole Will was a devolution in trust for the sole purpose of keeping up the *sheba* and provided merely maintenance for the daughter.

The question before the Court in that case was, what interest did the widow Ichhamoye take. The question before us now, is what interest did the daughter Hara Kumari take, and that question does not appear to have been gone into in the previous case. The Court, however, held that the widow took for life with power of alienation; but to the extent to which such power was not exercised

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the daughter took the property with equal rights to those conferred on the widow.

On the 8th March 1908, Hara Kumari executed a deed of gift in favour of her daughter, Hemangini, and on the 8th April 1908 a similar deed in favour of Nagendrabala. On the same date she also conveyed a *patni* to Hemangini.

On the 1st July 1903 Mahim Chandra Sarkar instituted the administration suit against Hara Kumari on the ground of waste, and it is out of this suit that Appeal No. 2597 of 1910 arises. On the death of Hara Kumari in August 1910, her daughters remained on the record as respondents having been brought on previously as assignees of the property during her life-time. On the 29th September 1910 Hemangini and Nagendrabala filed a suit to recover possession of the property on the basis of a gift to Hemangini by her grandmother, Ichhamoye. This is the subject of Appeal No. 1318 by Hemangini, against whom the lower Courts decided that Ichhamoye only having a life interest could not make a gift to a person not in existence at the time of her husband's death and that the property, therefore, on her death went to the reversioner. On the 19th December 1910, Mahim Chandra Sarkar filed a rent suit against the *darpatni-dars* of Hemangini making Hemangini and Nagendrabala parties. Out of this the appeal No. 889 arises.

We will deal with the main question first, which is, what interest did Hara Kumari take under her father's Will. To decide this it is necessary to go more fully into the Will than was done by this Court on the previous occasion. The learned Judge in the lower Appellate Court has somewhat light-heartedly held in the appeal in the administration suit that under the construction put by this Court in 1908 upon the Will the present defendant takes the estate absolutely, holding, as we have seen erroneously, that the judgment in that case was exhaustive. But it is obvious that no question of the nature of Hara Kumari's estate was either raised or decided in that case. The sole question before the Court was the nature of the widow's estate.

Turning, therefore, to the Will itself we find that the testator clearly recites that the family had ancestral *zemindari* in Pabna District, that there were seven brothers of whom the testator and Mohan Lal Sarkar,

the father of the present appellant, alone survived, that one brother died childless and the names of the widows of the other four are given together with the minor son of one of them. He then recites that on the 11th *Ashar* of the current year they determined their shares in equal parts and after putting them into writing they are in enjoyment separately and that the testator with money acquired in his service as *sheristadar* had purchased certain *taraf* (estate) and gave 2-annas share of the said estate to his brother Mohan Lal, six-annas share to the brother's widow who had a son and reserved the remaining eight-annas share of his own self-acquired property to himself. He then recites that he has also acquired by his own exertions money by service, with which he had acquired two *pucca* houses at Bhowanipur, Calcutta, the Murshidabad property where he was the *sheristadar*, and Government paper, etc., etc., in which his brother, his nephew or his brothers' widows have no concern. He then proceeds to recite that he has no male issue but only a daughter named Hara Kumari, and although he has given her in marriage he felt it his duty to support her. For this reason he executes this Will in favour of his wife Ichhamoye; and then follow the terms which have already been discussed and which appear to us to amount to an absolute gift as far as the daughter is concerned, whether it be regarded from the point of view of the clear provisions of Manu and the *Dayabhaga* that a gift to a daughter makes the property her *stridhan* and the principle that the bequests of a Hindu Will follow the Hindu Law of gift, or whether it be regarded as a life-estate to the widow with remainder to a single living daughter with no limitation to her ownership except the charge on the estate to keep a certain *sheba* or religious endowment.

Against this view three main contentions are taken: *first*, that the Privy Council has modified the rule of the *Dayabhaga* by laying down in more than one case that a Hindu must be presumed not to intend to allow his estate to descend in the female line unless there are express words to indicate such intention; *secondly*, that there is a power of appointment given to the daughter enjoining her to transmit the estate to some unknown person, and if that person was not living at the time of the testator's death the estate goes to the

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reversioners; and, *thirdly*, that the whole object of the Will was to create a trust in favour of the *sheba* and that the respondent had no beneficial interest in the estate, apart from the *sheba*, which reverts on her death to the reversioner.

Reliance is placed for the plaintiff-appellant upon the case of *Brij Lal v. Suraj Bikram Singh* (2) which, it is contended, is on all fours with this case. A more clearly distinguishable case can hardly be imagined, for there the lady was given no estate in terms and she was vested with the power of appointing an heir to the testator either in her life-time or by Will. There, as the Judicial Commissioners pointed out, the words of the disposition to the two ladies are identical. Here they are markedly and, in our opinion, intentionally different, and as the learned Judicial Commissioners pointed out, in order to ascertain the intention of the testator former Wills cannot be looked at. All we can derive from the consideration of cases concerning other Wills are principles of construction applicable to all Wills. One of these principles which is cited by the Judicial Commissioners in the rule of the Privy Council in *Mahomed Shumsool Hooda v. Shewukram* (3), is that in construing the Will of a Hindu it is not improper to take into consideration what are known to be the ordinary notions and wishes of Hindus with regard to the devolution of property. It may be assumed that a Hindu generally desires that an estate, especially an ancestral estate, shall be retained in his family, and it may be assumed that as a general rule at all events women do not take an absolute estate of inheritance which they are enabled to alienate.

But what are the facts we have here? The recitals as to the nature of the property in the Will are not disputed, although it is faintly suggested that there was no actual partition. The major portion of the property is not ancestral. It is the

separate property of the testator. He says that his object was to make provision for his daughter. She was then married, but too young to have children; subsequent to his death she had two daughters. He had, therefore, every reason to hope she might have sons, and he must be presumed to have known as a Judge's *sheristadar* that a bequest by a father to a daughter is under the Hindu Law an absolute estate, and by his conferring an absolute power of alienation on the daughter subject to the *sheba*, he must have intended, contrary to the general presumption and practice of Hindus, to confer an absolute right of inheritance on the daughter. We cannot hold that, when their Lordships of the Judicial Committee speak of a general rule in connection with Hindus' knowledge that women do not take an absolute estate of inheritance which they are able to alienate, they meant a rule of Hindu Law; since we know that the rule of Hindu Law with regard to gifts to mothers and daughters is the reverse. The judgment delivered in the Judicial Committee by Sir Andrew Scoble in the case of *Radha Prasad Mullick v. Ranee Mani Dassee* (4) does not carry the contention any further, since he merely cites with approval the previous *dictum* of the Privy Council in *Mahomed Shumsool Hooda v. Shewukram* (3) and found that in the case then before their Lordships the testator had clearly succeeded in showing that his daughters were not to have more than what is generally known to be a woman's estate in his property. On the principles laid down by Wills, J., in the case of *Jatindra Mohan Tagore v. Ganendru Mohan Tagore* (5), a daughter being a person to whom the testator can under the Hindu Law give an estate of inheritance, if the Will shows that it was intended that she should have the estate of inheritance, a benignant construction is to be used even if the language is ungrammatical or mistaken

(2) 16 Ind. Cas. 92; 34 A. 405; 16 C. L. J. 47; 16 C. W. N. 745; 9 A. L. J. 802; (1912) M. W. N. 646; 23 M. L. J. 38; 12 M. L. T. 1; 14 Bom. L. R. 827; 15 O. C. 270.

(3) 22 W. R. 409; 2 I. A. 7; 14 B. L. R. 226.

(4) 35 C. 896; 35 I. A. 118 at p. 128; 12 C. W. N. 729 (P. C.); 10 Bom. L. R. 604; 8 C. L. J. 48; 5 A. L. J. 460; 18 M. L. J. 287; 4 M. L. T. 23.

(5) 18 W. R. 359; 9 B. L. R. 377; Sup. Vol. I. A. 47 2 Suth. P. C. J. 692; 3 Sar. P. C. J. 35.

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as to name or description, or in any other manner, incorrect provided it sufficiently indicates what was meant, that meaning shall be enforced to the extent and in the form which the law allows. It is idle to contend that the use of the words "a man" in the judgment excludes females whom the Hindu Law allows to take such bequests. There is no universal presumption with regard to mother or daughter that in every case the estate she takes is less than would be taken by a male: see *Kollany Kooer v. Luchmee Pershad* (6), *Thakur Singh v. Nokhe Singh* (7), *Ramasami v. Papayya* (8). In the case of *Bai Motivahu v. Bai Mamubai* (9), their Lordships of the Judicial Committee held that decided cases too numerous to be now questioned have determined that the testamentary power exists, and may be exercised at least within the limits which the law prescribes for alienation by gift *inter vivos*. The case was in many respects similar to the present case, and their Lordships say, it appears to them to follow from the first taker (who is the widow) being allowed to have only a life-interest that her possession is sufficient to complete the executory bequest which follows the gift for life.

It is sought to distinguish this case, because there was a power of demise by Will given to the daughter. But the only distinction is that in consequence of such power being given, the daughter did not take an absolute estate; but there was no principle of Hindu Law which stood in the way to prevent the testator from substituting his daughter for himself as the person empowered to designate a person who was alive at the time of the testator's death. In the Will before us we can find no such power to designate an heir to the testator. The daughter has absolute power, subject to the trust, to alienate the whole property to whomsoever she please. This is an absolute estate which takes effect on the death of the life-tenant. We find, therefore, that there is nothing in the decision of the Privy Council to

derogate from the rule of Hindu Law that the father can make an absolute gift to his daughter, and that there was no power of appointment to the daughter enjoining her to nominate an heir or successor to her father's estate, and *thirdly*, that the provision for keeping up the *sheba* was merely a collateral charge on the property in whosever's hands it may be and did not affect the absolute character of the gift. That being so, the plaintiff calling himself the reversioner has no cause of action and cannot maintain the suit for administration against the respondent.

But it is argued that the *shebaitship* passes by law to the reversioner on the death of the last *shebait*. This point cannot arise in this appeal, since the suit for administration was brought in the lifetime of Hara Kumari; nor do we think that any specific estate was devised for the purpose of the alleged *sheba*. It is evident from the Will itself and from the translation cited by Maclean, C. J., in his judgment that there were several pious intentions which the testator classed together as *shebas*. No specific sum is assigned to any of them and the injunction appears to go no further than the expenditure of a reasonable amount on them. These objects were no doubt a charge on the property; but the property was not left in trust for those objects alone, nor can the reversioner in face of the lady holding an absolute estate sue either herself or her heirs for administration of the property as trust property. The Appeal No. 2597 of 1910, therefore, must be dismissed with costs.

Appeal No. 889, which arises out of the rent suit against the *darpatnidars* of Hara Kumari's daughters brought on the record after her death, must be dismissed on the same considerations, *first* because the *patni* is vested in the defendants by alienation during Hara Kumari's life, *secondly*, because they are Hara Kumari's heirs, the property being *stridhan* and the plaintiff had no title whatever to any of the properties left by Hara Kumari. Appeal No. 889 of 1912 must, therefore, also be dismissed with costs.

As regards Appeal No. 1318 of 1913, the case is somewhat different. There the respondent, Mahim Chandra Sarkar, has got possession of the property which was given to

(6) 24 W. R. 395.

(7) 23 A. 309; A. W. N. (1901) 84.

(8) 16 M. 466; 3 M. L. J. 205.

(9) 24 I. A. 93; 21 B. 709; 1 C. W. N. 366.

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Hemangini by her grandmother, Ichhamoye, who had only a life-interest. But upon the death of Ichhamoye the property did not revert to Mahim Chandra Sarkar as the reversioner of her husband, because he had already made a valid bequest of it to his daughter Hara Kumari. She was, therefore, the sole reversioner and the property being vested in her and having descended to her heirs, their title cannot be extinct if they sue within 12 years of her death or within 12 years of Mahim Chandra Sarkar's assumption of adverse possession. It is, therefore, necessary to see when the plaintiffs were dispossessed. This was in *Kartik* 1306 corresponding to October 1899. They brought their suit on the 23rd September 1910 well within 12 years of their dispossession.

The error committed by the lower Courts in deciding this suit appears to us to be that they erroneously held that the defendants, Mahim Chandra Sarkar, was the reversionary heir of Ichhamoye's husband, Ananda Lal Sarkar. Admittedly, this appeal depends like the others on the question of the construction of Ananda Lal's Will, and if Hara Kumari was Ananda Lal's reversionary heir in absolute estate as has been held in the other cases, it is clear that the defendant-respondent can have no title whatever as reversioner to Ananda Lal's estate. The estate vested in Hara Kumari and has descended to the plaintiffs and the defendant is a pure trespasser.

The only difficulty is that they claimed possession on the basis of the gift from Ichhamoye which, it is said, failed on her death, if the estate Ichhamoye took was the ordinary estate of a Hindu widow. But we agree with Maclean, C. J., that the estate she took was something more than this and that there is no reason why she should not take the life-interest *plus* the power of alienation which, though perhaps analogous to what is known as a power of appointment in English Law, cannot be governed by the rules of English Law relating to such appointments. The Privy Council in *Bai Motivahu v. Bai Mamubai* (9) expressly says that there is no application of the English Law of powers to Hindu Wills. In ordinary life-estates of Hindu widow, the gift of the widow would be taken not from her but from the testator; but here she had absolute

power of alienation in derogation of the rights of the sole reversioner, her daughter, who was only entitled to the residue. It would be idle to say that all alienations which Ichhamoye may have made to strangers of her own free will are recoverable by the defendant-respondent as reversioner. They are recoverable, if at all, only by Hara Kumari and her heirs.

We think, on the construction we have put on the Will, the gift to Hemangini and her sister was valid and that the defendant-respondent cannot plead his right as reversioner against a suit by the heirs of Hara Kumari to eject him as a trespasser, even though the gift by which they originally obtained title should fail. Before they brought the suit, they had added to it a better title which concludes the defendant who has no title whatever. To hold otherwise would be to interpret the Will in one sense in two of these appeals and in a different sense in the third.

For all these reasons, Appeal No. 1318 of 1913 is decreed and the plaintiffs are declared to be entitled to recover whatever portion of the property claimed appertains to the estate of Ananda Lal Sarkar as set out in the Will, unless it had already passed out of the estate before the date of the gift. To decide these questions it is necessary to remand the case to the lower Court for a decision on issues Nos. 9 and 15, which were not decided by the judgment in appeal. The lower Appellate Court will decide these issues if there is evidence on the record in regard to them, otherwise it will itself take such evidence or cause it to be taken by the Court of first instance and make a decree according to the directions contained in this judgment, that the plaintiffs do recover the lands to which they may be entitled under our judgment with costs in proportion to their success.

Appeals Nos. 2597 of 1910 and 889 of 1912 dismissed.

Appeal No. 1318 of 1913 decreed.

SITAL PRASAD v. BISHEN DAT.

KAILASH CHANDRA NATH v. SHEIKH CHHENU.

COURT OF THE BOARD OF REVENUE,
UNITED PROVINCES.

REVENUE PETITION No. 11 of 1909-10

OF BANDA DISTRICT.

August 22, 1912.

Present:—Mr. Baillie, S. M., and

Mr. Brown, J. M.

SITAL PRASAD AND OTHERS—DEFENDANTS—
APPELLANTS*versus*

BISHEN DAT—PLAINTIFF—RESPONDENT.

*Agra Tenancy Act (II of 1901), s. 22—Succession—
Last male occupancy tenant dying before Tenancy Act—
Widow dying after Tenancy Act—Daughter's son, if col-
lateral—Co-sharing, if necessary.*

One R who was the last male occupancy tenant of the holding in dispute died before the present Tenancy Act came into force and upon his death, his widow succeeded. She died after the Tenancy Act had come into force. R's daughter's sons who were not born at R's death claimed occupancy rights upon the death of the widow. The claim was resisted by the *zemindar* on the ground that they did not share in cultivation with R.

Held, that the daughter's sons were not collaterals and that under the old Act, which applied in this case, they could succeed without co-sharing in the cultivation.

Second appeal from an order of the Commissioner of the Allahabad Division, dated the 7th June 1910, reversing that of the Collector of Banda District, in a case of correction of *jamabandi*.

JUDGMENT.

BAILLIE, S. M.—(August 13th, 1912.)—The dispute was as to the entry to be made in regard to the present occupant of the holding of one *Musammât Daryai*, who was found by the Commissioner to have succeeded as a widow to the holding of her husband, Raman, who is said to have died nearly 40 years ago. The appellants are the daughters' sons of Daryai and Raman. The Assistant Collector rejected their claim to be recorded as occupancy tenants on the ground that they were not born at the time of Raman's death and could not have shared in cultivation with him. The Collector held that Daryai having inherited occupancy rights under the former Act had full rights and was able to transmit them to her daughters' sons who shared with her in cultivation. The Commissioner held that *Musammât Daryai* had only a life-interest under Hindu Law and could not, therefore, transmit her right of occupancy. None of these decisions appear to me to state the law on the subject directly. When Raman died rights in an occupancy holding devolved as

if it were land, subject to the single condition that a collateral succeeding must have shared in cultivation with him. It is the analogy of the collateral which has probably misled the Commissioner. The present claimants are not collaterals and could have succeeded to Raman without sharing in cultivation. They were not alive at the time, but the daughters of Raman who are still alive were then in existence. Raman's widow succeeded for life, but the right to inherit after her death accrued to the daughters without any condition as to their co-sharing in cultivation.

I hold that the daughters are now the occupancy tenants and that as they have allowed the names of their sons to be entered on their behalf, the names of the sons may now be entered as enjoying the rights their mothers inherited, that is to say, as having occupancy rights. I would allow the appeal with cost on respondent.

Pleader's fee, Rs. 16.

BROWN, J. M.—I concur.

Appeal allowed.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 1740 of 1912.

July 14, 1914.

Present:—Mr. Justice Holmwood and
Mr. Justice Chapman.KAILASH CHANDRA NATH AND ANOTHER
—PLAINTIFFS—APPELLANTS*versus*

SHEIKH CHHENU—DEFENDANT—

RESPONDENT.

Registration Act (III of 1877), s. 17 (n)—Receipt releasing liability to pay compound interest as written in mortgage-deed, if required registration.

A receipt by a mortgagee releasing the mortgagor from the liability to pay compound interest as written in the mortgage-bond, does not require registration, and operates as a full acquittance for the money already paid. [p. 805, col. 1.]

Appeal against the decree of the District Judge of Tippera, dated April 11th, 1912, affirming that of the Munsif of Brahmanbaria, dated May 8th, 1911.

Mr. Casperz (with him Babus Dwarka Nath Chakravarti and Birendra Chandra Das), for the Appellants.

Babu Sasulhar Roy, for the Respondent,

ALA BUX v. RADHAY LAL.

JUDGMENT.—[In this second appeal two questions have been raised, *first*, that the receipt (Exhibit A) not being registered could not be admitted in evidence, being a document which purported to affect the terms of the mortgage; and, *secondly*, assuming that it could be looked at, the release really means that there is a release of four years for which payment has been made, and not a waiver in future.

As regards the first point, we think, the matter is concluded by the decision of the Full Bench in *Jiwan Ali Beg v. Basa Mal* (1), which has now been enacted into law by clause (n) of section 17 of the Registration Act. We, therefore, think that registration was not necessary and that the receipt operates as a full acquittance for the money already paid.

As regards the question of waiver, the words contained in the document are a clear waiver. They say "be it known that I release you from the liability to pay compound interest as written in the said mortgage-bond;" and we can find nothing in the law or in any authority which would require such waiver to be registered; although under the terms of section 92 of the Evidence Act it undoubtedly must be in writing. In the present case this question is rather an academical one, as the difference in the decree would be a matter of about 8 annas. We, therefore, do not think it necessary to disturb in any way the decree of the lower Appellate Court, and the appeal must, therefore, be dismissed with costs.

Appeal dismissed.

(1) 9 A. 108; A. W. N. (1886) 310.

COURT OF THE BOARD OF REVENUE,
UNITED PROVINCES.

REVENUE PETITION NO. 2 OF 1913-14
OF FARRUKHABAD DISTRICT.

March 26, 1914.

Present:—Mr. Baillie, S. M., and
Mr. Tweedy, J. M.

ALA BUX AND OTHERS—APPELLANTS

versus

RADHAY LAL AND OTHERS—RESPONDENTS.

Custom—Resumption, right of—Wajib-ul-arz, statement in, of one interested party, if sufficient proof of custom.

A *wajib-ul-arz* which merely contains a statement of a *mukhtar* of a *zemindar* that he has the power to take away all *muafis* is not sufficient evidence of custom of resumption as it contains merely the statement of one interested party and is not prepared after such inquiry as is contemplated by the law. [p. 805, col. 2.]

Second appeal from the order of the Commissioner of the Allahabad Division, dated the 21st August 1913, reversing that of the Assistant Collector of Farrukhabad District, in a case of resumption of *muafi*.

JUDGMENT.

BAILLIE, S. M.—(March 19th, 1914.)—The land in question consists of three plots, No. 7, entirely under cultivation, Nos. 9 & 10, partly cultivated and partly graveyard. The Commissioner has found that No. 7 was held at the pleasure of the *zemindar* and was resumable and that the other two numbers being partly graveyard were according to custom not resumable. In regard to these two latter numbers, he, therefore, ordered that rents should be fixed. I cannot consider that in this order the Commissioner has been consistent. The holding was a single one. All the three numbers, at least so far as the cultivated part of them is concerned, go together. The evidence on which the Commissioner relies showing that No. 7 is resumable, is that of the so-called *wajib-ul-arz*. I do not think that this document can be considered to have been prepared in accordance with the law on the subject. The law provided that the Settlement Officer shall ascertain and record existing village customs. What he did was to take the statement of one interested party. The *Mukhtar* of the *zemindar* said that his client has power to take away all *muafis* at his pleasure. This cannot be considered to be such an enquiry as was contemplated by the law, and I attach no more importance to the statement of the *zemindar* in 1872 than I do to the statement of the *zemindar* now made before me. I do not think that it can be held in this case that the *zemindar* has proved that the *muafi* is resumable.

Remains the question as to whether rent or revenue is to be assessed. The Commissioner has found that it has not been proved that this land was rent free before 1872 and in this his finding must

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be upheld. The consequence is that rent should be assessed on the cultivated area of the entire holding under section 156. To this extent the appeal should be allowed. Costs on respondent.

TWEEDY, J. M.—I concur. The same view was taken by the Board in *Dukh Haran v. Raja Pirthipal Singh* (1). It was held there that the statement of the Talukdar's *mukhtar* is simply the statement of an interested party in his own favour.

Appeal allowed.

(1) 3 Rev. L. J. 103.

MADRAS HIGH COURT.

FIRST CIVIL APPEAL No. 106 OF 1914.

August 12, 1915.

Present:—Sir John Wallis, Kt., Chief Justice, and Mr. Justice Srinivasa Aiyangar.

Sheik IBRAHIM ROWTHER *alias*
CHINNAPPA ROWTHER AND OTHERS—
DEFENDANTS NOS. 1 TO 4

—APPELLANTS

versus

MUHAMAD IBRAHIM ROWTHER AND
OTHERS—PLAINTIFFS AND DEFENDANTS
NOS. 5 AND 6—RESPONDENTS.

Custom—Labbais—Hindu converts—Muhammadan Law, applicability of—Custom to exclude females from succession, applicability of.

In the matter of succession Labbais or Tamil-speaking converts to Muhammadanism in the district of Coimbatore adhere to the Hindu Law which excludes females from the right of succession. [p. 807, col. 2; p. 810, col. 2.]

Mirabivi v. Vellayanna, 8 M. 464; *Rajkishan Singh v. Ramjoy Surma Mozoomdar*, 1 C. 186 (P. C.); 19 W. R. 8; 3 Sar. P. C. J. 174; 8 M. J. 151; 2 Suth. P. C. J. 744; *Kunhambi v. Kalanathar*, 24 Ind. Cas. 528; 16 M. L. T. 17; 27 M. L. J. 156; *Hirbai v. Gorbai*, 12 B. H. C. R. 294 at pp. 316, 317; *Rarichan v. Perachi*, 15 M. 281; *Kunhi Raman v. Kunhi Parvathi*, 8 Ind. Cas. 367; (1910) M. W. N. 642; 9 M. L. T. 92, followed.

Appeal against the decree of the Court of the Subordinate Judge of Coimbatore, in Original Suit No. 28 1909 (on the file of the District Court of Coimbatore).

Messrs. L. A. Govinda Raghava Aiyar and T. M. Krishnaswami Aiyar, for the Appellants.

Messrs. T. R. Ramachandra Aiyar and T. B. Krishnaswami Aiyar, for the Respondents.

JUDGMENT.

WALLIS, C. J.—This case raises a question of considerable difficulty and importance as to the existence of a special custom among Labbais or Tamil-speaking converts to Muhammadanism in the District of Coimbatore, or alternatively in the family of the parties to the present suit who belong to that district, to depart from the Muhammadan rule of succession and, as alleged by the defendants, to follow the Hindu Law as regards the law of property succession and partition. This, however, is too broadly produced as the only question arising in the suit is whether they follow the particular rule of Hindu Law which excludes females from the right of succession. The suit is brought by the plaintiffs, who are respectively the husband and minor daughter of the deceased Ponnuthayee, as her heirs to recover her share under the Muhammadan Law in the estate of her father, the late Mahomed Hussain Rowther who predeceased her. In 1877, in a suit tried by Innes, J., in the original side of the High Court, the custom relied by the defendants in the present case was proved to exist, but the case was compromised whilst under appeal; and in *Mirabivi v. Vellayanna* (1), which came before the High Court in second appeal, this Court reversed the decrees of the lower Courts finding a similar custom proved in the Palghat country which adjoins the Coimbatore District. The decision, of course, proceeded on the evidence in the case, but the question was approached from the standpoint that it was for the parties setting up the custom to show that though following their religion generally Labbais had adopted from the Hindu Law the principle of the exclusion of the females. The onus, no doubt, was rightly placed, but, having regard to the fact that we are dealing with Tamil-speaking people whose adoption of Muhammadanism in many cases cannot be referred to an earlier date than the second half of the eighteenth century, I should prefer to state the question as being whether after their conversion they had adhered in these respects to the usages to which they had been accustomed as

(1) 8 M. 464.

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Hindus; and with great respect, I am unable in the face of the evidence in this case to attach much weight to the suggestion that the state of things which we find existing may be due to unwillingness on the part of Muhammadan females to assert their rights against the male members of the family. Of the later cases, this is the first to come before this Court on first appeal so as to enable the Court to appreciate the evidence for itself, but there have been several cases in the lower Courts in which the custom was upheld when set up, and the plaintiff has had to rely largely on the fact that in certain other cases it was not set up. Exhibits L, C, N, R, H, and Q show that in suits of 1890, 1892, 1894, 1903, 1904 and 1910 arising in the district the women's right to succeed in accordance with Muhammadan Law was not contested. Exhibit G relates to a suit of 1893 in which the custom was pleaded and negatived by the lower Courts, whose judgments were upheld in second appeal as, on the other hand, Exhibit B and Exhibit B-1 relate to a suit of 1901 in which the District Judge held that the evidence went to show that the parties who were Labbais had adhered to the Hindu Law in this respect, but had hesitated to plead such adherence expressly for fear of being considered not to be good Muhammadans, and had set up instead a family custom under which women were excluded from the succession as regards immoveable property and were given cash and jewels in lieu of their share. He accordingly upheld the decree of the District Munsif, disallowing the custom on the ground that it was not pleaded that the parties had adhered to the rule of Hindu Law and that the family custom derogatory to Muhammadan Law had not been proved. Exhibit 18 relates to a suit of 1893 in which it was expressly pleaded on behalf of the minor plaintiff by his mother as his next friend that according to well-established custom, the widow and daughter of the deceased Labbai do not take any share in the inheritance, and the *razinama* decree, Exhibit XVII; proceeded on this view. Exhibit 3 again is a judgment of the District Judge, now Mr. Justice Oldfield in a suit of 1904 which upheld the custom in that case, and Exhibit XVI is a

judgment of a later District Judge in another suit to the same effect. The general result would, therefore, seem to be that in more recent years, whenever the custom has been set up, it has been established, and the number of instances in which it has not been set up would appear, as was observed by Mr. Brodie in Exhibit B-1, to be due to the growing disinclination of members of the community to adhere to a usage which is not in accordance with a strict observance of the Koran. Looked at as a whole the evidence, in my opinion, goes far to show that the Labbais of this part of India at the date of their conversion preferred to retain the Hindu rule excluding women, as it was not unnatural they should; and I should infer that the usage was general until some time before 1877 when we first hear of the question coming before the Courts, as any difference on the point must probably before long have given rise to litigation. But it also seems to me perfectly natural that, as the evidence shows, there should be of late years a growing tendency to depart from the usage and conform in this matter to the precepts of their sacred law. Now assuming that the special usage among Labbais of this part of the country has been proved, and that it would be open to individual families to abandon it and conform to the ordinary law governing their co-religionists, as to which see the observations of their Lordships in *Rajkishen Singh v. Ramjoy Surma Mozoomdar* (2), it would be a question of fact whether they had in fact abandoned it, and such abandonment would have to be proved. It is unnecessary to consider this question further, because so far as the parties to the suit are concerned, I think that the evidence, oral and documentary, of their transactions is amply sufficient to show that they adhere to the Hindu rule, even if we put aside the various judgments concerning other persons coming from the same part of the country which support this conclusion. Exhibit 10 would seem to show that there had been a partition between the plaintiff and his brothers in which the claims of the sisters were ignored, and the document itself is a release by the plaintiff and one of his brothers in favour

(2) 1 C. 186 (P. C.); 19 W. R. 8; 2 Sar. P. C. J. 174 8 M. L. J. 151; 2 Suth. P. C. J. 744.

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of another brother of their share in the estate of a deceased brother in which again, nothing is allotted to the female members. The 1st plaintiff who was a party to the deed has not ventured to go into the box, which goes very far to prove the custom in the family. Exhibit J on which the plaintiffs, rely relates to the share which a deceased brother of the defendants' family had in partnership with two Hindus. It expressly states that the brothers of the deceased were his heirs, though it also states that with them the 1st plaintiff and his brothers as sister's sons of the deceased had received his share. The signatures of the sister's sons who were adults were, I think, obtained to protect the surviving partners from any possible claim by them, although the document does not include them as among heirs of the deceased, just as there is an indemnity inserted lower down against any claim by the minor daughter of the deceased partner then aged nine. This daughter, according to D. W. No. 8, has since married the 1st plaintiff himself and it is not suggested that any claim has ever been made on her behalf. The general effect of the document is to assert that the brothers of the deceased were his heirs, though for the security of the Hindu partners of the deceased, it provides against possible claims against them by his sister's sons and his minor daughter. D. W. No. 7, who is related to the defendants by marriage, proves that in his family their properties were divided by Exhibit 5 without any share being given to the daughters. D. W. No. 8, who is related to the plaintiff's and defendants' families, also speaks to the custom, as does D. W. No. 10 who is related by marriage to the plaintiffs. D. W. No. 13 speaks to the fact that women get no shares in the defendants' family and proves Exhibit 10 which, as I have already said, amply bears him out. I think the evidence oral and documentary is sufficient to show that the defendants' family have adhered with perhaps most of the other Labbais of the neighbourhood to the Hindu rule excluding the succession of females. As observed in *Kunhambi v. Kalanathar* (3) it is under the provisions of the Civil Courts

Act a question of fact in each case as to the usage followed by the family, and in the present case, I think, the usage is sufficiently proved. As regards the point taken as to *res judicata*, I agree with the judgment of my learned brother and with the order proposed by him.

SRINIVASA AIYANGAR, J.—The principal question for decision in this case is as to the devolution of the property of a Muhammadan named Hussain Rowther who died, it is said, about the end of the year 1904. He left him surviving three sons, defendants Nos. 1 to 3, a widow, the 4th defendant, and two daughters, Ponnuthayee and Sulaihab. There was another son who is now dead, but whether he left any heirs other than the parties to the suit does not appear. The two daughters are dead. The first plaintiff is the husband of Ponnuthayee and the 2nd plaintiff is her daughter. Defendants Nos. 5 and 6 are the children of the other daughter Sulaihab.

Plaintiffs sue to recover their share, under the Muhammadan Law, of the share of Ponnuthayee in the estate of her father, Muhammad Hussain Rowther. Muhammad Hussain Rowther and the parties to the suit are Labbais. The claim is opposed by defendants Nos. 1 to 4, who plead that, according to the custom prevailing among Labbai Muhammadans of the Coimbatore District and alternatively, according to the custom prevailing among the parties and their relations, the property of a deceased Labbai devolves on the sons to the exclusion of the daughters, as under the Hindu Law; they also state that unmarried daughters are maintained out of the paternal estate and *stridhanam* given to them at the time of marriage, as in Hindu families. Custom in its legal sense means a rule exceptional to the general rule of law. In countries like England where there is a uniform territorial law binding on all persons, a custom in derogation of that law, when allowed, requires very strict proof. But in India, where there are innumerable sects each following its own usages which constitute its law, in many cases it is impossible to say that any particular usage which is pleaded is in derogation of a general law. For instance, the Nambudris and Nairs of the

(3) 24 Ind. Cas. 528; 27 M. L. J. 156; 16 M. L. T. 17.

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West Coast are Hindus, but they are mostly governed by their usages. In the case of many of the aboriginal tribes who come in under the general designation of Hindus, the presumption that they are governed by the Hindu Law of the Smriti writers and their commentators, is so slight that very little evidence suffices to displace this presumption. Among the Nattukottai Chetties of Southern India who are orthodox Hindus, there are usages relating to adoption which are entirely at variance with the rules of Hindu Law. The Moplahs of North Malabar, who are Muhammadan converts from Hinduism, generally follow the Marumakkattayam system, modified in some matters by rules of Muhammadan Law, as in the case of succession to self-acquired property. The Khojas and Memon Cutchis of Bombay who are Muhammadans by religion follow the Hindu Law of succession. Again, a family domiciled in Southern India is presumed to be governed by the *Mitakshara* School of Hindu law, but if it is proved that they emigrated from the northern or Maharatta country, this presumption is rebutted, and the family is presumed to retain the law of the place from which it emigrated. In many cases the inquiry is as to what is the law, and not as to what is the usage at variance with law [*Hirbai v. Gorbai* (4), *Rarichan v. Perachi* (5), *Kunhi Raman v. Kunhi Parwathi* (6).] The Judicial Committee in dealing with a family custom forbidding adoption said: "Looking at the origin and history of the family, it appears to their Lordships that the question is not whether the general Hindu Law is modified by a family custom forbidding adoption, but whether with respect to inheritance the family is governed by Hindu Law, or by customs which do not allow an adopted son to inherit". [*Fanindra Deb Raikat v. Rageswar Das* (7).] Standard of proof which is required in any particular case may, therefore, vary.

The parties to this suit being Muhammadans by religion they are presumably governed by their religious law i.e., the Muhammadan Law, in matters of succession. There is, however, the fact that the Labbais are a mixed class of Muhammadans consist-

(4) 12 B. H. C. R. 294 at pp. 316, 317.

(5) 15 M. 251.

(6) 8 Ind. Cas. 367; (1910) M. W. N. 642; 9 M. L. T. 92.

(7) 12 I. A. 72 at p. 81; 11 C. 463; 4 Sar. P. C. J. 610; 9 Ind. Jur. 277.

ing partly of compulsory converts to Islam made by the early Muhammadan invaders and Tippu Sultan. (See Madras Census Report of 1891.) They generally speak Tamil in their houses. Their marriage ceremony is said to closely resemble that of the low Hindu castes. (See Thurston on Castes and Tribes, Volume IV, page 200) It is, therefore, probable that many of the Labbais being recent converts from Hinduism retained the mode of devolution of property according to Hindu usages even after their conversion, though, in course of time, they would try to give up such usages and adopt rules of devolution of property prescribed by their religious law. An examination of the evidence in this case presents these features.

In 1878 this custom was pleaded in a suit in the original side of this Court, and Mr. Justice Innes, after a careful consideration of the large mass of evidence, both oral and documentary, placed before him, came to the conclusion that "in the District of Coimbatore there are peculiar customs in regard to marriage and succession, and the most prominent feature in the rule observed as regards succession is that, on the death of a man leaving sons and unmarried daughters and a widow, the sons take to the exclusion of the females who are simply maintained, and that married daughters are regarded as entitled, as among Hindus, to no provisions whatsoever". Exhibit XII. It is noticeable that the evidence in this case consisted mostly of witnesses from the village of Pallipatti in which and in the neighbouring villages the defendants and their relations mostly live. This decision was appealed against but the appeal was compromised.

This custom was again set up in a case, *Mirabiri v. Vellayanna* (1). That was a case of Labbai Muhammadans residing at Palghat. Both the first Court and the first Appellate Court held the custom proved. But the High Court interfered in second appeal holding that the evidence was not sufficient to prove the custom. The learned Judges were able to find satisfactory explanation in the evidence in that case as regards the various instances proved in that case of devolution in accordance with the principles of Hindu Law.

The next occasion when the matter was the

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subject of controversy was in the year 1901. (Exhibits B and B1⁹) Exhibit B is the judgment of Mr. Sadasiva Aiyar (now Mr. Justice Sadasiva Aiyar) as District Munsif of Coimbatore and Exhibit B-1 is the judgment of Mr. Brodie, the District Judge, on appeal. A careful perusal of the two judgments leads to only one conclusion, namely that at that time, that is so late as 1901, it was the practice of the Labbais Muhammadans of Coimbatore District to follow Hindu usages in matters of succession. In paragraph 6 of the appeal judgment, Exhibit B-1, Mr. Brodie observes that "though no doubt the customary law of the Labbais in this district has upto date been more in accordance with Hindu than Muhammadan Law as is only natural, I observe a tendency on the part of the defendants in such cases as the present to resort to any defence to defeat such claims amongst themselves rather than plead that they are governed in anything by Hindu Law, as this lays them open to the reproach of not being strict observers of Muhammadan practices". The actual decision was in favour of the claim of a female to a share, but this was based on the absence of the plea that the parties were governed by Hindu Law in matters of succession.

Again in 1906 the District Judge of Coimbatore held the custom proved in Exhibit III.

This matter came up for adjudication again in 1910 and it was held that among the Labbais of Pallappatti the custom of exclusion of females was prevalent: Exhibits IX and XVI.

There is only one other judgment to which I need make reference, i.e., Exhibit G. What is printed in the records is merely the decree the second appeal, but our attention was drawn to the judgments in the lower Courts. It appears that, in a previous litigation between the parties, this custom was set up, but was found against for want of evidence. In the present litigation the question was disposed of on the plea of *res judicata*. This decision is not of use either way. The respondent relied on several judgments in partition suits in which the right of females to shares was not disputed. They are Exhibits L and M in 1890, Exhibit C in 1892, Exhibit N in 1894, Exhibit R in 1903, Exhibit H in 1904, and Exhibit Q in 1910.

In Exhibit XVIII, a plaint in a suit of 1893, the custom was expressly pleaded by a mother suing as next friend of her minor son; the suit was compromised, but the compromise-decree, Exhibit XVII, proceeded on this view. The documents referred to above prove, in my opinion, the general prevalence among the Labbais of the Coimbatore District of this custom of excluding females from participating in the property of their deceased ancestors at the time of partition, and also that in recent times the custom was not set up in some cases owing to the disinclination of members of this community to follow usages at variance with their religious law.

There is evidence in this case which establishes that the family of the parties follow this custom. Defence 7th witness, a relation of the parties, speaks to this custom and proves a partition in his own family, where the father's properties were divided amongst the sons without any share being given to the daughters: Exhibit V. The property divided was considerable. He says, no doubt, in his examination-in-chief, that he does not remember what the brothers did for the daughters; but that does not imply that anything was given to the daughters on account of their shares. The statement may refer to the practice of giving *stridhanam*. Defence 8th witness, another relation, speaks to a partition in his own family in which the daughters were not given any shares. Defence 10th witness, also a relation, proves Exhibit VIII, a deed of partition which shows that the sons alone divided the properties of their father. The mother who was alive was not given a share, but Rs. 200 was set apart for her maintenance as in the case of a division among the members of a Hindu family. I attach considerable importance to this circumstance. Defence 13th witness speaks to this custom and proves Exhibit X. It is a release executed to the 1st plaintiff by two of his brothers releasing all their rights to the property of a deceased brother, the executants receiving Rs. 900 from the 1st plaintiff in satisfaction of their claims. The 1st plaintiff and his two brothers considered themselves solely entitled to the property of their deceased brother, though their sisters were alive at the time. The document also recites an oral partition among the brothers which again makes no

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reference whatsoever to the sisters. This document is important as proving an instance of exclusion of females in the plaintiffs' own family. The 1st plaintiff has not chosen to go into the box to explain this transaction. General evidence is given by the other witnesses for the defendants in proof of the custom, but I do not attach much value to that evidence. There is no evidence on the plaintiffs' side except general statements of witnesses, to which again I am unable to attach any weight. The learned Pleader for the respondents relied on Exhibit J as affording an instance in which the Muhammadan Law was assumed by the family to be the law by which they were governed. After carefully considering this document I am unable to come to any such conclusion; on the other, hand I agree with my Lord the Chief Justice that it is against the plaintiffs. The evidence above set out taken along with the evidence of the general prevalence of the practice is, I think, sufficient to prove the family custom set up.

It is remarkable that the 4th defendant, the widow, who, if the Muhammadan Law applied, would be entitled to a $\frac{1}{8}$ th share in the properties of her husband which are of considerable value, disputes the claims of the plaintiffs along with her sons, defendants Nos. 1 to 3. No explanation is given for her disclaiming any interest in the valuable properties of her husband, nor is there any reason shown for her joining her sons as against her own daughter's children. I am, therefore, unable to agree with the conclusion of the lower Court on this point. On this ground the decree of the lower Court will have to be reversed and the plaintiffs' suit dismissed with costs throughout.

The appellants contended that the plaintiffs are not entitled to institute this suit as they had already instituted Original Suit No. 16 of 1909 in respect of the same cause of action. I agree with the lower Court that the cause of action pleaded in Original Suit No. 16 of 1909 was quite different from the cause of action in the present suit, and disallow this contention.

The appellants also contended that the suit is barred by limitation in respect of the moveables. It is unnecessary to decide this question as we are dismissing the plaintiffs' suit on another ground.

Appeal allowed; Suit dismissed.

COURT OF THE BOARD OF REVENUE,
UNITED PROVINCES.REVENUE PETITION No. 8 OF 1912-13
OF FATEHPUR DISTRICT.

August 5, 1913.

Present:—Mr. Baillie, S. M., and
Mr. Tweedy, J. M.CHANDIKA PRASAD—PLAINTIFF—
APPELLANT

versus

BHAIRON PRASAD—DEFENDANT—
RESPONDENT.

*Ex-proprietary right—Vendee in possession of sir—
Suit for possession not brought within six months—
Vendor if can obtain possession—Agra Tenancy Act (II
of 1901), ss. 31, 34.*

B sold his property, which he had contracted to sell to C, to a third person. C thereupon brought a suit for specific performance of the contract of sale. The suit was decreed and possession given to him. C took possession not only as a proprietor but also took actual cultivatory possession of the *sir* land, which had become the ex-proprietary tenancy of B and which was so recorded. In a suit for correction of papers, B alleged that C's name should be entered as sub-tenant:

Held, that as C had taken wrongful possession and a suit under section 79 was not brought within six months, B had lost his rights. [p. 812, col. 1.]

Selected Decision No. 6 of 1912, followed.]

Appeal from an order of the Commissioner of the Allahabad Division, dated the 7th December 1912, reversing that of the Settlement Officer of Fatehpur District in the case of correction of papers.

JUDGMENT.

BAILLIE, S.M.—(*July 25th, 1913.*)—Respondent is recorded as the ex-proprietary tenant of the land in question. Appellant is the proprietor who got possession under a decree for specific performance of a sale on the 8th October 1909. He appears to have taken possession of the land now in question immediately on possession being ordered in his favour and has remained in possession since. Respondent's decree for ex-proprietary rights was given against a person who held (before the appellant got possession) under a second sale-deed executed by the respondent and whose possession was found to be wrongful. The decree does not bind the appellant in any way. In Selected Decision No. 6 of 1912, it was laid down that where a proprietor takes possession of a tenant's land by way of wrongful ejectment, section 34 cannot be considered to be applicable and the record of such a proprietor as the sub-tenant of his

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tenant is improper. These principles apply here. Respondent had a right of suit within six months after appellant took possession of his land. He has now lost that right and cannot re-gain possession nor can he, section 34 being held to be inapplicable, recover rent for this land. I think that this appeal must be allowed and the order of the Settlement Officer restored. As the Settlement Officer's order was not appealed, I cannot direct any more extensive alteration in appellant's favour. Appellant will get his costs.

TWEEDY, J. M.—I concur.

Appeal allowed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 2839 OF 1913.

August 26, 1915.

Present:—Mr. Justice Sadasiva Aiyar and
Mr. Justice Napier.

METHUKU SIVARAMAYYA—PLAINTIFF
—APPELLANT

versus

MUNIREDDIGARI CHINNA MUNEAPPA

AND OTHERS—DEFENDANTS—RESPONDENTS.

Madras Estates Land Act (I. of 1908), s. 8, cls. (1), (3)—Landlord purchasing from tenant his kudivaram right in land—Land continues to be "ryoti"—Conversion of "ryoti land" into private land by zemindar—Acts to prove such conversion, nature of

Where a land-holder purchases from a ryot for consideration his kudivaram right in the land, the land-holder purchaser should treat the land as a "ryoti land" and there is not such a merger of rights as to extinguish the "ryoti" character of the land. [p. 812, col. 2.]

Land once "ryoti" continues to be such unless the landlord, by strong and unequivocal acts (not necessarily those referred to in the proviso to section 8 of the Madras Estates Land Act) shows that he is entitled on the evidence to an exceptional finding that he has converted the ryoti land into his private land. [p. 812, col. 2.]

Second appeal against the decree of the District Court of North Arcot, in Appeal Suit No. 372 of 1913, preferred against that of the Court of the District Munsif of Madanapalli, in Original Suit No. 333 of 1911.

Mr. L. A. Govindaraghava Aiyar, for the Appellant.

Mr. N. Chandrasekhara Aiyar, for the Respondents.

JUDGMENT.—Assuming that Exhibit B is a genuine document and also that Exhibit A has the legal effect of a transfer for valuable consideration of the kudivaram right in favour of the zemindar, section 8, clauses (1) and 3, of the Estates Land Act clearly enact that ryoti land cannot cease to be such owing to such merger of the melvaram and kudivaram rights and that the landholder purchaser shall continue to treat the land as ryoti land of which he is the landholder.

As Exhibit B of 1872 was relied on by the plaintiff from the beginning, as there is nothing in the records to show that the plaintiff land was treated as home-farm land before the date of Exhibit C and as the grounds of appeal to the lower Appellate Court relied on the transfers under Exhibit B and Exhibit A and not on the ground that the land had even before the date of Exhibit B been home-farm lands, we cannot allow the appellant to set up such a new case for the first time in second appeal, a case evidently not set up in the lower Courts. The allegation in plaintiff, paragraph 1, that the lands are the khas lands of the 5th defendant cannot in the above circumstances be construed into an allegation that the lands have been, from time immemorial, the khas lands of the 5th defendant.

Section 8, clauses (1) and (3), of the Estates Land Act seem to prevent lands once ryoti from being converted into private lands on the ground of merger of the kudivaram rights into melvaram rights. Assuming that there might be cases in which such conversion can take place by any acts of the landlord after the merger (see proviso to section 165 of the Act), such acts, even though they need not come within the terms of the proviso and need not be confined to the acts mentioned in the proviso, must be of such strong and unequivocal character as to justify the Courts in giving an exceptional finding in favour of the conversion of ryoti into private land. We think that the finding of the Lower Courts in this case that Exhibits C, D, G and H are wholly insufficient to prove such conversion, was quite justified though their reliance on a passage in the judgment, Exhibit VI, (which only decided that home-farm lands are impartible like the other zemindari land) is palpably erroneous.

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In the result we dismiss the second appeal with costs.

Appeal dismissed.

PUNJAB CHIEF COURT.

FIRST CIVIL APPEAL NO. 279 OF 1911.

February 15, 1913.

Present:—Mr. Justice Rattigan and
Mr. Justice Chevis.

WADHAWA SHAH AND OTHERS—
PLAINTIFFS - APPELLANTS

versus

RATTAN CHAND AND OTHERS—DEFENDANTS

—RESPONDENTS.

Hindu Law—Joint family—Ancestral business—Presumption—Managing member, power of—Liability of minor members—Contract Act (IX of 1872), s. 247.

In carrying on an ancestral trade, the infant member of an undivided Hindu family are bound by all acts of the adult member who is the manager, which are necessarily incident to, and flowing out of, the carrying on of that trade. [p. 814, col. 2.]

The power of a manager to carry on a family trade implies a power to pledge the property and credit of the family for the ordinary purposes of that trade and third parties in the ordinary course of *bona fide* trade dealings should not be held bound to investigate the status of the family represented by the manager whilst dealing with him on the credit of the family property. [p. 814, col. 2.]

In the case of a firm carried on by an adult member of a joint Hindu family consisting of an adult and a minor member, the presumption is that the minor member is also a partner in the firm but the presumption is rebuttable. [p. 815, col. 1.]

Mul Chand v. Sathu Singh, 59 P. R. 1893 and *Johurra Bibee v. Sreegopal Misser*, 1 C. 470, followed.

Lutchmanen Chetty v. Siva Prokasa Modeliar, 3 C. W. N. 190; 26 C. 349; *Vadilal v. Shah Khushal*, 4 Bom. L. R. 968; 27 B. 157; *Joykisto Cowar v. Nittyanund Nundy*, 3 C. 738; 2 C. L. R. 440; 3 Ind. Jur. 117 and *Sakrabhai v. Maganlal*, 26 B. 206; 3 Bom. L. R. 738, referred to.

First appeal from the decree of the District Judge, Sialkot, dated the 30th November 1910, decreeing plaintiffs' claim.

Rai Bahadur Lala Sukh Dial and Bakhshi Tek Chand, for the Appellants.

The Hon'ble Mr. Shaai Lal, R. B., for the Respondents.

JUDGMENT.—This judgment will cover the connected Appeal No. 280 of 1911. The defendants, Rattan Chand and Ladha Mal, are sons of the late Jiwan Shah, Bhabra. There is a firm trading under the name of

Jiwan Shah-Rattan Chand. According to plaintiffs Rattan Chand is the managing partner, but the shop is an ancestral one, and the minor defendant Ladha Mal is also a partner. Five suits were brought against the defendants to recover moneys advanced to the firm and interest. One case was compromised, and decrees have been passed in four cases. The pleadings and evidence were the same in all four cases.

The defendants pleaded that Rattan Chand was the sole proprietor of the firm and was solely liable, also that the defendants, being Jainis by caste, were not governed by Hindu Law, also that they were not members of a joint Hindu family. The learned District Judge held that they were governed by Hindu Law, and also they were members of a joint Hindu family. On the question whether Ladha Mal was a partner in the firm, the District Judge came to no very decided finding, though he remarked that from the mere fact of the brothers being members of a joint Hindu family it did not necessarily follow that both were partners in the shop, and he stated that in his opinion it was not proved that Ladha Mal was a co-partner in the firm. But the District Judge went on to say that if Ladha Mal had any share in the firm that share would be liable, but that his person and other property would not be liable. So the District Judge passed decrees for the amounts claimed against the firm, absolving the person and other property of Ladha Mal. It may be noted that the District Judge found that the debts were not contracted for family purposes or household affairs, but that Rattan Chand has wasted the money in a foolish trade.

The plaintiffs in two of the four suits have appealed asking that both of the defendants should be made fully liable, and also asking for interest till date of realisation.

Interest is claimed at the rate of $7\frac{1}{2}$ annas per Rs. 100 per mensem in this case and in the connected case at 6 annas per Rs. 100. These rates are very moderate, and we can see no reason why future interest should not be allowed in cases of this kind.

As regards personal liability of the minor Mr. Sukh Dial has stated that he does not press this matter, and we think he is well

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advised. The only remaining question, therefore, is whether the property of the minor should be held liable.

In the first place it may be noted that Mr. Shadi Lal, who appears for Ladha Mal, has stated that he does not contend that the defendants are not governed by Hindu Law, and he has also abandoned the plea that the defendants are not members of a joint Hindu family. His contentions are:—

(1) That the minor is not a partner in the firm and (2) that even if he is a partner, his property other than his share in the firm is not liable.

We will first proceed to discuss the question, whether if the minor defendant is a partner his property other than his share in the firm should be held liable. Mr. Shadi Lal contends that though in some cases the whole property of the family may have been earned by trading and that in such cases all the property of the family, including the shares of minor members, must be held liable for debts incurred to carry on the trade, there are other cases in which the bulk of the property is entirely distinct from a business carried on by the family, and that in such cases the liability of minors for trade debts must be limited to their share in the business. Mr. Shadi Lal quotes *Lutchmanan Chetty v. Siva Prokasa Modeliar* (1). Whatever effect this ruling may have on the decision of the question whether Ladha Mal is a partner in the shop, we fail to see how it helps Ladha Mal so far as the question which we are now considering, viz., the question whether, assuming him to be a partner in the shop, his liability should be limited to his share in the shop. The same may be said with regard to *Vadilal v. Shah Khushal* (2), which is also cited by Mr. Shadi Lal.

The ruling which really supports Mr. Shadi Lal's contention is *Joykisto Cowar v. Nittyanund Nundy* (3), in which the liability of the minor for trade debts is limited to his share in the business. In this ruling section 247, Contract Act, is quoted and the principle is applied, it being held, that "on principle there ought not to be any difference between the nature of the liability of an

infant admitted by contract into a partnership business and that of one on whose behalf an ancestral trade is carried on by a manager." It is urged that this case is cited with approval in *Sakrabhai v. Maganlal* (4); it is certainly referred to on page 212, but no question of the extent of the liability of minor partners was then involved, and we cannot say that it was cited with approval. It is also urged on behalf of the minor respondent that the burden of proving that these debts were advanced for the genuine purposes of the firm lies on the plaintiffs and that they have failed to prove it, and that consequently the minor respondent is not liable. It is pointed out that Rattan Chand, defendant, himself says he lost the money in *satta* dealings.

The whole question is discussed in a ruling of this Court, viz., *Mul Chand v. Sadhu Singh* (5), which points out that the law of the partnership, as contained in the Contract Act, is in several respects more restrictive than the Hindu Law, and that in considering the affairs of an ancestral business exclusive attention cannot be paid to the Contract Act, although reference to that Act may be useful. The learned Judges refer to *Johurra Bibee v. Sreegopal Misser* (6) as the leading case on the subject and hold that though that ruling was given prior to the passing of the Contract Act it still holds good. They quote several paragraphs from the Calcutta rulings (*vide* page 265) to the effect that in carrying on an ancestral trade the infant members of the undivided family are bound by all acts of the adult member, who is the manager, which are necessarily incident to, and flowing out of, the carrying on of that trade, and that the power of a manager to carry on a family trade necessarily implies a power to pledge the property and credit of the family for the ordinary purposes of that trade, and that third parties in the ordinary course of *bona fide* trade dealings should not be held bound to investigate the status of the family represented by the manager whilst dealing with him on the credit of the family property. We have no hesitation

(1) 26 C. 349; 3 C. W. N. 190.

(2) 27 B. 157; 4 Bom. L. R. 968.

(3) 3 C. 738; 2 C. L. R. 440; 3 Ind. Jur. 117.

(4) 26 B. 206; 3 Bom. L. R. 738.

(5) 59 P. R. 1893.

(6) 1 C. 470.

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in following this ruling in preference to the earlier Calcutta ruling.

Now, bearing in mind that we are for the present assuming that Ladha Mal is a partner in the firm, we think all this fully applies to the present case. There has never been any suggestion that Ladha Mal was admitted as a partner by his brother, so if Ladha Mal be a partner at all it can only be because the business is an ancestral one. Apart from the fact that the father's name is still preserved in the appellation of the firm, we know from the accounts in the present case (see page 2 of the paper-book) that the dealings of the firm go back at least as far as 30th Poh 1957, at which time Jiwan Shah was alive. The debts in dispute are to all appearance loans to (or deposits with) the firm in the ordinary course of banking or trading, and even if, as Rattan Chand himself alleges, he has lost the money in imprudent speculations, we fail to see how the right of the plaintiffs to make all the members of the firm fully liable can be diminished. Even if Rattan Chand was gambling it is not shown that the plaintiffs had any knowledge of this.

The ruling, *Mul Chand v. Sadhu Singh* (5), lays down that where money has been advanced to a firm in the ordinary course of business, subsequent dishonesty on the part of a member of the firm causing the loss of the money will not prevent the creditors from recovering their money from all the members of the firm, minors included.

There seems nothing in the present case, so far as we have been able to discover, to warrant a finding that the business was not an ancestral business or that the money was not advanced for ordinary purposes of the business, or that any distinction should be drawn between the assets of the firm and the other property of the family so far as the liability of the minor respondent is concerned.

But so far we have proceeded on the assumption that Ladha Mal is member of the firm. Starting with the fact that the family is a joint Hindu family we certainly think that the presumption is that the two brothers are both partners in the firm which is carried on by the adult brother. At the same time this presumption is rebuttable. We do not propose to examine the evidence at present with a view to deciding whether

Ladha Mal is a member of the firm, for the reason that we think there must be a remand for further inquiry. The onus of proving that they were not members of a joint Hindu family was rightly placed on the defendants, and the onus of proving that they were not also partners in the firm should also have been placed on them, but unfortunately it was placed on the plaintiffs, and Mr. Shadi Lal on behalf of Ladha Mal urges that if the onus is to be changed his client should be allowed a further opportunity of producing evidence. We think this request must be acceded to.

We accordingly remand both these cases for further inquiry into the issue whether Ladha Mal is or is not a partner in the firm.

The onus will be on Ladha Mal; the plaintiffs will, of course, be allowed to produce evidence in rebuttal.

Return to be made in four months.

Case remanded.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL NO. 2660 OF 1913.

August 27, 1915.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Napier.

VEERAMMAL AND ANOTHER—DEFENDANTS
NOS. 2 AND 3—APPELLANTS
versus

KAMU AMMAL AND OTHERS—PLAINTIFFS—
DEFENDANTS NOS. 1, 4 AND 5—RESPONDENTS.

Hindu Law—Reversioner, contingent, suit by—Declaratory decree, scope of—Court, whether can grant other reliefs—Relinquishment, validity of—Consideration—Ability to maintain one-self otherwise, if necessary.

The only declaratory relief to which a contingent reversioner is ordinarily entitled when he disputes an alienation made by a Hindu widow is that the alienation is not binding beyond the life-time of the widow. Any other declaration *e.g.*, the order in which the reversioners should succeed on her death etc., is not in proper exercise of the discretion to grant declaratory reliefs. [p. 816, col. 2.]

The Hindu Law requires for the validity of a relinquishment by a co-parcener of his interest in the family property *only* that he should accept a trifle, and *not also* that he should be able to support himself otherwise by his own exertions. [p. 816, col. 2; p. 817, col. 1.]

Thangavelu Pillai v. Doraisami Pillai, 26 Ind. Cas. 211; 16 M. L. T. 393; 27 M. L. J. 272, followed.

VEERAMMAL v. KAMU ANMAL.

Second appeal against the decree of the Court of the District Judge of Tanjore, in Appeal Suit No. 484 of 1912, preferred against that of the Subordinate Judge of Kumbakonam, in Original Suit No. 54 of 1908.

FACTS.—The properties in suit originally belonged to a joint Hindu family consisting of one Narayanaswami and his son, Perianna. The former having relinquished his share of the joint family properties in favour of the latter by a duly registered deed of gift, the latter alone continued to enjoy the same and died in 1888 leaving him surviving his two widows a daughter by his first wife, a son born dumb and insane by his second wife and his father. Thereupon the junior widow got into possession of the properties and enjoyed them till 1898 when Narayanaswami died. The senior widow then trespassed upon the properties and disturbances ensued which were, however, put an end to by a settlement whereby the senior widow was allotted some portions of the property for her share, the junior widow taking the rest. The widows then alienated portions of the properties which fell to the share of each. In the meanwhile the daughter of Perianna, who had been a minor during the disputes attained majority, and sued for a declaration that she was entitled to inherit the properties of Perianna after the life-time of the two widows, that the son of Perianna had no interest in those properties as he was incapacitated from inheriting the same by reason of his having been born a dumb and insane person and that the alienations made by the widows were not binding on her. Both the lower Courts granted her a decree as prayed for. The junior widow and the son appealed to the High Court.

Mr. G. S. Ramachandra Iyer, for the Appellants:—The relinquishment deed is invalid as the father did not accept any consideration, even a trifle, as required by the Hindu Law and as he was not able to support himself otherwise.

[SADASVA AIYAR, J.—*Thangavelu Pillai v. Doraisami Pillai* (1) is against such a position.]

I wish to argue the whole question. Acceptance of some trifling consideration is

necessary to validate the relinquishment. See the observations of Bhashyam Iyengar J., in *Sudarsanam Maistri v. Narasimhulu Maistri* (2). Further, the person relinquishing must be able to maintain himself otherwise by his own exertions. Sacred Books of the East, Volume XXV, page 207 and Colebrook's Digest, Chapter II, page 277. Jagannadha's Digest cannot be taken as a binding authority. Again, the Courts below erred in granting a declaration that the plaintiff was entitled to inherit the property after the death of the widows and that the 3rd defendant (the son) was not entitled to the same.

Mr. K. S. Jayarama Iyer, for Mr. V. C. Seshachariar, for the 1st Respondent and Mr. A. K. Madhava Rau, for the 5th Respondent:—The texts quoted by the other side are merely directory and not mandatory, *Thangavelu Pillai v. Doraisami Pillai* (1). The decree in so far as it grants a declaration that the plaintiff is entitled to inherit the properties after the life-time of the widows and that the 3rd defendant has no interest in the same cannot be supported.

JUDGMENT.—The only declaratory relief to which a contingent reversioner is ordinarily entitled when he disputes the alienation by qualified female heirs, is that those alienations are not binding beyond the life-time of the qualified female owner or owners. The other declarations given by the first Court decree (confirmed by the Appellate Court), namely, "that the plaintiff be declared entitled to inherit the property after the death of defendants Nos. 1 and 2" and "that 3rd defendant has no interest, etc.", were unnecessary and the discretion of the Courts as to declaratory reliefs was not exercised properly in granting those two declarations. The decrees will be modified by striking out the words relating to the above two declarations. The decrees are confirmed in other respects. As regards the contention that the release, Exhibit I, was invalid under Hindu Law, the only new argument brought forward by appellants' learned Vakil for re-considering our decision in *Thangavelu Pillai v. Doraisami Pillai* (1) was that the Hindu Law requires for the validity of a relinquishment by a co-partner of his interest in the joint family property, not only that he should accept a trifle

(1) 26 Ind. Cas. 211; 27 M. L. J. 272; 16 M. L. T. 393.

(2) 25 M. 149 at p. 156; 11 M. L. J. 353.

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but also that he should be in possession of ability to support himself otherwise by his own exertions. The texts of Manu and Yajnavalkya relied upon for this contention, when they speak of the relinquishment by an "able" co-parcener of his right, do not make his "ability" (to earn his living) the test of the validity of the relinquishment, but intend to indicate [to repeat the language used in *Thangavelu Pillai v Doraisami Pillai* (1)] that that will also afford "evidence of the deliberate and final character of the relinquishment."

As the second appeal has failed substantially, the 1st appellant will pay the 1st respondent's costs.

Decree modified.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 1061 OF 1914.

Jul. 29, 1915.

Present:—Mr. Justice Chevis.

PARMA NAND AND OTHERS—DEFENDANTS—
APPELLANTS*versus*

THIKHU—PLAINTIFF—RESPONDENT.

Mortgage—Foreclosure—Sale—Burden of proof—Pleas—Preliminary pleas—Court to insist on filing full pleas—Ground of appeal, appellant when can go out of.

A mortgagee who alleges that the mortgage has become a sale must prove that all the necessary legal requirements have been fulfilled, nothing can be presumed.

As a general rule at all events, Courts of original jurisdiction should call on defendants to put in their complete pleas in the first place. Pleading piecemeal should be avoided as far as possible.

A party can go outside his grounds of appeal with the leave of the Court.

Second appeal from the decree of the Divisional Judge, Hoshiapur Division, dated the 12th February 1914, reversing that of the Munsif, second Class, Dharmasala, dated the 19th August 1913, dismissing the suit.

Bakhshi Tek Chand, for the Appellant.

Lala Hukam Chand for Mr. N. C. Mehra, for the Respondent.

JUDGMENT.—This is a suit for redemption. The defendants put in pleas which are marked as preliminary pleas, to the effect that the deed was one of *lai-bil-wafa* and that foreclosure proceedings had taken place which had turned the mortgage into an out and out sale. Issues marked as preliminary issues were framed on this point. The first Court decided these issues in defendants' favour and dismissed the suit. Plaintiff appealed to the Divisional Judge, who held that it was not proved that all the requisite formalities necessary to complete foreclosure had been complied with. With this finding I quite agree. That all the necessary legal requirements have been fulfilled must be strictly proved by a mortgagee who alleges that the mortgage has become a sale, and nothing can be presumed. The burning of the Kangra record room may be unfortunate for the defendants in this case, but still we cannot make presumption as to service of notice on the mortgagors, etc.

But the Divisional Judge apparently overlooked the fact that only a preliminary plea had been put in, so instead of remanding the case to give defendants a chance of putting in their full pleas he gave plaintiffs a decree for redemption.

Defendants now (through Counsel) ask for a chance of putting in their full pleas. For respondents it is urged that defendants should have made this request in the Divisional Court. But did they know, when their case was before the Divisional Judge, that the Judge was going to give plaintiffs a decree off hand? Might they not well have thought that in case the Divisional Judge, disagreed with the first Court in its finding on the preliminary point he would remand the case for further pleading?

It is also urged that defendants are now going outside their grounds of appeal to this Court. But they can do so with leave of this Court.

I note that, as a general rule at all events, Courts of original jurisdiction should call on defendants to put in complete pleas in the first place. Pleading piecemeal should be avoided as far as possible.

I accept this appeal, and reversing the decree of the Divisional Judge, I return

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the case to him with instructions to remand it to the first Court under Order XLI, rule 23.

Stamp on appeal to this Court to be refunded, other costs in this Court to be costs in the cause.

Appeal accepted; Case remanded.

MADRAS HIGH COURT.

FIRST CIVIL APPEAL No. 152 OF 1913.

April 1, 1915.

Present:—Sir John Wallis, Kt., Chief Justice,
and Mr. Justice Tyabji.

THRIKKIDIRI MANAKKAL VASU-
DEVAN ATISSERIPAD—PLAINTIFF
—APPELLANT

versus

KONURUPETAMANNA *alias*
PUNNAMANNA THARAVATTIL
KARNAVAN AND KAIKARIAKARTA
GOVINDA MENON AND OTHERS
—DEFENDANTS—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Arts. 110, 132—Mortgagor and mortgagee—Usufructuary mortgage—Lease by mortgagee to mortgagor—Interest charged on mortgaged property—Rent not paid—Suit for principal and interest on foot of mortgage—Interest, whether can be decreed.

On the 8th April 1896, the plaintiff obtained an usufructuary mortgage of items 1 to 9 of the suit properties and by a document of even date leased the same to the mortgagors. On 1st September 1903, he obtained an usufructuary mortgage of the same items 1 to 9 and a simple mortgage of items 10 to 19 in consideration of further advances, the mortgagors obtaining at the same time a fresh lease of items 1 to 9 from the mortgagee. This second document expressly made the mortgaged properties liable not only for re-payment of the principal but also for interest. In 1912 the mortgagee instituted the present suit on the foot of both the mortgages for sale of the mortgaged properties and for the realisation of the mortgage amount, including the interest due. The Subordinate Judge gave a decree for the principal and three years' rent:

Held, that the document of 1903 having made the payment of interest also a charge on the mortgaged properties, the claim for interest was governed by Article 132 and not Article 110, Limitation Act, and that the plaintiff was entitled to recover the interest under the terms of the mortgage-deed irrespective of the fact that a portion of the properties had been mortgaged usufructually and had been leased by the mortgagee to the defendants. [p. 819, col. 1; p. 820, col. 1.]

Appeal against the decree of the Court of the Subordinate Judge of South Malabar at Palghat, in Original Suit No. 26 of 1912.

FACTS.—The facts of the case appear sufficiently from the judgment.

Messrs. C. A. Anantakrishna Iyer and T. Eroman Unni, for the Appellant:—The plaintiff is entitled to recover the full amount of interest claimed under the terms of the mortgage-deed, dated 1st September 1903. That document expressly charges the mortgaged property with the payment of interest also. The claim for interest is governed by Article 132 of the Limitation Act, and not by Article 110 as wrongly decided by the Subordinate Judge. The fact that some of the properties comprised in the mortgage had been leased out by the mortgagee to the mortgagor has no bearing upon the question. There is no reason why effect should not be given to the express provisions of the mortgage-deed. Further, the mortgagor himself having been in possession and not having paid the rent, it is very inequitable that he should be allowed to say that the mortgagee is to suffer owing to his (mortgagor's) non-fulfilment of his legal obligation. The mortgagor should not be allowed to profit by his own fraud. *Juggeevundas Keeka Shah v. Ramdas Brijbookundas (1), Hughes v. Williams (2).*

Mr. C. Madhavan Nair, for the Respondents:—The decision of the Subordinate Judge is quite correct. The mortgage is usufructuary; only rent was payable and not interest *Kutti Umma v. Madhava Menon (3)*. Consequently Article 110 applied and rent for more than three years is not recoverable. The plaintiff is responsible for the non-collection of the rent in time. He is accountable to the mortgagor for whatever rent he might have collected but for his negligence. See section 76 (6), Transfer of Property Act.

JUDGMENT.

WALLIS, C. J.—On the 8th April 1896, under Exhibit A, the defendants mortgaged with possession nine items of property estimated to yield 1,000 *paras* of paddy which, after meeting the assessment and interest, left 126 *paras* to go in reduction of the principal. On the same

(1) 2 M. I. A. 487 at p. 500; 6 W. R. 10 (P. C.);

1 Suth. P. C. J. 109; 1 Sar. P. C. J. 222; 18 E. R. 386.

(2) 12 Ves. (jun.) 493 at p. 495; 8 R. R. 364;

33 E. R. 187.

(3) 11 M. L. J. 186.

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day, by Exhibit B, the mortgagors leased back from the mortgagees the nine items on the terms that they were only to pay the mortgagees the 650 *paras* due for interest on the mortgage and retain 350 *paras* out of which they were to pay the assessment.

On the 1st September 1903 the mortgagors executed another mortgage in favour of the mortgagees, Exhibit C, for Rs. 3,300, of 19 items of property, of which items 1 to 9 were the subject of the mortgage with possession (Exhibit A).

The mortgage was expressly recited to be given as security for the principal sum of Rs. 3,300 and the interest thereon, and as to items 1 to 9 was with possession and as to the other items without possession. On the same day the mortgagors again took a lease of the nine items which were included in both mortgages at a rental of 1,000 *paras* of paddy. On these facts the Subordinate Judge has held that the plaintiff is not entitled to a charge on the mortgaged properties for the arrears of interest due on the mortgage, although the mortgage is expressly stated to secure the interest as well as the principal, by reason of the fact that the mortgagors took the nine items on lease under Exhibit D and that the rent due by them for more than three years is barred. He, accordingly, only allowed the amount of three years' rent. The Subordinate Judge says the interest on the mortgage Exhibit C had been agreed to be paid out of the usufruct of the nine items comprised in Exhibit A, but I do not find any such provision in Exhibit C and I can see no reason for refusing to give effect to the provisions of the Exhibit C that the whole 19 items mortgaged should be security for the interest as well as the principal. I would, therefore, modify the decree accordingly. The similar ground of appeal as to the interest in Exhibit A was not pressed, and the other objections are untenable. The decree will be modified accordingly. The parties will pay and receive proportionate costs of the appeal.

The memorandum of objections is dismissed with costs. Time for redemption is extended to three months after the re-opening of the lower Court.

TYABJI, J.—This appeal arises out of a suit for the realisation of debts secured by two mortgages, for the sale of the properties mortgaged, and for a personal decree against the mortgagors. The mortgages are Exhibits A and C on the record, dated 8th April 1896 and 1st September 1903, for the sums of Rs. 5,000 and Rs. 3,300 respectively. It has been found by the learned Subordinate Judge that the mortgages were supported by consideration, that they were executed for *tarwad* purposes, that there was necessity for their execution and that they are, therefore, binding as against the properties themselves and the interests of all the members of the *tarwad*. These findings are based on a consideration of all the evidence, including the circumstances that all the adult members (for the time being) of the *tarwad* joined in the execution of the mortgages sued upon and that "reasonable inquiries" had been made into the necessities of the *tarwad*. It is unnecessary to say more in regard to these findings than that the evidence fully supports them.

The mortgages sued upon purport to be usufructuary. But on the very days on which they were executed, the parties entered into agreements (Exhibits B and D respectively, dated 8th April 1896 and 1st September 1903), by which the usufructuary mortgagee purported to let the mortgaged premises to the mortgagor; and the latter purported thenceforth to hold possession of the mortgaged properties as tenant of the mortgagee. Thus the mortgagor continued in possession of the properties usufructuarily mortgaged, but in effect attorned to the mortgagee.

The question then arises, whether what the plaintiff was entitled to claim over and above the repayment of the principal mortgage amount was rent or interest. If it was rent then he could claim it in the present suit only for three years (the rest being barred under Article 110 of the Limitation Act); whereas if it is to be considered as interest the payment of which was charged upon the properties mortgaged, then Article 132 of the Limitation Act would apply and the claim would not be barred for 12 years.

The appellant does not press his claims

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under Exhibit A but relies on Exhibit C, which is explicit that the mortgaged properties were to be "the security of these Rs. 3,300 and the interest therefor." Hence the interest is clearly a charge on the mortgaged properties and Article 132 applies—not Article 110; *Kutti Umma v. Madhava Menon* (3) is clearly distinguishable. The mortgagor can then disclaim liability for payment of any interest (or rent) on the properties, only on the basis that the mortgagee was in possession and he ought to have collected the rents, and that as he has failed to collect the rents and their collection (as rents) is barred by limitation, he ought to be made to account as though he had collected them.

This argument can be supported in India only on the basis of section 76 (6) of the Transfer of Property Act. I may say at once that it hardly lies in the mouth of the mortgagor or tenant (however he be styled) to say that the mortgagee must account to him on the basis of wilful default for not collecting the rent which he (the mortgagor) himself has failed to pay. If the reason of the rule is looked to, this *prima facie* view is strengthened. For the mortgagee in possession is made to account for what he ought to have (but has not) received, because, where the loss of the rents has to fall on either the mortgagor or the mortgagee and the mortgagee alone is responsible for the loss and had he used his best endeavours to collect the rents "they would have been collected and there would have been no loss on either the mortgagee or the mortgagor, in such cases it is but fair that the loss should fall on the mortgagee. I am speaking, of course, only with reference to the facts of this case and do not suggest that other aspects of the question are excluded. Now, here, in the *first* instance, by the non-collection of rents there has been no loss to the mortgagor: the mortgagor has in fact been so far saved the payments. In *Juggeewundas Keeka Shah v. Ramdas Brijbookundas* (1), where under similar circumstances the mortgagee permitted the mortgagor to receive the rents instead of collecting them himself, he was held not to have forfeited his rights. *Secondly*, as I have already said, the mortgagor cannot be heard to say: "True, I did not pay the rent that I was bound to pay. But it is the mortgagee who is at fault. He

ought to have compelled me to fulfil my legal obligations." This kind of virtuous indignation is out of place in the circumstances. Thus in *Hughes v. Williams* (2), the Lord Chancellor (Lord Erskine) said:

"Another circumstance that weighs with me is, that the mortgagor, if he knows the estate is under-let, ought to give notice to the mortgagee, and to afford his advice and aid, for the purpose of making the estate as productive as possible. If he communicated to the mortgagee plans of improvement in his contemplation, which were disappointed by the embarrassment of his affairs, the Court might take a stricter view of the mortgagee's conduct. In this instance, not only such notice was not given, but during this whole period of 16 years, while the mortgagor was out of possession, he never stated that the estate was not managed as it might be. Can the mortgagor lie by, not giving notice, that a greater rent may be made, and come afterwards, by way of penal inquiry, to charge the mortgagee with the effect of his own negligence? I agree to the principle that has been stated by the Solicitor-General that it would be dangerous to say, the mortgagee is not answerable except for fraud, and would contradict many decrees. If such gross negligence can be shown as comes up to the description of wilful default, he ought to be answerable for it."

Similar considerations tell against the mortgagor's contention in the present case, though the facts are not on all fours.

Finally, if the case must be decided with reference to abstract reasoning, it may well be urged that the mortgagee was only constructively in possession, if at all, and that for the period during which the mortgagee has not collected rents owing to the refusal of the mortgagor to pay the rents, there can hardly be said to have been any possession even constructive on the part of the mortgagee as between him and the person who was in actual possession without recognizing the rights of the mortgagee as landlord: *Juggeewundas Keeka Shah v. Ramdas Brijbookundas* (1).

For these reasons, I agree in the order proposed by the learned Chief Justice.

Decree modified.

DEBENDRA NATH HALDAR v. BIRESHWAR HALDAR.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 3291 OF 1912.

December 3, 1914

Present:—Mr. Justice Richardson and
Mr. Justice Mullick.DEBENDRA NATH HALDAR—DEFENDANT
—APPELLANT*versus*BIRESHWAR HALDAR—PLAINTIFF—
RESPONDENT.*Evidence Act (I of 1872) ss. 31, 32—Judgment not inter partes, inadmissibility of, to prove admission—Admission, how to be proved.*

A judgment in a previous suit not *inter partes* is inadmissible as evidence of an admission said to have been made by a party in the course of the previous suit.

The proper mode of proving any admission made by a defendant in a previous suit is by producing a certified copy of his written statement or if the admission was made orally, by producing a copy of the defendant's deposition or by putting in the witness-box some one who actually heard what the defendant said.

Appeal against the decree of the Subordinate Judge, first Court, Alipore District, 24-Parganas, dated the 13th June 1912, affirming that of the Munsif, second Court at Baruipur, dated the 29th March 1911.

Babu Mohini Mohan Chatterjee, for the Appellant.

Babus Biswa Nath Bose and Phanindra Nath Dass, for the Respondent.

JUDGMENT.

RICHARDSON, J.—This is an appeal from the judgment and decree of the learned Subordinate Judge of Alipur dated the 13th June 1912. The appellant is defendant No. 1. The plaintiff sued for the recovery of the share which the plaintiff claims in a certain property in the appellant's possession. The plaintiff's case is that he and defendant No. 1 are co-sharers and that he is entitled to a one-anna six-gandas share in the land in suit. The Courts below have decided in his favour.

In this appeal it is contended that the learned Subordinate Judge in the lower Appellate Court has wrongly admitted a judgment in a previous suit not *inter partes* as evidence of an admission said to have been made by the defendant apparently incidentally in the course of that suit. That suit was brought by another person against the present defendant. The learned Subordinate Judge relies upon a certain passage in the judgment as proving an admission made by the defendant. I am of opinion

that the judgment was inadmissible in evidence for the purpose for which it was used. It is not suggested that the learned Subordinate Judge who wrote the judgment is dead, or that the judgment is admissible under section 32 of the Indian Evidence Act. What is suggested is that the judgment is admissible under section 13 of that Act. It seems to me, however, the judgment has not been used as evidence of a transaction in which the right now claimed by the plaintiff was admitted or recognized. So far as I can see the transaction to which the judgment relates does not involve or include any such admission or recognition. The admission is not part and parcel of that transaction. The judgment has been used solely for the purpose of proving the alleged admission. It is very doubtful whether the admission made has the effect attributed to it by the learned Subordinate Judge. But apart from that it seems to me that the proper mode of proving any admission made by the defendant in the previous suit was by producing a certified copy of the defendant's written statement or if the admission was made orally, by producing a copy of the defendant's deposition or by putting in the witness-box some one who actually heard what the defendant said. The statement in the judgment does not purport to be a quotation of the precise words used by the defendant either in his written statement or in his deposition. It is certainly not clear how or why the admission came to be made for the purpose in view; the judgment seems to me to be no better than any other hearsay evidence of the admission.

The learned Subordinate Judge has come to the conclusion that the plaintiff has established his title mainly on the strength of the admission to which I have referred. The error, therefore, which he has committed in using the judgment for a purpose for which it cannot be legitimately used vitiates his decree. The result is that, in my opinion, the judgment and decree appealed from should be set aside and the case should be remanded to the lower Appellate Court in order that the appeal to that Court, so far as relates to plots Nos. 2, 3, 4, 9, 12 and 19, may be re-heard with reference to these observations. As regards plot No. 1 this appeal is dismissed with proportionate costs. The balance of the costs

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will abide the result of the re-hearing in the Courts below:

MULLICK, J.—I agree.

Appeal allowed; Case remanded.

MADRAS HIGH COURT.

FIRST CIVIL APPEAL No. 239 OF 1914.

August 18, 1915.

Present.—Sir John Wallis, Kt., Chief Justice,
and Mr. Justice Srinivasa Aiyangar.

PEESAPATI SITARAMANUJACHARI

AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

KANDURI VELLAMMA—DEFENDANT—

RESPONDENT.

Hindu temple—Dedication to public—Character of temple, inference as to, from particular acts and circumstances.

ONE S, the paternal uncle of the defendant's husband, built a temple in 1830 and dedicated it to Sri Venkateswaraswami. Idols were installed. Servants such as *Archakas*, *Vedaparayanam* and *Adhyapakam* office holders and others usually employed in public temples were appointed. There was no difference between this temple and other public temples so far as the performance of *pūja* and other services was concerned. Ever since it was built the temple was under the management of the defendant and her predecessors-in-title as *dharmakartas*. The public were freely allowed to worship therein and perform vows, and there was nothing to show that the public had to obtain the permission of the *dharmakarta* therefor. It also appeared that when the temple lands had to be enfranchised, *inam pūttals* were issued in the name of the idol. Some lands were also given to the temple by a stranger to the family. There was also a Will in which the defendant's husband was described as a *dharmakarta*.

Held, that the above facts clearly established that the suit temple was dedicated for public worship. [p. 823, col. 1.]

Held, further, that the fact that the food cooked in the temple and offered to the idol was used by the defendant, that the temple servants rendered services to her also, that the Will contained elaborate provisions regarding the management of the temple, and that no accounts had been maintained by the defendant or her predecessors-in-title of the management of the temple properties, did not in any way derogate from the public character of the temple and were quite insufficient to prove that it was the private property of the defendant. [p. 823, col. 2.]

Appeal against the decree of the District Court of Vizagapatam, in Original Suit No. 7 of 1913.

FACTS.—The facts of the case sufficiently appear from the judgment.

Messrs. M. O. Parthasarathi Iyengar and V. Ramesam, for the Appellants:—The temple

in question was no doubt originally built by the paternal uncle of the defendant's husband, but it was being managed by him all along only as *dharmakarta*. Ever since it was built the outside public had the right of worship therein and were making offerings and performing vows; no permission had ever been obtained for the same. Even in the matter of *pūja* and services there was absolutely no difference between a public temple and the suit temple. Exhibit IV clearly recites that the defendant's husband was only a *dharmakarta*. The lands belonging to the temple had been enfranchised in the idol's name. These facts clearly show a dedication to the public.

The Hon'ble Mr. B. N. Sarma, for the Respondent:—The temple is purely a private institution. The public had only been permitted to worship therein. The food cooked in the temple and offered to the idol is taken by the defendant. The servants of the temple are only her private servants, who in addition to their other work are working in the temple. Exhibit IV itself shows that the temple cannot be a public one, as it contains elaborate provisions for management which are *ultra vires* of the trustee. The most important and conclusive fact is the non-maintenance of accounts by the defendant and her predecessors-in-title regarding the management of the temple. This could never be if the suit temple had been a public one.

JUDGMENT.

SRINIVASA AIYANGAR, J.—The question for decision in this appeal is whether the suit temple is a private temple or a public temple. The temple was built in 1830 by one Singarachary, the paternal uncle of the defendant's husband, in the village of Bhyripuram. The temple was dedicated to Sri Venkateswaraswami. The defendant and her predecessors are styled *dharmakartas* of the temple (Exhibits I, III and IV).

A fixed stone idol was installed in the temple and also, copper idol to be taken out in processions. *Archakas* or priests were appointed to make the *pūja* or worship as also reciters of *Veda* and Tamil *prabandhams* and other servants usually employed in public temples. In fact the *pūja* and other services in the temple in no way

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differ from those in a public temple. It is admitted that the general public, ever since the construction of the temple and the consecration of the idols, have been worshipping in the temple. It is said that they do so with the permission of the *dharmakarta* for the time being. There is, however, no evidence that any such permission was ever asked for. The witnesses for the plaintiffs say that all caste Hindus have a right to worship in the temple, and the evidence for the defendant materially corroborates this. Defence witness No. 1 says in his cross examination that "*Vaishnavas* have a right to worship god in the temple. *Brahmins*, *Kshatriyas* and *Komatis* have a right to get worship done through the *Archakas*. People of all castes may make offerings to god. Such offerings were never refused. Even defendant's enemies worship at the temple." Defence witness 3 says "that all the three castes have a right to make worship and give offerings at the suit temple. As defendant is trustee she has the right to allow or refuse admittance to the temple without assigning reasons. She never to my knowledge refused admittance." Her fourth witness says in his examination-in-chief "that the temple is under the *dharmakartaship* of the defendant. It belongs to god. Venkateswaraswami," and in cross-examination "the defendant cannot appropriate the lands to her use, nor alienate them. All people can worship and offer *bhoyams* at the suit temple only through *archakas*. Defendant has never hitherto refused permission to worship." It is also clear from the evidence, especially paragraphs 13 and 14 of Exhibit IV, that the general public have been making offerings, and fulfilling vows in the temple. Another important circumstance is that the lands belonging to the temple were enfranchised and *inam puttahs* issued in the name of the idol. Exhibit C shows that a person who was a stranger to the defendant's family gave some lands to the temple. Further, the Will, Exhibit IV, shows that with respect to the temple and its endowments the defendant's husband was merely a *dharmakarta* or trustee. The evidence above set out clearly establishes that the suit temple was dedicated for public worship.

The defendant, however, relies on the

following facts to prove that the temple is her private temple *viz.*, that the food cooked in the temple and offered to the idol is used by the defendant; that the temple servants also render service to her; that the Will, Exhibit IV, contains elaborate provisions for the management of the temple which ordinarily a trustee of a public temple would have no power to make; and that no accounts were kept by the defendant or her predecessors of the management of the temple properties. It appears that the bulk of the property of the temple was given by the defendant's husband and his uncle, they were also the hereditary trustees; and it is, therefore, not unlikely that they, sometimes, arrogated to themselves powers which they did not possess. They are quite insufficient to prove that the temple is a private temple. It is very unusual for a Hindu in Southern India to construct a temple outside his dwelling house for private worship. I am, therefore, unable to agree with the learned District Judge on this point.

The District Judge finds that no misconduct or negligence has been proved against the defendant in the management of the temple or its properties, and I agree with him. As I find that the temple is a public temple, the defendant is bound to maintain accounts of her management of the temple and its endowments.

The respondent contends that the sanction of the Collector, Exhibit A, is vague and also that the plaintiffs, who are only two out of the large number of persons to whom sanction was given, are not entitled to sue under section 92 of the Civil Procedure Code. But as the two plaintiffs have obtained the sanction of the District Court under the Religious Endowments Act, it is unnecessary to decide this point. I would reverse the decree of the District Judge and declare that the suit temple is a public temple and direct the defendant to maintain accounts of her management of the temple and its endowments.

As regards the costs, in the circumstances of this case I would direct each party to bear his own costs throughout.

WALLIS, C. J.—I agree. Having regard to the ideas prevailing among Hindus in this part of India, I think there is sufficient evidence of an intention to dedicate these properties for public charitable purposes, that is

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to say, for the purposes of a temple for the use of Hindu worshippers.

Appeal allowed.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL NO. 397 OF 1914.

August 2, 1915.

Present:—Justice Sir Asutosh Mookerjee, Kt.,
and Mr. Justice Beachcroft.

KALI CHARAN NATH AND ANOTHER—
DECREE-HOLDERS—APPELLANTS

versus

SUKHADA SUNDARI DEBI AND OTHERS—

DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 47—Execution of decree—Representative—Decree against ostensible representative—Execution against executor—Remedies of decree-holder—Suit upon domestic judgment.

On the 16th September 1911 A instituted a suit against M for the recovery of a large sum of money. During the pendency of the suit M died on the 27th November 1911. On the application of A, the three sons of the deceased, who were ostensibly his heirs and representatives, were brought on the record in his place. They did not object to the adoption of this course. The case was tried on the merits and on the 8th May 1912, a decree was made, with the usual direction that the judgment-debt be realised out of the estate of the deceased in the hands of the substituted defendants. On the 9th June 1913, the decree-holder applied for execution of the decree, and notices were duly issued. Thereupon the wives of the three sons of the deceased intervened and stated that execution could not proceed as M had made a testamentary disposition of his properties on the 18th May 1911, whereby they had been appointed executrices.

Held, that the decree as it stood could not be executed against the estate in the hands of the executrices; [p 825, col. 2.]

that the remedy of the decree-holder was, either to have the decree vacated, the suit restored, the executrices brought on the record and a new decree made against them, or, to institute a suit on the judgment and to obtain a decree thereon against the executrices. [p. 825, col. 2.]

An action on what may be called a domestic as distinguished from a foreign judgment is permissible only where the judgment cannot be enforced in some other way. [p. 827, col. 1.]

Appeal against the order of the District Judge of Dacca, dated the 16th March 1914, affirming that of the Munsif, Dacca, dated the 3rd January 1914.

Babus Satish Chunder Ghosh and Smritis Chunder Ghosh, for the Appellants.

Babu Upendra Lal Roy, for the Respondents.

JUDGMENT.—This is an appeal by the decree-holders against an order in execution proceedings, and illustrates, what has been often stated before, that the difficulties of a litigant begin when he has obtained his decree. On the 16th September 1911 the appellants instituted a suit against one Mahim Chandra Chakrabarti for recovery of a large sum of money. During the pendency of the suit, the defendant died on the 27th November 1911. On the application of the plaintiffs, the three sons of the deceased, who were ostensibly his heirs and representatives, were brought on the record in his place. They did not object to the adoption of this course. The case was tried on the merits, and on the 8th May 1912 a decree was made against the persons supposed to be the heirs and representatives of the original debtor. The decree directed as usual that the judgment-debt be realised out of the estate of the deceased in the hands of the substituted defendants. On the 9th June 1913, the decree-holders applied for execution of their decree, and notices were duly issued. Thereupon the wives of the three sons of the deceased intervened and stated that execution could not proceed as Mohim Chandra, their father-in-law, had made a testamentary disposition of his properties on the 1st May 1911, whereby they had been appointed executrices. They alleged that the Will had been duly proved in 1913, but that the Probate had not been actually issued as the question of valuation of estate was still under investigation by the Collector. The Court held that the decree had been obtained against persons who were not the true representatives of the deceased debtor and could not be executed against the estate in the hands of the executrices. The application for execution was consequently dismissed. The decree-holders appealed to the District Judge, but the appeal has been dismissed as incompetent. The decree-holders have now appealed to this Court and have contended that the appeal should have been heard on the merits by the District Judge and execution allowed against the estate in the hands of the executrices. It is plain that the answer to the question whether the order of the primary Court was appealable or not, depends upon the question, whether

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the decree is capable of execution against the estate in the hands of the executrices; if the latter are representatives of the parties to the suit, the order falls within the scope of section 47 of the Code and is appealable as a decree; if they cannot be deemed such representatives, the order is not covered by that section and cannot be challenged by way of appeal.

We may at the outset deal with a narrow ground assigned by the respondents in support of the view that the executrices are not representatives of the parties to the suit; they have argued that they are the representatives of the original debtor but are in no sense representatives of the sons of the debtor, who were brought on the record of the suit as his successors-in-interest. This contention is based on a limited view of the meaning of the term 'representative.' The sons of the deceased defendant were brought on the record as his representatives-in-interest; they were unquestionably his representatives to all appearances; the Will had not been proved at that time, nor were the plaintiffs ever aware of its existence. Consequently, they were the only persons who could be brought on the record as successors-in-interest of the deceased. Since then the Will has been proved, and the Probate, by a legal fiction, takes effect retrospectively from the date of the death of the testator. Consequently the estate which was then ostensibly represented by the sons and heirs of the deceased, is now represented by the executrices. Without undue stretch of language, the view may, in these circumstances, be maintained that the executrices are representatives of the parties to the suit who were themselves before the Court in a representative character. Reference may in this connection be made to the decision in *Premmoyi v. Preonath Dhur* (1), where an analogous question arose for consideration. There a Hindu widow had instituted a suit as representative of the estate of her husband; on her death during the pendency of the suit, the reversionary heirs were brought on the record. It was contended that they were not *her* representatives as they derived title not from *her*, but from her husband. This contention was negatived, and it was

ruled that as the widow and the reversioners successively represented the same interest, the reversioners might be treated as representatives of the widow. We are, therefore, not prepared to hold that the order of the primary Court is beyond the scope of section 47, merely because the executrices cannot, in popular language, be called representatives of the deceased debtor. Whether they can be deemed representatives of parties to the suit or not, depends, in our opinion, upon the answer to a more fundamental question.

It was explained by a Full Bench of the Court in *Ishan Chunder Sirkar v. Beni Madhub Sirkar* (2) that the term representative includes not merely a legal representative such as heir, executor or administrator, but also a representative-in-interest, that is, a representative of the decree-holder or judgment-debtor who, so far as such interest is concerned, is bound by the decree: *Gulzari Lal v. Madho Ram* (3). We are thus brought back to what must be deemed the root of the matter in this case, namely are the executrices bound by the decree? We are of opinion that the decree as it stands cannot be executed against the estate in their hands and that the remedy of the decree-holders is, *either*, to have the decree vacated, the suit restored, the executrices brought on the record and a new decree made against them, *or*, to institute a suit on the judgment and to obtain a decree thereon against the executrices. This is clear from the decision in *Ashi Bhushan Dasi v. Pelaram Mandal* (4). There a decree had been obtained for mesne profits against an alleged adopted minor son as the representative of the wrong-doer. The adoption was subsequently declared invalid, whereupon the decree-holder sought to proceed in execution against the real representative. It was ruled that the decree-holder could not proceed against the judgment-debtor on the record as he had not received any assets of the wrong-doer; nor could he ask the Court to substitute the name of the real representative in the decree, because the result would be really a new decree in his favour against such represen-

(2) 24 C. 62; 1 C. W. N. 36.

(3) 26 A. 447 (F. B.); A. W. N. (1904) 61; 1 A. L. J. 65.

(4) 21 Ind. Cns. 519; 18 C. L. J. 362; 18 C. W. N. 173.

(1) 23 C. 636.

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tative. At the same time, it is clear that a suit can be brought against the executrices on the basis of the judgment already obtained.

Reference may be made to the decision of Markby, J., in *Prosunno Chunder Bhattacharjee v. Kristo Chytunno Pal* (5), where, under circumstances somewhat similar to those of the present case, it was held that if the decree could not be executed against the estate in the hands of the executor, it was at any rate sufficient to enable the plaintiff to bring a suit against the executor to have the decree satisfied. We are not now concerned with the question of the binding character of orders made or sales held in execution of a decree obtained against persons who, as subsequent events show, are either not the proper representatives of the deceased defendant or constitute only some of his representatives. There has been some divergence of judicial opinion upon this matter, as is clear from an examination of the decisions in *General Manager of the Raj Durbhanga v. Ramaput Singh* (6); *Assamatthem Nessa Bibee v. Lutchempeet Singh* (7); *Chuni Lal v. Osmond Beeby* (8); *Baswantapa Shidapa v. Ranu* (9); *Janaki v. Dhanu Lal* (10); *Chathakelan v. Govinda Karumiar* (11); *Kadir Mohideen Marakkayar v. Muthukrishna Ayyar* (12) and *Ramasawmi Chettiar v. Oppilamani Chetti* (13) on the one hand, and *Sitanath Das v. Roy Luchmiput Singh* (14); *Harish Chunder Biswas v. Puri Das Das* (15) and *Lal Behary v. Nagendra Nath* (16) on other hand. These decisions do not directly touch the question in controversy now before us, viz., whether the decree obtained against the ostensible representatives should be allowed to be

executed against the estate in the hands of the executrices though objection is taken before execution has been issued, or whether the decree-holders should be limited to their remedy by way of a decree against the executrices, either by re-opening the suit or by instituting a fresh suit on the judgment previously obtained. The decision in *Rameshwar Singh v. Janeshwari Babooshin* (17), which bears on the subject, is clearly distinguishable, in view of the special circumstances under which the decree in the first suit was obtained. There cannot, we think, be a reasonable doubt that a suit would lie on the judgment; this, indeed, is to some extent borne out by Article 122 of the Schedule to the Indian Limitation Act, which shows that the Legislature contemplated the possibility of suits upon judgments obtained in British India, though we are not unmindful that the Limitation Act cannot give rise to a cause of action where none exists independently of the provisions thereof; as Sir Richard Couch observed in *Hari Nath v. Mothuramohan* (18), the intention of the law of limitation is not to give a right where there is not one, but to interpose a bar after a certain period to a suit to enforce an existing right: *Khunni Lal v. Kunwar Gobind Krishna Narain* (19). It is not necessary, for our present purpose, to enter upon a discussion of the circumstances under which a suit lies upon a judgment in British India. An examination of the cases, specially those of *Sandes v. Jomir Shaikh* (20); *Attermoney Dossee v. Hurry Doss Dutt* (21); *Golam Arab v. Curreembux Shaikjee* (22); *Bhavanishankar v. Pursadri* (23); *Merwanji Nowroji v. Ac' abai* (24); *Ramayya v. Venkataratnam* (25); *Annoda Prasad v. Nobi Kissore Roy* (26); *Mullesam Naidu v. Jugala Panda* (27);

(5) 4 C. 342; 3 C. L. R. 154.

(6) 14 M. I. A. 605; 10 B. L. R. 294; 17 W. R. 450; 2 Suth. P. O. 7. 575; 3 Sar. P. C. J. 117; 20 E. R. 912.

(7) 4 C. 142; 2 C. L. R. 223; 1 Shome L. R. 219.

(8) 30 C. 1044.

(9) 9 B. 86.

(10) 14 M. 454.

(11) 17 M. 186; 4 M. L. J. 59.

(12) 26 M. 230; 12 M. L. J. 368.

(13) 4 Ind. Cas. 1059; 33 M. G. 6 M. L. T. 269; 19 M. L. J. 671.

(14) 11 C. L. R. 268.

(15) 6 Ind. Cas. 627; 12 C. L. J. 561; 14 C. W. N. 1041.

(16) 16 Ind. Cas. 690; 22 C. L. J. 266.

(17) 21 Ind. Cas. 397; 18 C. W. N. 129; 19 C. L. J. 19.

(18) 20 I. A. 183; 21 C. 8.

(19) 10 Ind. Cas. 477; 15 C. W. N. 545 (P. C.); 38 I. A. 87; 8 A. L. J. 552; 13 Bom. L. R. 427; 13 C. L. J. 575; 10 M. L. T. 25; 21 M. L. J. 646; 33 A. 356; (1911) 1 M. W. N. 432.

(20) 9 W. R. 399.

(21) 7 C. 74; 9 C. L. R. 357; 4 Shome L. R. 192.

(22) 5 C. 254; 4 C. L. R. 477.

(23) 6 B. 292.

(24) 8 B. 1.

(25) 17 M. 122; 4 M. L. J. 52.

(26) 9 C. W. N. 952; 33 C. 560.

(27) 23 M. 292.

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Periasami Mudaliar v. Seetharama Chettiar (28), shows that there is considerable divergence of judicial opinion upon the subject, and that the Courts are by no means agreed as to the circumstances under which a suit may be instituted in this country on what may be called a domestic as distinguished from a foreign judgment. It is well known that in England there has been divergence of judicial opinion on the subject [Freeman on Judgments, Chapter XVII; Black or Judgments, Chapter XXIV], and it is only in recent years that the principle has been adopted that although an action lies on judgment which finally establishes a debt, whether the judgment be English or foreign, it is an abuse of the process of the Court to bring an action upon an English judgment if it can be enforced in some other way: *Pritchett v. English and Colonial Syndicate* (29); *Grant v. Easton* (30); *Nourion v. Freeman* (31); *Pemberton v. Hughes* (32); *Hodsoll v. Baxter* (33). The principle on which an action is allowed to be maintained on a judgment was concisely explained by Baron Parke in *Williams v. Jones* (34): "The principle... is, that, where a Court of competent jurisdiction has adjudicated a certain sum to be due from one person to another, a legal obligation arises to pay that sum, on which an action of debt to enforce the judgment may be maintained." No mischief can result from the acceptance of this principle, if it is adopted subject to the qualification recognised in modern English law, viz., that an action is permissible only where the judgment cannot be enforced in some other way; and beyond this, it is not necessary for our purpose to proceed.

We hold accordingly that the decree-holders are not entitled to execute their decree against the estate in the hands of the

executrices. The appeal is consequently dismissed, but there will be no order for costs.
Appeal dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEALS NOS. 1127 AND 1147
OF 1914.

August 26, 1915.

Present:—Mr. Justice Spencer and
Mr. Justice Seshagiri Aiyar.

PARVATHI AMMAL—DEFENDANT—
APPELLANT IN S. A. NO. 1127 OF 1914 AND
RESPONDENT IN S. A. NO. 1147 OF 1914
versus

GOVINDASAMI PILLAI—PLAINTIFF—
RESPONDENT IN S. A. NO. 1127 OF 1914 AND
APPELLANT IN S. A. NO. 1147 OF 1914.

Civil Procedure Code (Act V of 1908), O. XXI, r. 93—
Civil Procedure Code (Act XIV of 1882), s. 315—
Execution sale set aside—Purchaser, suit by, against
decree-holder for poundage deducted from purchase-
money as well as for interest on amount of purchase-
money deposited, maintainability of—Poundage, what is.

A third party purchaser at an execution sale, which was subsequently set aside owing to the irregularities in the conduct thereof for which the decree-holder was responsible, is entitled to sue and recover from the decree-holder the amount of poundage which was deducted from the purchase-money deposited by him into Court as well as interest on such deposit. There is nothing in Order XXI, rule 93, Civil Procedure Code, which debars such a suit. [p. 830, col. 2.]

The nature of poundage fees pointed out. [p. 829, col. 1.]

Second appeals against the decrees of the Court of the Temporary Subordinate Judge of Tanjore, in Appeal Suits Nos. 690 and 718 of 1912, respectively, both preferred against those of the Court of the District Munsif of Tanjore, in Original Suit No. 271 of 1911.

FACTS.—The facts of the case appear clearly from the judgment.

Mr. K. S. Ganapathi Iyer, for the Appellant in Second Appeal No. 1127 of 1914 and for the Respondent in Second Appeal No. 1147 of 1914:—No suit lies to recover poundage or interest. The remedy of the plaintiff was in execution proceedings. Section 315 of the Code of 1882 has been changed in this respect and Order XXI, rule 93, of the present Code of 1908 does not permit a suit. Vide *Mohideen Imbrahim v. Mahamed Meera Levvai* (1);

(1) 17 Ind. Cas. 437; 23 M. L. J. 487; 12 M. L. T. 431; (1912) M. W. N. 1130.

- (28) 27 M. 243 (F. B.); 14 M. L. J. 84.
(29) (1899) 2 Q. B. 428; 86 I. J. Q. B. 801; 47 W. R. 577; 81 L. T. 206.
(30) (1883) 13 Q. B. D. 302; 53 L. J. Q. B. 68; 49 L. T. 645; 32 W. R. 239.
(31) (1889) 15 App. Cas. 1; 59 L. J. Ch. 337; 62 L. T. 189; 38 W. R. 581.
(32) (1899) 1 Ch. 781; 68 L. J. Ch. 281; 47 W. R. 354; 80 L. T. 369; 15 T. L. R. 211.
(33) (1858) El. Bl. & El. 884; 28 L. J. Q. B. 61; 4 Jur. (N. S.) 556; 6 W. R. 686; 120 E. R. 739; 113 R. E. 929.
(34) (1845) 13 M. & W. 628; 67 R.-R. 767; 2 D. & L. 680; 14 L. J. Ex. 145.

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also Rule 157 of the Mofussil Rules of Practice, which provides that on setting aside the sale, the Court shall determine which of the parties is responsible therefor, etc. Further, the purchaser is not entitled to the return of the poundage under rule 157 (2) of the Rules of Practice (Mofussil). Again, the purchaser is either on the ground of estoppel or by *res judicata* debarred from claiming a refund of the poundage or interest inasmuch as he failed to ask for them in the proceedings to set aside the sale to which he was a party. *Prosunno Kumar Sanyal v. Kali Das Sanyal* (2). Lastly, there is no provision in the Code for the recovery of poundage.

Mr. G. S. Ramachandra Iyer, for the Respondent in Second Appeal No. 1127 of 1914 and the Appellant in Second Appeal No. 1147 of 1914:—The suit is not for poundage, but for a portion of the purchase-money which has been withheld by the Court for poundage from the amount deposited by the purchaser. The case in *Mohideen Ibrahim v. Mahamed Meera Levvai* (1) does not apply, as there the sale was set aside for want of saleable interest in the judgment-debtor. Moreover, the right to recover the purchase-money, being a substantive right, cannot be affected by a change in procedure. The Court ought to assist the purchaser as he is an innocent third party. The right to recover the purchase-money in a case such as the present where the sale is avoided for fraud or carelessness on the part of the decree-holder is not a creation of Statute, but is an inherent right existing apart therefrom. Vide *Powell v. Powell* (3), *Rawstorne v. Wilkinson* (4), *Tyson v. Paske* (5) and 24 American Cyclopaedia of Law and Procedure, page 70. The plaintiff is clearly entitled to interest as he has been deprived of the use of his money. *Raghubar Dayal v. Bank of Upper India Limited* (6).

Mr. K. S. Ganapathi Iyer, in reply:—The decree-holder did not draw the money from the Court and as he had not the use of the money, which remained all

along in Court, he is not liable to pay any interest.

JUDGMENT.—The facts of the case are not in dispute. The defendant obtained a decree against certain persons. Immoveable properties were sold under that decree, and the plaintiff became the purchaser. At the instance of the judgment-debtors the sale was set aside on the ground of irregularities in the conduct of the sale. Plaintiff, the purchaser, sued to recover the amount of the poundage fee deducted from the purchase-money paid by him, and also interest. The claim for Vakils' fees, etc., has not been pressed before us. The District Munsif held that plaintiff was entitled to interest at 6 per cent. and that a separate suit does not lie to recover poundage. Both the parties appealed. The Subordinate Judge held that the claim for poundage was sustainable, but that interest should not have been decreed. Second Appeal No. 1127 of 1914 is by the defendant against the decree for poundage. Second Appeal No. 1147 of 1914 is by the plaintiff for the interest disallowed.

Before dealing with the question of law argued before us, we may state that we see no reason to differ from the conclusion of the Courts below that defendant is responsible for the irregularities in the conduct of the execution sale. In the order passed on the application of the judgment-debtor, the Subordinate Judge held "that the decree-holder was responsible for the material irregularity in publishing or conducting the sale." (See paragraph 9 of the District Munsif's judgment.) The District Munsif in the present suit came to the same conclusion—apparently the liability of the defendant was not disputed in appeal. It is true the Court in ordering the sale of the property should have directed the *amin* to sell the property in different lots, but that would not absolve the defendant from his liability. The responsibility of the officer leaving execution in the *mofussil* is not that of the Sheriff in England. It is the duty of the decree-holder to put the Court in possession of the necessary information and to attend to the various requirements of the law in publishing and conducting the sale. The Court cannot be proceeded against for irregularity in execution, if it acted to the best of its

(2) 19 C. 683.

(3) 19 Eq. Cas. 422; 44 L. J. Ch. 311; 32 L. T. 148; 23 W. R. 482.

(4) 4 M. & S. 256; 16 R. R. 455; 105 E. R. 829.

(5) 2 Raym. 1212; 92 E. R. 300.

(6) 5 A. 304; A. W. N. (1883) 51.

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information and without malice. The party who puts the Court in motion is liable to the purchaser who has been aggrieved. Even in Sheriff's sales, the purchaser is entitled to proceed against the decree-holder. In *Dorab Ally Khan v. Executor of Khajah Moheooodeen* (7), in which the Judicial Committee had to pronounce upon the liability of the Sheriff who executed a decree of the original side of the Calcutta High Court, it was pointed out that the Sheriff may render himself liable if he seized the property situated beyond his territorial jurisdiction, or if he exceeded the powers expressly conferred on him by the Statute. Their Lordships have also laid down that where the Sheriff acts under the advice and guidance of the execution creditor, the latter will be responsible to the purchaser. The present is an *a fortiori* case.

The main question argued related to the maintainability of the suit. Mr. Ganapathy Aiyar contended that the plaintiff should have sought redress in execution and that a separate suit does not lie. Section 315 of Act XIV of 1882 provided for two classes of cases: (1) where the sale has been set aside as provided for in the Code and (2) where it was found that the judgment-debtor had no saleable interest in the property sold. The present Code contains no provision regarding the right of the purchaser to obtain a refund of his purchase-money without applying to set aside the sale, when it is subsequently found that the judgment-debtor had no saleable interest in the property. It may be, as suggested by Mr. Ramachandra Aiyar for the respondent, that unless the purchaser seeks the aid of the Court to set aside the sale, he has no remedy against the decree-holder. It was laid down by the Judicial Committee in *Dorab Ali Khan v. Executors of Khajah Moheooodeen* (7) that there was no warranty of title in Court sales. See also *Sundara Gopalan v. Venkatarada Ayyangar* (8). The right of action to obtain a refund consequent on the want of saleable interest in the judgment-debtor is not a right inhering in a purchaser, but is only the creature of a Statute and the

(7) 5 I. A. 116; 2 C. L. R. 529; 3 C. 806; 3 Suth. P. C. J. 519; 3 Sar. P. C. J. 818; 2 Ind. Jur. 426.
(8) 17 M. 228; 3 M. L. J. 293.

right thus conferred can only be exercised within the limitations prescribed. Consequently, without getting the sale set aside through Court, the purchaser has no right of action. The general principle of *caveat emptor* would affect the purchaser unless he chooses to adopt the remedy given him by the Statute. But the right to recover from a party whose fraud or carelessness has led to the invalidity of the sale stands on a different footing. In such cases by neglecting the duty cast on him, he renders himself liable to compensate the injured party for the loss the latter has sustained. The right is not created for the first time by the Statute. The Code only recognised what has existed all along. As stated by Sir James Bacon (Vice-Chancellor) in *Powell v. Powell* (3), the purchaser is entitled under these circumstances to be discharged from his contract by reason of the invalidity of the proceedings which led up to the sale and is entitled to be placed in *status quo ante*. The same proposition is stated in 24 Cyclopaedia of Law and Procedure 70, thus:—

"It is generally held that when the proceedings are invalid, so that the purchaser loses the land, title to which he would have had but for the defects in the proceedings, he is entitled to recover back the purchase-money paid by him, and to be reimbursed for money expended by him for taxes and on repairs and improvements that have increased the value of the land."

The decision in *Mohideen Ibrahim v. Mohamed Meera Levvai* (1), on which the appellant relied strongly, does not touch the present question. Mr. Justice Napier held in that case that where the purchaser was deprived of the possession by reason of a decision in a subsequent suit, he is not entitled to sue for the return of the purchase-money. The omission from the Code of 1908 of the clause relating to the want of "saleable interest" in the judgment-debtor is relied on strongly by the learned Judge. In the present case the sale has not become abortive owing to the absence of saleable interest in the judgment-debtor. Mr. Ganapathy Aiyar contended that the words of section 315 of Act XIV of 1882 "that the purchaser shall be entitled to receive back his purchase-money" may confer a right of suit as held in numerous cases, but that the words "shall be entitled to an

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order for re-payment" in rule 93 indicates a deliberate policy to restrict the remedy to execution in all cases of sales being set aside. We are unable to see the distinction. There are no words in the present Code, as in the Code of 1882, enabling the purchaser to realise his money by way of execution. Further, he is no party to the suit or the decree. Unless, therefore, his right of action is taken away by express words, he is entitled to pursue his ordinary remedy by filing a suit.

Another contention of the appellant was that as poundage is taken by the Court, the decree-holder is not bound to pay it to the purchaser. This argument proceeds on a misconception of the nature of the poundage fees. As was pointed out by Mr. Ramachandra Aiyar in his able argument, what the purchaser claims is really a portion of the purchase-money. It is from the payment made by him the Court makes a deduction for poundage and pays the balance to the decree-holder. Poundage is the fee which is levied in England by the Sheriff as remuneration for his services: In this country, as the officers of the Court conducting the sales are paid a fixed salary, a certain percentage of the purchase-money is taken for purchasing stamps. In effect the fee is a charge paid by the decree-holder for the services he obtains from the Court. In England as well as in this country, this fee is taken out of the sale-proceeds. See paragraph 71 in 14 Halsbury's Laws of England and rule 154 of the Civil Rules of Practice. There is, therefore, no warrant for the suggestion that in claiming the money retained as poundage fee, the purchaser does not ask for the return of the purchase-money. Nor do we see any reason to assent to the argument that the claim for the recovery of such fees should be disposed of in execution. The omission of the word "poundage" in rule 157, clause (2), was much relied on. This omission cannot affect the substantive right of suit which the purchaser has. It was held in *Rawstorne v. Wilkinson* (4), that the Sheriff has a right of action to recover poundage fees where the sale proves abortive. See also *Tyson v. Paske* (5). The auction-purchaser whose money has been paid by way of poundage

to the Sheriff will stand in his shoes to recover it against the execution creditor. The fact that it is retained by the Court can make no difference in principle. We have, therefore, come to the conclusion that the Subordinate Judge was right in holding that the suit is not obnoxious to the execution provisions of the Code of Civil Procedure. We dismiss Second Appeal No. 1127 of 1914 with costs.

We are, however, unable to agree with the lower Appellate Court that the purchaser has lost his right to interest by any laches on his part. He is under no duty to see that the property is put up for sale in separate lots. He is not affected by any anterior mismanagement in the conduct of the sale. He has to take the property as advertised and sold. As he paid the money required by law, there is no reason for depriving him of the interest on his money. See *Raghubar Dayal v. Bank of Upper India Limited* (6). The rate of interest awarded by the Munsif is correct. We must reverse the decree in Second Appeal No. 1147 of 1914 with costs in this and in the lower Appellate Court and give a decree for Rs. 206 with interest at 6 per cent. from the date that the plaintiff deposited the money into Court.

Second Appeal No. 1127 of 1914 dismissed;

Second Appeal No. 1147 of 1914 allowed.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 1261 OF 1914.

July 16, 1915.

Present:—Justice Sir George Knox, KT.

SATNARAIN DUBE—PLAINTIFF—

APPELLANT

versus

NARAIN BARGAH AND OTHERS—DEFENDANTS—RESPONDENTS.

Evidence—Public document—Dakhlanama, copy of, admissible in evidence without proof.

A dakhlanama is a document forming record of the act of a public officer and, therefore, its copy is admissible in evidence without proof. [p. 831, col. 1.]

Muhammad Nasir v. Ram Karan Singh, 25 Ind. Cas. 529, followed.

Second appeal from a decree of the Additional Subordinate Judge of Gorakhpur.

Mr. Iswar Saran, for the Appellant.

The Hon'ble Dr. Sumdar Lal (with him Mr. S. M. Mir), for the Respondents,

PEER MAHOMED ROWTHEN v. RARUTHAN AMBALAM.

JUDGMENT.—As the lower Appellate Court observed, the chief point to be decided is whether the plaintiff has proved delivery of possession in his favour. In support of the fact that he had received delivery of such possession he produced a duly certified copy of a *dakhalnama*. That copy was admitted and by order of the Court of first instance placed upon the record. Afterwards it was returned, but no reason appears upon the document as to why it should have been returned. The lower Appellate Court held that the copy of the *dakhalnama* was not admissible in evidence without proof of due execution. It accordingly refused to consider it. It further held that if it were admissible in evidence, the plaintiff had not succeeded in proving delivery of possession in his favour. The reason why it so held is that the *dakhalnama* contained only an admission of the plaintiff and no person is allowed to prove his own admission. As the plaintiff had not in the opinion of the lower Appellate Court succeeded in proving that delivery of possession was made in his favour on the 5th of March 1909 it dismissed the appeal with costs.

The plaintiff comes here in appeal and takes the plea that the *dakhalnama* is admissible in evidence and proves the plaintiff's allegation. In support of this contention reliance is placed upon the case of *Muhammad Nasir v. Ram Karan Singh* (1). In this case my brother Rafique held that as the *dakhalnama* is a public document, its copy is admissible in evidence without proof. I also am of the same opinion. The *dakhalnama* is a document forming record of the act of a public officer (executive), viz., the *amin* of the Court and that being so, a copy is admissible in evidence. As the lower Appellate Court has decided the appeal on a preliminary point, I reverse the decree upon this point. I direct that the appeal be returned to that Court with instructions to place it upon its file of pending appeals and to determine it according to law. The Court will receive in evidence the copy of the *dakhalnama quantum valebat*. This will not prevent the lower Appellate Court from exercising the discretion given it under Order XLI, rule 27. Costs will abide the event.

Appeal allowed; Cause remanded.

(1) 25 Ind. Cas. 529.

MADRAS HIGH COURT.

APPEAL AGAINST ORDER NO. 180 OF 1911.

December 4, 1914.

Present:—Sir John Wallis, Kt., Chief Justice, and Mr. Justice Seshagiri Aiyar.

PEER MAHOMD ROWTHEN AND ANOTHER
—DEFENDANTS NOS. 47 AND 70—

APPELLANTS,

versus

RARUTHAN AMBALAM, THROUGH HIS
AUTHORISED AGENT, JAGANNATHA

IYENGAR—PLAINTIFF NO. 5—RESPONDENT.

Execution—Assignment of rights prior to decree—Assignee, whether can execute decree.

An assignment of rights prior to decree does not give any party right to execute a decree subsequently obtained.

Appeal against an order of the Court of the Subordinate Judge of Ramnad at Madura, in Execution Petition No. 78 of 1911 in Original Suit No. 2 of 1908 on the file of the Court of the Temporary Sub-Judge of Madura.

Mr. C. S. Venkatachariar, for the Appellants.

Messrs. T. Rangachariar and R. Kappusawmy Aiyar, for the Respondent.

JUDGMENT.—The view taken by the Subordinate Judge cannot be supported. The Subordinate Judge who heard the suit considered that the claim of the 5th plaintiff was barred by limitation and consequently did not pass any decree in his favour, therefore, the 5th plaintiff was not entitled to execute the decree as it stood at the time of the application. The Subordinate Judge to whom the application for execution was made considered that the 5th plaintiff must be regarded as the assignee of the decree, but the assignment to the 5th plaintiff was not of the decree but of rights prior to decree: and as pointed in *Basroorvittil Bhandari v. Ramachandra* (1), such an assignment will not give the 5th plaintiff any right to execute the decree subsequently obtained: the fact that in *Basroorvittil Bhandari v. Ramachandra* (1), the assignee did not apply to be made a party prior to decree can make no difference in the application of the principle enunciated in that decision. We must reverse the order of the Subordinate Judge and dismiss the application, without prejudice to his right to apply

(1) 17 M. L. J. 392.

CHENNAMA SHETTITHI v. KRISHNAYYA SETTI.

BIRIDUGADDA VENKADU v. RECEIVER N. & M. ESTATES.

again under the decree as amended by us.
The appellant is entitled to his costs in this
and in the lower Court.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 2546 OF 1913.

November 24, 1913.

Present:—Mr. Justice Oldfield and
Mr. Justice Tyabji.

CHENNAMA, SHETTITHI AND OTHERS—

DEFENDANTS NOS. 1 TO 16—APPELLANTS

versus

KRISHNAYYA SETTI AND OTHERS—

PLAINTIFFS AND OTHERS—DEFENDANTS—

RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XLI, r. 22
—Memorandum of objections—Time of one month, how
to be calculated—Principle.

The principle applicable to the calculation of the
time of one month allowed by Order XLI, rule 22,
Civil Procedure Code, is that it shall be taken to
extend upto and including the day before the corre-
sponding date of the next month and there is no
authority for any special rule as regards February—
March.

Therefore, a memorandum of objections presented
on the 16th March, the plaintiff having been served
with notice on the 13th February, was presented out
of time, although the 15th March was Sunday.

Second appeal from the decree of the
Court of the Subordinate Judge of South
Canara, in Appeal Suit No. 33 of 1913,
preferred against that of the Court
of the District Munsif of Coondapoor, in
Original Suit No. 657 of 1909.

Messrs. B. Sitarama Rao and K. Y. Adiga,
for the Appellant.

Mr. K. P. Lakshman Rao for Mr. Sundara
Rao, for the Respondents.

JUDGMENT. The memorandum of ob-
jections was presented on the 16th March,
the plaintiffs having been served with
notice on the 13th February. The principle
applicable to the calculation of the time,
one month allowed by Order XLI, rule 22,
is that it shall be taken to extend up
to and including the day before the
corresponding date of the next month and
we have not been shown authority for
any special rule as regards February—
March. Although, therefore, the 15th March
was Sunday, the memorandum was
presented out of time and must be dismissed
with costs.

Appeal dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 802 OF 1914.

Septembr 15, 1915.

Present:—Mr. Justice Coutts-Trotter and
Mr. Justice Kumaraswami Sastri.
BIRIDUGADDA VENKADU—DEFENDANT
—APPELLANT

versus

RECEIVER OF NIDADAVOLE AND
MEDUR ESTATES—PLAINTIFF—

RESPONDENT.

*Appeal time-barred—Admitted by mistake—Issue of
notice to respondent—Memorandum of objections filed
by respondent—Appeal rejected Objection, if can be
heard.*

A respondent who in response to a notice issued to
him by mistake has appeared and filed a memo-
randum of objections in a time-barred appeal, is
entitled to be heard on it even if the appeal is rejected
as being out of time.

Second appeal against the decree of the
District Court of Kistna, in Appeal Suit
No. 707 of 1912, preferred against that
of the Court of the Suits Deputy Collector
of Kistna at Ellore, in Summary Suit No.
220 of 1912.

Mr. A. Viswanadham for Mr. V. Ramesam,
for the Appellant.

Mr. M. Purushotham Naidu, for the
Respondent.

JUDGMENT.—The point taken in this
case is that as the appeal was out of time
and thrown out by the Judge without trial,
it was not competent for him to proceed to
try the memorandum of cross-objections. It is
quite unnecessary to decide that general
question in this case, because what hap-
pened in this case was that in error
the Court admitted the appeal as having
been presented in time, and notice was
given of it to the respondent and he
filed the memorandum of cross-objections
within thirty days of the service of the
notice upon him. It was subsequently
found out that this was a mistake; hav-
ing been made, the respondent was entitled
to take advantage of it, and he took it.
Therefore his memorandum which was filed
within the time laid down by the Code
of Civil Procedure must be heard. The
appeal fails and must be dismissed with
costs.

Appeal dismissed.

TARA KUMARI v. CHATURBHUJ NARAYAN SINGH.

PRIVY COUNCIL.

APPEALS FROM THE CALCUTTA HIGH COURT.

July 13, 1915.

Present:—Viscount Haldane, Lord Shaw,

Sir John Edge and Mr. Ameer Ali.

Thakurani TARA KUMARI—

APPELLANT

versus

CHATURBHUJ NARAYAN SINGH AND

OTHERS—RESPONDENTS

AND

Maharajah Sir RAVANESWAR PRASAD

SINGH BAHADUR—APPELLANT

versus

CHATURBHUJ NARAYAN SINGH

AND OTHERS—RESPONDENTS.

Hindu Law—Custom and general law—Mitakshara—Impartibility, custom of—Female's right to succession—Rule of primogeniture—Joint family—Separation.

Where a custom is proved to exist, it supersedes general law, which, however, still regulates all outside the custom. [p. 836, col. 2.]

Neelkisto Deb Burmono v. Beerchunder Thakoor, 12 M. L. A. 523; 2 W. R. (P. C.) 21; 3 B. L. R. (P. C.) 13; 2 Suth. P. C. J. 243; 2 Sar. P. C. J. 523; 20 E. R. 436, approved.

There is no inconsistency between a custom of impartibility and the right of females to inherit, and, therefore, the general law must prevail unless it be proved that the custom extends to the exclusion of females. [p. 837, col. 1.]

Ram Nundun Singh v. Maharani Janki Kcer, 29 I. A. 178 at p. 194; 29 C. 528; 7 C. W. N. 57, approved.

The widow of the last holder of an impartible estate which descends by the rule of primogeniture is not excluded from the succession if her husband was in fact separated and died without issue male, and if no custom which would exclude her from succession is proved. [p. 836, col. 2.]

In a *Mitakshara* family an ancestral impartible estate, on the death of the sole holder thereof, devolved, according to the family custom of primogeniture, on the elder of his two sons, the younger becoming entitled to maintenance. Subsequently, the elder brother granted to the younger brother a *mokarari pattah* of a part of the estate for his and his descendants' maintenance. It was proved that thereafter the younger brother built a new house outside the family dwelling, removed his family there and lived there separately from his elder brother and his family, that the younger brother constructed a wall between his house and the family dwelling, that he established in his new house a separate *thakurbari* and *tulsi pinda* and raised money on the mortgage of property granted to him and spent it on the marriage of his son's daughter, and that after the younger brother's death his son stated on oath in a criminal case that he was separate from the elder brother's branch of the family:

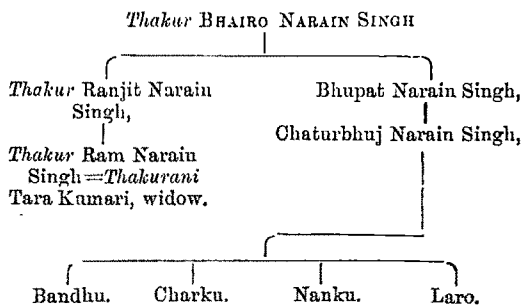
Held, that at the time of the death of the elder brother's only son who succeeded to the said estate the younger brother and his only son were separate from the elder brother and his son, and that the

elder brother's son having died without male issue his widow was entitled to succeed to the impartible estate in question in preference to the younger brother's son. [p. 838, col. 2.]

Consolidated appeals from a judgment and decree of the Calcutta High Court, dated January 7th, 1910, reversing those of the Court of the Subordinate Judge of Monghyr, dated January 22nd, 1909.

FACTS are as follows:—

The following pedigree will show the relationship of the parties:



The *taluk* of Telwa, an impartible estate, succession to which was governed by the rule of primogeniture descended on Bhairu Narain Singh who died in 1863 leaving two sons, Ranjit and Bhupat. The family was a joint and undivided one, governed by the *Mitakshara* School of the Hindu Law, but the succession to the estate was regulated by a custom of the family according to which the eldest son of the last holder succeeded to the *gadi* as sole owner, his other sons being entitled to receive *khorphosh* or maintenance. Ranjit accordingly succeeded to the *gadi* and Bhupat received maintenance. In 1879 Ranjit executed a *mokarari pattah* in favour of his brother, Bhupat, whereby he assigned to him two *mouzahs* and four *bighas* of *kamat* land in another *mouzah* as a *khorphosh* grant for his maintenance. By the terms of the said *mokarari*, it was not alienable by the grantee; but in breach thereof Bhupat did in fact execute mortgages from time to time to raise money for his needs. In 1897 Ranjit died, leaving a widow Gyan Kumari and an infant son Ram Narain him surviving. She was appointed guardian of her minor son, who succeeded to the *gadi* as Thakur according to the custom. In 1902

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Bhupat Narain died leaving a son, Chaturbhuj Narain, who had four sons, all of whom were respondents. In 1903 Ram Narain died while still a minor, leaving no issue, but only a widow, Tara Kumari. All the Revenue Courts refused to admit her claim and entered Chaturbhuj's name in the Revenue Registers as heir to the estate. In order to pay off the debts incurred by Ranjit Narain, Tara Kumari sold a half share of the *Taluk* Telwa to Maharaja Ravaneshwar Singh for Rs. 50,000 on September 16, 1906. The Maharaja paid off the debts. On August 19, 1907, Tara Kumari and the Maharaja instituted the suit against the respondents for the recovery of the estate from the respondents. The Subordinate Judge decided in favour of the appellants, but on appeal to the High Court the judgment of the lower Court was reversed and her and the Maharaja's claims were disallowed. They thereupon obtained a certificate to appeal to His Majesty in Council in due course and subsequently both appeals were consolidated.

Sir Robert Finlay, K. C., M. P. (with him Mr. Lowndes), for the Appellants, contended that the Subordinate Judge had held on facts that Bhupat and Ranjit had separated in food and estate. Bhupat had built a house separate from the family house, had a different *thakurbari* and *tulsi pinda* and had removed his family from the family house. He had built a wall separating both houses and borrowed money for the marriage of his grand-daughter. He had further deposed in a criminal case that he was separate. The judgment of the Subordinate Judge was good and should be upheld. The defence was a series of denials. They had not proved that by custom a female was excluded from succession. The estate was never joint. It went by custom of primogeniture. This custom was inconsistent with the property being joint. What the opposite party said was that inasmuch as the property was impartible, there could be no partition.

[MR. AMER ALI: Does not the decision in *Katama Natchiar v. Rajah of Shivagunga* (1) cover the point you argue?]

In *Tekaet Doorga Pershad Singh v. Tekaetnee Doorga Kooeree* (2) it was held that from the (1) 9 M. L. A. 539 at p. 547; 2 W. R. 31 (P. C.); 1 Suth. P. C. J. 520; 2 Sar. P. C. J. 25; 19 E. R. 843. (2) 20 W. R. 155,

fact of an estate being impartible, it did not follow as a necessary consequence that no division or separation could be effected with respect to it, and that an ancestral impartible estate might be held separately after separation from other members of the family.

[LORD HALDANE: When does a family cease to be joint is the whole point; a separate idol does not suggest that the family is divided.]

Reference was made to *Chintaman Singh v. Nowlukho Kowari* (3); *Bejai Bahadur Singh v. Bhupindar Bahadur Singh* (4); *Jogendro Bhupati Hurrochindra Mahapatra v. Nityanand Man Singh* (5); *Kali Krishna v. Raghunath Deb* (6); *Raja Rup Singh v. Rani Baisni* (7) and *Ram Nundun Singh v. Maharani Janki Koer* (8).

Messrs. DeGruyther, K. C., and Dunne, for the Respondents, contended that the presumption of law was that the family was joint.

[SIR ROBERT FINLAY: The estate has never been joint. It goes by custom of primogeniture. The custom was inconsistent with the property being joint.]

There could be no partition where the estate was impartible and the question was, how far the ordinary rule of succession was modified. Appellants had to establish that separation had taken place. The onus rested on them. They had to prove when the estate which was joint became separate. The impartible estate could devolve according to custom. Food and worship were immaterial.

The property given to Bhupat was only for maintenance and not by way of partition. *Mokarari* was not alienation in this case. The plaint did not say that there was anything in the nature of separation.

[LORD HALDANE: It is one of the cases in which one has to determine whether there was any partition with reference to all the circumstances. Even a deed will not be sufficient.]

(3) 1 C. 153; 2 I. A. 263; 24 W. R. 255; 3 Sar. P. C. J. 537; 3 Suth. P. C. J. 204.

(4) 22 I. A. 139; 17 A. 456; 6 Sar. P. C. J. 593

(5) 18 C. 151; 17 I. A. 125

(6) 31 C. 224.

(7) 7 A. 1; 11 I. A. 149; 4 Saraswati's P. C. J. 533; A. W. N. (1884) 246.

(8) 29 I. A. 178 at p. 194; 29 C. 828; 7 C. W. N. 57.

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It would be extraordinary if he was to treat himself as a separate entity.

[LORD HOLDANE: The only question is whether they came to an arrangement for partition, which is a question of circumstantial evidence. If you find arrangement of some kind and separation in worship, food, etc., the presumption is that separation has taken place. The whole thing is of inference to be inferred from the whole circumstances.]

There was no co-parcenary between the eldest and minor members of a *raj* family having an impartible estate. One might have a *thakurbari* of his own if he were to live away from the family house.

Reference was made to *Ialiteswar Singh v. Rameshwar Singh* (9); *Stree Rajah Yanumula Venkayamah v. Stree Rajah Yanumula Brochia Venkondora* (10); *Rani Sartaj Kuari v. Deoraj Kuari* (11); *Chintamun Singh v. Nowlukho Konwari* (3); Mayne on Hindu Law, section 495; *Raja Rup Singh v. Rani Baisni* (7).

Sir Robert Finlay, in reply.

JUDGMENT.

SIR JOHN EDGE.—These are consolidated appeals. That in which Thakurani Tara Kumari is the appellant has arisen in a suit which was brought by her on the 19th August 1907 in the Court of the Subordinate Judge of Monghyr against Chaturbhuj Narayan Singh and his minor sons. In that suit Maharajah Sir Ravaneswar Pershad Singh was a *pro forma* defendant. The other appeal, in which Maharaja Sir Ravaneswar Pershad Singh is the appellant, has arisen in a suit which was brought by him on the 19th August 1907 in the Court of the Subordinate Judge of Monghyr against Chaturbhuj Narayan Singh and his minor sons. In the latter suit Thakurani Tara Kumari and others were *pro forma* defendants. In each suit the Subordinate Judge made a decree in favour of the plaintiff in the suit. From each decree Chaturbhuj Narayan Singh and his minor sons appealed to the High Court of Judicature at Fort William in Bengal, which, by its decree in

each appeal, reversed the decree to which the appeal related and dismissed the suit. From those decrees of the High Court these consolidated appeals have been brought.

The Thakurani is the widow of Thakur Ram Narayan Singh, who was a son of Thakur Ranjit Narayan Singh, who was the elder of the two sons of Thakur Bhairo Narayan Singh. Chaturbhuj Narayan Singh was the son of Bhupat Narayan Singh, who was the younger son of Thakur Bhairo Narayan Singh. Thakur Ram Narayan Singh died without issue male. The immoveable property to which the suits relate is known as *Taluka Telwa*, otherwise *Telwa gadi*, in the District of Monghyr. *Taluka Telwa* is an ancestral impartible estate which, in his life-time, was held as his estate by Thakur Ram Narayan Singh, and had previously been held by his father Thakur Ranjit Narayan Singh, and before him by his father Thakur Bhairo Narayan Singh. By the *kulachar* or family custom *Taluka Telwa* descends by the rule of primogeniture. The appellants allege that Thakur Ranjit Narayan Singh, on the 14th September 1879, granted to his brother Bhupat Narayan Singh a *mokurari patta* (perpetual lease) of a part of *Taluka Telwa* for the maintenance of Bhupat Narayan Singh and his descendants, and that Thakur Ranjit Narayan Singh and his brother Bhupat Narayan Singh separated and ceased to constitute a joint Hindu family; except in so far as the family custom applies, the law of the *Mitakshara* governed Thakur Bhairo Narayan Singh and his descendants. The Thakurani claims that she, as the widow of Thakur Ram Narayan Singh, who left no issue, succeeded to the estate on his death for a Hindu widow's interest. It is proved that after her husband's death she, in order to discharge debts which had been contracted by Thakur Ranjit Narayan Singh, sold a moiety of *Taluka Telwa* to the Maharaja. In her suit the Thakurani claimed possession of one moiety of *Taluka Telwa*, as the widow of Thakur Ram Narayan Singh. The Maharaja in his suit claimed possession of the other moiety of *Taluka Telwa* as the vendee from the Thakurani. Chaturbhuj Narayan Singh is in possession, and he and his minor sons deny that Thakur Ranjit Narayan Singh and

(9) 2 Ind. Cas. 290; 36 C. 481; 13 C. W. N. 838; 6 M. L. T. 1.

(10) 13 M. I. A. 333 at p. 339; 2 Suth. P. C. J. 302; 2 Sar. P. C. J. 546; 20 E. R. 576.

(11) 15 I. A. 51 at pp. 64, 65; 10 A. 272; 5 Sar. P. C. J. 139; 12 Ind. Jur. 213.

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Bhupat Narayan Singh separated.

The written statement of Chaturbhui Narayan Singh in the suit of the Thakurani is not before this Board, but his written statement in the suit of the Maharaja is, having regard to the evidence and to the findings of the Courts below, instructive. In his written statement in the Maharaja's suit Chaturbhui Narayan Singh alleged:—

"4. That the said family is governed by the Benares School of Hindu Law, save and except that according to family custom the said ancestral *zemindari* descends according to the rule of primogeniture on the eldest male member of the eldest line and the junior members are entitled to maintenance and that females are in no way entitled to succeed to the said *zemindari*. The junior members, even after *kharposhi* or maintenance grants are made to them out of the joint property, are entitled to obtain the expenses of marriage, *sraddh* and other similar ceremonies and all other necessary expenses from the income of the said property in the hands of the holder of the said estate for the time being.

"5. That with reference to paragraph 3 this defendant states that Thakur Ranjit Narayan Singh succeeded to the said estate on the death of his father in accordance with the family custom aforesaid and that the *mokurari* settlement referred to in the said paragraph was also made in accordance with the said custom and not otherwise. This defendant craves leave to refer to the original of the said *mokurari* deed for the terms thereof. This defendant wholly denies that either before or after the said *mokurari* settlement Bhupat Narayan Singh became separate from the said Ranjit Narayan Singh or that he was at any time separate in food, worship or estate from the said Ranjit Narayan Singh or that he lived in a house separately built. This defendant asserts that he and his father, the said Bhupat Narayan Singh, during his life-time were joint in food, worship and estate with the said Ranjit Narayan Singh and after his death with Thakur Ram Narayan Singh and that they never ceased to reside in the family dwelling house. This defendant continued joint in food, worship and estate with the said Thakur Ram Narayan Singh until the latter's death and thereafter

with the defendant No. 6, until shortly before the commencement of the registration proceedings, when disputes and disagreements arose. The allegations to the contrary in paragraph 3 of the plaint are wholly false.

"6. That assuming, though by no means admitting, that Bhupat Narayan Singh and this defendant became separate from Thakur Ranjit Singh in the year 1287 F. S., and since then he and this defendant were separate in mess and business and lived in a separate house, as has been falsely alleged in the plaint, this defendant submits that nevertheless the impartible estate *Taluka* Telwa, continued to remain joint family property as before, as it never was nor could be the subject of partition and the defendant No. 1, therefore, became solely entitled to it under the family custom on the death of Thakur Ram Narayan Singh, in preference to his widow."

The "defendant No. 1" mentioned in the written statement is Chaturbhui Narayan Singh, and the "defendant No. 6" is the Thakurani, who, as has been already stated, was a *pro forma* defendant in the suit of the Maharaja. So far as is now material, the defence of Chaturbhui Narayan Singh, as disclosed by his written statement, was that females were by the family custom excluded from a succession to the impartible estate and that the joint family had not separated.

No custom excluding the widow of a sonless and separated holder of the impartible estate of *Taluka* Telwa from the succession to the estate for a Hindu widow's interest has been proved, and it is well decided law that the widow of the last holder of an impartible estate which descends by the rule of primogeniture is not excluded from the succession if her husband was in fact separated and died without issue male, and if no custom which would exclude her from the succession is proved. It was held by this Board in *Neelkisto Deb Burmono v. Beerchunder Thakoor* (12) that where a custom is proved to exist it supersedes the general law, which, however, still regulates all outside the custom. In *Ram Nundun Singh v.* (12) 12 M. I. A. 523; 12 W. R. (P. C.) 21; 3 B. L. R. (P. C.) 13; 2 Suth. P. C. J. 243; 2 Sar. P. C. J. 543; 20 E. R. 436.

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Maharani Janki Koer (8), this Board held that:—

"There is no inconsistency between a custom of impartibility and the right of females to inherit, as may be illustrated by the well-known *Katama Natchiar's* case(1), and, therefore, the general law must prevail unless it be proved that the custom extends to the exclusion of females."

Consequently the only issue in these suits which is now material is one of fact, namely, the issue as to whether Thakur Ranjit Narayan Singh and Bhupat Narayan Singh separated.

The Subordinate Judge came to the conclusion that Thakur Ranjit Narayan Singh, being displeased with his brother Bhupat Narayan Singh because the latter kept women, separated from him. It was found as a fact by the Subordinate Judge that Bhupat Narayan Singh built a *pucca* house about a *russi* (120 feet) to the westward of the family house, established a *tulsi pinda* there, and removed his family to his *pucca* house and lived there separately from Thakur Ranjit Narayan Singh. As a fact Thakur Bhupat Narayan Singh built a wall between his *pucca* house and the family house of Thakur Ranjit Narayan Singh and established a separate *thakurbari* in his house. The houses were quite separate houses, as was found by the Subordinate Judge on the evidence.

A daughter of Chaturbhuj Narayan Singh was married after Thakur Ranjit Narayan Singh had in 1879 granted the *mokurari pattah* to Bhupat Narayan Singh. Chaturbhuj Narayan Singh attempted to prove that Thakur Ranjit Narayan Singh defrayed the expenses of that marriage. The Subordinate Judge, however, found on incontestable evidence that the expenses of the marriage were defrayed by Bhupat Narayan Singh and not by Thakur Ranjit Narayan Singh. As a matter of fact, Bhupat Narayan Singh borrowed Rs. 689-2-6 for the expenses of that marriage, and on the 27th June 1897 gave to Shir Lal Modi and Amir Modi a mortgage of lands which he held under the *mokurari pattah* to secure the repayment to them of, amongst other moneys, that sum of Rs. 689-2-6, which was stated in the mortgage-deed to have been

borrowed by him from them for performing the marriage of my own granddaughter, *i.e.*, the daughter of my son, Baba Chaturbhuj Narayan Singh."

On the 27th April 1905 Chaturbhuj Narayan Singh, on his examination in a criminal case which apparently related to the removal of some timber, stated, "I am separate from the Thakur of Telwa."

On a careful review of all the evidence the Subordinate Judge came to the conclusion that Bhupat Narayan Singh and his son Chaturbhuj Narayan Singh were separate from Thakur Ranjit Narayan Singh and his son Thakur Ram Narayan Singh.

The learned Judges of the High Court, whilst accepting as correct the findings of facts of the Subordinate Judge on which he had come to the conclusion that there had been a complete separation between Thakur Ranjit Narayan Singh and his brother Bhupat Narayan Singh, came to the conclusion that it was not proved that there was a separation in intention and in fact. As it is difficult to understand the reasoning of the learned Judges of the High Court it is better to give the following extracts from their joint judgment. They say:—

"It is the case common to both sides that Bhupat Narain was a man of licentious habits and that he made himself a nuisance to his brother Ranjit Narain and created a scandal by introducing his mistresses into the family dwelling house. It was in consequence of this that Ranjit Narain executed the maintenance grant in his favour in 1287 to enable him to start a separate establishment. There can be no doubt that, after receipt of the grant, Bhupat Narain built himself a new house outside the old family dwelling and that in course of time a *thakurbari* and a *tulsi pinda* were established in that house and that a wall of separation between his house and the family house was constructed. It seems to be also beyond doubt that after receipt of the grant Bhupat Narain raised money by mortgages on the property leased to him and spent it on the marriage of members of his family and on their maintenance. Still are not all these acts such as

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might have been expected on the part of a member of the family who had received a grant for his maintenance? Or must they be accepted as incontestable proof of an intention to separate from Ranjit Narain from the time of the grant and of a separation in fact from that time?

"It has not been contended before us, nor indeed could the contention be accepted as a sound one, that a separation in estate and from the joint family must follow as a necessary consequence from the receipt of a maintenance grant.

"The learned Subordinate Judge has accepted these facts coupled with the admitted separation in food as sufficient proof that from the date of the maintenance grant, Ranjit Narain and Bhupat separated and ceased to be members of a joint Hindu family. We have given our careful consideration to the judgment of the Subordinate Judge and also to the evidence and the arguments of the learned Pleader and Counsel which have been advanced before us and even though we accept the findings of the Subordinate Judge, we are unable to agree in his conclusion that the plaintiffs have proved that there was a separation in intention or in fact.

"The fact that after the grant of the *mokurari* lease for maintenance Bhupat Narain lived in a separate house alongside his family homestead, that he and his branch of the family were afterwards separate in food and possibly in worship and that he paid the expenses of his family out of the profits of the property granted to him for maintenance, by borrowing money on mortgages on that property, do not appear to us in this case to be sufficient to prove that there was a complete separation between Bhupat Narain and Ranjit Narain, by which Bhupat sacrificed his expectancy to succeed to the family property on the failure of nearer male heirs of Ranjit Narain."

In the opinion of their Lordships, the evidence clearly proved that there had been complete separation between Thakur Ranjit Narayan Singh and his brother Bhupat Narayan Singh in worship, in food and in estate, and they find that there had been complete separation.

Their Lordships infer from the extracts which they have quoted from the judgment

of the learned Judges of the High Court that those Judges considered that there could have been no complete separation of the joint family, as the impartible estate of *Taluka Telwa* had not been partitioned between Thakur Ranjit Narain Singh and his brother Bhupat Narayan Singh. Those learned Judges overlooked the fact that Bhupat Narayan Singh and his son had no co-parcenary rights in the impartible estate, and no rights in that estate which entitled them or either of them to a partition of impartible estate. They could not have prevented Thakur Ranjit Narain Singh from alienating that impartible estate in such a way as to determine any contingent interest they had in it under the custom. Their contingent interest under the custom was liable to be defeated by an alienation of the estate by Thakur Ranjit Narayan Singh even if the family had remained joint, and as the family ceased to be a joint Hindu family the ordinary Hindu Law of the *Mitakshara* gave to the Thakurani her widow's interest in the impartible estate in priority to the contingent interest of Chaturbhuj Narayan Singh under the custom. The Thakurani sold a moiety of the impartible estate to the Maharaja, and as there was valid necessity for that sale she conveyed a good title to the Maharaja.

Their Lordships will humbly advise His Majesty that these consolidated appeals should be allowed, that the decrees of the High Court should be set aside with costs and the decrees of the Subordinate Judge should be restored.

The respondents, Chaturbhuj Narayan Singh and his four minor sons, must pay the costs of the appeals.

Appeals allowed.

Solicitors for the Appellants: Messrs. Downer and Johnson.

Solicitors for the Respondents: Messrs. T. L. Wilson & Co.

RAMASAMY CHETTI v. BANK OF MADRAS.

MADRAS HIGH COURT.

APPEAL AGAINST ORDER NO. 190 OF 1914.

August 31, 1915.

Present:—Mr. Justice Sadasiva Aiyar and
Mr. Justice Napier.RAMASAMY CHETTI—INSOLVENT—
RESPONDENT—APPELLANT

versus

THE BANK OF MADRAS—CREDITOR—
APPELLANT—RESPONDENT.*Presidency Insolvency Act (III of 1907), s. 43, proceedings under, nature of.*

Proceedings under section 43 of the Insolvency Act are in the nature of criminal proceedings and hence there should be a definite charge, a finding and a conviction as a foundation for the sentence.

Harihar Singh v. Moheshwar Prashad, 27 Ind. Cas. 199; 16 Cr. L. J. 135; 18 C. W. N. 692, followed.

Appeal against the order of the District Court of Coimbatore in Insolvency Appeal No. 95 of 1914, in Insolvency Petition No. 9 of 1911.

Dr. Swaminadhan, for the Appellant.

Messrs. David, Brightwell and Moresby, for the Respondent.

JUDGMENT.—It is very difficult to gather from the order of the District Judge under what clause of the sub-section 2 of section 43 of the Provincial Insolvency Act the appellant was convicted. The words "realizing his property and distributing the proceeds among his creditors" occurring in the District Judge's order seem to show that sub-section (1), and not sub-section (2), was in the mind of the District Judge.

As pointed out in *Harihar Singh v. Moheshwar Prashad* (1) (Jenkins, C. J., and N. A. Chatterjea, J.), proceedings under section 43 of the Insolvency Act are in the nature of criminal proceedings and hence there should be a definite charge, a finding and a conviction as a foundation for the sentence.

We set aside the District Judge's order and direct the District Court to re-hear the case to pass fresh orders after framing a definite charge using the words of section 43 in that charge, as far as possible and mentioning briefly the alleged facts on which the charge is based.

Order set aside.

(1) 27 Ind. Cas. 199; 16 Cr. L. J. 135; 18 C. W. N. 692.

LAL SINGH v. MALUK SINGH.

COURT OF THE FINANCIAL COMMISSIONERS, PUNJAB.

CIVIL REVISION PETITION NO. 199 OF 1914-15.

August 13, 1915.

Present:—Mr. Fenton, F. C.

LAL SINGH *alias* LAL DIN—PLAINTIFF—
APPLICANT

versus

MALUK SINGH AND MAKHAN SINGH—
DEFENDANT—RESPONDENT.*Mutation—Gift—Entry of mutation made in life-time of donor—Duty of mutation officers—Questions of religion and customs, whether to be gone into at mutation—Will—Illegitimate son by Muhammadan wife—Gift.*

A mutation officer is not concerned with the intricate questions of religion and Customary Law and if he finds that the factum of gift is duly attested by the donor, he is bound to effect the mutation in accordance with the gift, whether it be in favour of a stranger or an heir. [p. 839, col. 2.]

A mutation officer is not concerned with the question that an illegitimate son cannot inherit, he must be guided by the attestation of the gift by the donor. [p. 839, col. 2.]

Until a gift is set aside as invalid by Civil Court the transaction must be treated by mutation officers as a valid one. [p. 840, col. 1.]

Petition for revision of the order of the Commissioner, Lahore, dated 25th March 1914, upholding that of the Collector, Gujranwala, dated 14th January 1915, refusing to effect mutation in favour of the petitioner.

Mr. Michael, for the Appellant.

Mr. N. C. Mehra, for the Respondent.

JUDGMENT.—That the late Jawahar Singh gifted the land in dispute to Lal Singh *alias* Lal Din, his son—whether legitimate or illegitimate, matters not for present purposes, is a fact duly attested by the Naib Tahsildar on 22nd March 1914 and in pursuance of that attestation a mutation order ought to have been sanctioned at the time. Owing, however, to the machinations of a *patwari* no action was taken until Jawahar Singh died and the case was then brought up afresh as one involving a mutation of inheritance.

The action seriously prejudiced Lal Singh's position and has led to the discussion in the subsequent mutation proceedings of intricate questions of religion and Customary Law with which a mutation officer is not concerned. I see no reason why mutation should not now be effected in accordance with the gift, the actuality of which transaction is amply attested. The reversioners may sue in the Courts to have the gifts set aside as

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invalid, but until in such a suit they succeed in proving its invalidity the transaction must be treated by mutation officers as a valid one. I set aside the order of the Collector and restore that of M. Mangal Singh, Assistant Collector, in Lal Singh's favour, except that the mutation should be treated as one of gift and not of inheritance.

Revision allowed.

**MADRAS HIGH COURT.
FULL BENCH.**

LETTERS PATENT APPEAL No. 250 of 1914.

March 4, 1915.

Present:—Sir John Wallis, Kt., Chief Justice,
Mr. Justice Ayling and Mr. Justice
Sadasiva Aiyar.

JALDU VENKATASUBBA RAO—
PLAINTIFF—PETITIONER—APPELLANT

versus

THE ASIATIC STEAM NAVIGATION
COMPANY OF CALCUTTA—DEFENDANT—
RESPONDENT.

Common carrier—Action for non-delivery—Prayer for goods consigned or else their value—No allegation of possession of carrier—No suit for specific property lost—Suit for compensation for non-delivery—Limitation Act (IX of 1908), Sch. I, Arts. 31, 49, 105—Civil Procedure Code (Act V of 1908), O. XXI, r. 31—Specific Relief Act (I of 1877), s. 11.

Where in an action against a common carrier for non-delivery of a plank consigned to him for carriage, the prayer in the plaint asked for plank and damages for its detention or in the alternative its value together with interest thereon and there was no allegation in the plaint that the defendant was in possession of the plank in question:

Held, that the suit could not be treated as one for the return of specific moveable property lost, under section 11 of the Specific Relief Act, but only as one for compensation for non-delivery of goods. [p. 844, col. 1.]

Article 31 of the Limitation Act, 1908, applies to a claim by a consignor against a carrier for compensation for non-delivery of goods consigned. [p. 844, col. 1.]

In order to entitle a person to obtain delivery of specific moveable property by suit and to enforce the decrees obtained by the stringent methods provided in Order XXI, rule 31, Civil Procedure Code, it is necessary that he should allege and prove facts which entitle him to compel the delivery of the specific moveable under the provisions of section 11 of the Specific Relief Act. [p. 844, col. 1.]

The effect of the amendment of Article 31 of the Limitation Act, 1877, is to make it applicable to a claim against a carrier for compensation for non-delivery of goods irrespective of the question whether the suit was laid in contract or in tort. [p. 844, col. 2.]

British India Steam Navigation Company v. Hajee Mahomed Esack and Company, 3 M. 107; *Dannmull v. British India Steam Navigation Company*, 12 C. 477; *Great Indian Peninsula Railway Company v. Raisett Chandmull*, 19 B. 165, referred to.

Appeal, under clause 15 of the Letters Patent, against the judgment of the Hon'ble Mr. Justice Tyabji, dated the 26th of March 1914, in Civil Revision Petition No. 568 of 1913, reported in 24 Ind. Cas. 676, presented against that of the Court of the principal District Munsif of Masulipatam in Small Cause Suit No. 1257 of 1912.

This appeal coming on for hearing the Court (Spencer and Seshagiri Aiyar, JJ.) made on 18th January 1915 the following

ORDER OF REFERENCE.

SPENCER, J.—I have had the advantage of perusing the judgment which my learned brother is about to deliver, but I regret that I have not been able to come to the same conclusion at which he has arrived.

It is contended that the suit having been brought for the delivery of specific moveable property, *viz.*, a plank, or for its value, the plaintiff had three years within which to file his suit under Article 49 of the Limitation Act.

In support of this contention the decision in *Murugesu Mudali v. Jotharam Davy* (1) is cited.

That was a suit against purchasers at a Court auction to make them restore the goods purchased or their value as compensation.

The present is essentially a suit against a carrier for compensation for non-delivery of goods, and it has been held in *Haji Ajam Goolam Hoosein v. Bombay and Persia Steam Navigation Company* (2) and in *Great Indian Peninsula Railway Company v. Ganpat Rai* (3) that the Article applicable to such suits is Article 31, or if the carrier loses or injures the goods, then Article 30 [*Great Indian Peninsula Railway Company v. Raisett Chandmull* (4)], the period of limitation under either of these

(1) 22 M. 478.

(2) 26 B. 562; 4 Bom. L. R. 447.

(3) 10 Ind. Cas. 122; 8 A. L. J. 543; 33 A. 544.

(4) 19 B. 165.

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Articles in the present Limitation Act being one year.

In *British India Steam Navigation Co. v. Hajee Mahomed Esack and Company* (5), it was thought that, while Article 30 would apply to suits for compensation for loss or damages to goods carried, Article 115 which allows three years' time for suing would apply to suits of breach of contracts to deliver, but that decision was prior to the enactment of Act X of 1899, section 3 of which inserted the words 'non-delivery of or' in Article 31. It is not now argued before us that Article 115 applies. In *Danmull v. British India Steam Navigation Company* (6) which was also prior to Act X of 1899 the defendants denied that the plaintiff had entrusted them with the missing goods. It was the case of neither party that the goods had been lost. *Mohan Singh Chauhan v. Henry Conder* (7) was another case of non-delivery of goods prior to the enactment of 1899.

It may be that, when the words 'non-delivery of or' were inserted in this Article, the grouping of the Articles under the heads of suits upon contracts and suits upon torts was not heeded for convenience' sake, seeing that non-delivery by a common carrier is first and foremost a tort as observed by Garth, C. J., in *Moothora Kant Shaw v. India General Steam Navigation Company* (8), though an action against a common carrier may be founded either on contract or on tort (*vide* Bullen and Leake on Pleading; 6th Edition, page 139). The division between suits on torts and suits on contracts is not strictly observed in the schedule, for Articles 48 and 49 include cases of tort, and they are after Article 36.

It seems to me that the Legislature intended to provide exceptionally for the case of carriers on account of the difficulty of investigating and settling claims preferred against them after a long lapse of time in respect of a few articles out of the quantity of goods that are constantly passing through their hands.

Now, the plaintiff cannot be allowed to extend the period of limitation by the dodge

of demanding that the very goods themselves should be delivered to him, when the defendants have stated in a letter to him [see Exhibit A (1)] that, owing to the long delay caused by the plaintiff in not producing the invoice in support of his bill, they find it difficult to check the shortage and have on that account pleaded non-liability to account to him. The mere allegation in the plaint that there was non-delivery implies a breach of the contract to carry, although the facts may disclose a tort also on the part of the carrier, but the date within which the plaintiff must file his suit will not depend on the defence set up in written statement. So plaintiff cannot run the risk of waiting till he knows what the defence will be, but must come to Court within the period allowed by the Legislature for claims based on non-delivery.

It was pointed out in *Murugesu Mudali v. Jotharam Davy* (1) that the right to sue for the recovery of specific moveable property is governed by sections 10 and 11 of the Specific Relief Act, I of 1877, and that an injustice would be likely to result from giving a decree for the recovery of the goods *in specie*, as such a decree might be enforced by attachment of the judgment-debtor's property and the imprisonment of his person while it might be impossible for him to obey the decree without the assistance of the persons in possession of the goods. The same remarks might be made as to carriers of goods who are unable to trace missing goods entrusted to them for delivery.

In the present case the only decree that the plaintiff could have obtained upon the pleadings, if he had sued in time, would have been a decree that the defendants should pay him compensation for non-delivery of the plank in question. Article 48 or 49 cannot be applied, since under column 3 of the Schedule time has not begun to run and thus there is no cause of action for a suit under either of these Articles.

I consider, therefore, that the learned Judge was right in holding that the suit fell under Article 31 of the Limitation Act and that this Letters Patent Appeal should be dismissed with costs.

SESHAGIRI AIYAR, J.—I have come to a different conclusion. The facts are these;

(5) 3 M. 107.

(6) 12 C. 477.

(7) 7 B. 478.

(8) 10 C. 166 at p 186; 13 C. L. R. 342; 8 Ind. Jur. 247.

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61 planks of teak wood were consigned at Moulmein in May 1909 through the defendant Company for delivery to the plaintiff at Masulipatam. The defendants delivered only 60 planks on the 28th August 1909. This suit is brought on the 16th June 1912 for the recovery of the one plank of wood undelivered (the Court was closed from the 5th May to the 16th June). The prayer in the plaint is in these terms:

(a) "directing the defendant to deliver to the plaintiff the plank worth Rs. 60-15-0, as per the copy of the bill filed herewith, as also Rs. 21-12-0 being the loss of interest,

(b) "or else directing the defendant to pay to the plaintiff Rs. 60-15-0, the value of the teak plank, Rs. 21-12-0 for interest, in all Rs. 82-11-0 together with subsequent interest." The defendants pleaded the bar of limitation.

The District Munsif held that Article 31 of the Limitation Act applied and that as the suit was brought more than a year after the date on which the plank should have been delivered, he decided that the claim was barred by limitation. Mr. Justice Tyabji on revision agreed with this view. This Letters Patent Appeal is against that decision.

Article 31 is among a group of Articles dealing with compensation. The word compensation used in Articles 17 and 18 has not the same meaning as in the subsequent Articles, but from Articles 19 to 31 the term is used to denote a claim for damages; and in almost all the cases the cause of action is in tort. As was pointed out by Garth, C. J., in *Moothora Kant Shaw v. India General Steam Navigation Company* (8) the ordinary liability of a common carrier is founded on custom, and "a common carrier is and always has been liable to be sued for any breach of this common law duty in an action of tort." This accounts for the inclusion of carriers in the category of cases relating to the award of compensation for torts. It was pointed out in *British India Steam Navigation Company v. Hajee Mahomed Esack and Company* (5) that the position of Article 31 suggests that it was intended to cover cases of malfeasance, misfeasance and non-feasance independent of

contract. Garth, C. J., in *Danmull v. British India Steam Navigation Company* (6), points out that the shorter period of limitation provided by the Article will not govern breaches of contract. Wilson, J., takes the same view. The fact that other cases relating to compensation from tortious acts are provided with a period of two years' limitation in subsequent Articles only shows that in the cases of carriers and in the special cases referred to till Article 31 is reached, the Legislature wanted the grievances to be earlier dealt with. I was at first inclined to think that cases of compensation for breaches of contract would come under Article 31. On further consideration I think that the correct view is to hold that in order to affect Article 31 the claim must be founded only on tort. Article 36 is the residuary Article in cases of torts. Article 49 provides for cases of compensation arising from a breach of contract; and the residuary Article in regard to such matters is Article 115. Although it is not easy to give a logical explanation for the arrangement for the Articles in the Limitation Act, it seems clear from their grouping and from the position of the residuary Articles that compensation for torts is provided for separately from compensation for breaches of contract. I feel no hesitation, therefore, in holding that Article 31 does not relate to claims arising from contracts. It is true that the decisions to which I referred were passed before the Legislature amended Article 31 by inserting the words "or for non-delivery." But this amendment cannot enlarge its scope. The essential characteristic of the original Article which must attach to it even after the amendment is that it deals with a claim for damages arising from a tortious act. A claim against a common carrier is not always restricted to damages. A carrier may have the consigned article in his possession and yet refuse to deliver it. Such an article may have something more than a commercial value to the consignee. In such cases he is entitled to ask for its delivery. Article 31 cannot cover such cases. The carrier in addition to the common law liability pointed out by Garth, C. J., may incur contractual obligations. See observations in *Moothora Kant Shaw v. India General Steam*

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Navigation Company (8). The enforceability of such obligations will depend on considerations different from those relating to the award of damages. Although a decree for delivery of specific moveable property may by virtue of Order XX, rule 10, provide for the payment of its value in the alternative, the decree-holder can take steps for obtaining possession of the article itself. Mr. Chamier argued that as Article 31 is the only provision relating to carriers all cases against them are controlled by that Article. I am unable to agree with this contention. Suppose, (or instance, an honest carrier intimates to the consignee a year after the date fixed for its delivery that he is unable to trace it; Article 31 can give no relief in such cases. It would leave the consignee without any remedy. There are special provisions relating to the recovery of articles *in specie*; and unless the language of these Articles exclude claims against carriers, I see no reason for not applying them to the case of carriers as well. I am, therefore, of opinion that to the claim as laid Article 31 does not apply. In *Haji Ajam Goolam Hoosein v. Bombay and Persia Steam Navigation Company* (2) the suit was "for Rs. 750 as damages for the non-delivery of 35 out of 200 cases of oil." In *Great Indian Peninsula Railway Company v. Ganpat Rai* (3) also the claim was for damages. There was no relief for the delivery of the specific article in these cases and although to the Allahabad case, the latter portion of Article 49 seems applicable, the point does not seem to have been argued. I do not think these cases are decisive of the point we have to decide in this case.

I think the claim falls under Article 49. The language of the first part exactly covers this case. The view taken in *Murugesu Mudali v. Jotharam Dary* (1) is in accordance with this conclusion. If Article 49 does not apply, Article 115 will apply.

In *Moothora Kant Shaw v. The India General Steam Navigation Company* (8), already referred to by me, Garth, C. J., points out that "a carrier is liable to be sued in an action either of tort or contract, according to the convenience or advantage of the

plaintiff," and he quotes Bullen and Leake in support of the position. In the forms of pleading given in that treatise, we have first of all statements of claims in contract; then come the statements of claims in tort; then follow forms for defence in actions of contract and afterwards similar forms for defence in actions in tort. These indicate that it is at the option of the consignee to sue in contract or in tort either for the specific article or for damages. In the present case the plaintiff has chosen to claim the article and he is entitled to choose that remedy.

By THE COURT.—Having regard to the importance of the question involved and to the difference of judicial opinion that exists, we think it is desirable that the question should be referred for the decision of a Full Bench upon the following points:—

(1) "Whether Article 31, 49 or 115 is applicable to a claim by a consignor against a carrier for the recovery of goods consigned to him or, in the alternative, their value and for interest upon the amount claimed as the value of the goods?"

(2) "Whether upon the pleadings, the suit should be treated as a suit for specific moveable property lost, or as a suit against a carrier for compensation for non-delivery of goods?"

The appeal coming on for hearing as per above order, upon perusing the said Order of Reference and upon hearing the arguments of Mr. P. M. Srinivasa Aiyangar for Mr. P. Nagabhushanam for the Appellant and of Messrs. D. Chamier and K. Pandalai, instructed by Messrs. Partridge, Hignett and Sell, Attorneys, for the Respondent, the Court expressed the following

OPINION.—Two questions have been referred to us; and it will be more convenient to deal with the second one first, "whether upon the pleadings this suit should be treated as a suit for specific moveable property lost, or as a suit against a carrier for compensation for non-delivery of goods." If we look at the prayer of the plaint, which asks for the return of the plank and also for Rs. 21-12 being the loss of interest, it may be treated as a suit both for the return of the specific plank and for damages for its detention. But in

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order to entitle the plaintiff to obtain delivery of specific moveable property by suit and to enforce the decree so obtained by the stringent methods provided in Order XXI, rule 31, of the Code of Civil Procedure, it is necessary that he should allege and prove facts which entitle him to compel the delivery of the specific moveable under the provisions of section 11 of the Specific Relief Act, because unless he does so, he cannot have a decree for the return of the specific moveable property. There is no allegation in the plaint that the defendant is in possession of the plank in question and it is obvious from the correspondence that he is not. That being so, the case does not, in our opinion, come within clause (a) of section 11 of the Specific Relief Act; and it certainly does not come within clauses (b), (c) or (d). In so far then as the suit can be regarded as a suit for the return of the specific plank, the plaint discloses no cause of action, and the suit must be dismissed.

It may, however, as framed, be regarded as a suit for compensation for failure to deliver the plank in breach of the contract under the bill of lading. That brings us to the first question in the reference, "Whether Article 31, 49 or 115 is applicable to a claim by a consignor against a carrier for the recovery of goods consigned to him, or in the alternative their value, and for interest upon the amount claimed as the value of the goods." As the Limitation Act of 1877 originally stood, there was a good deal of authority for saying that Articles 30 and 31, which deal with suits against a carrier for compensation for losing or injuring goods and suits against a carrier for compensation for delay in delivering goods, did not apply. We need only refer to the decision of Sir Charles Turner, C. J., and another learned Judge in *British India Steam Navigation Co. v. Hajee Mahomed Esack & Co.* (5) and the other authorities cited in *Dannull v. British India Steam Navigation Co.* (6) and *Great Indian Peninsula Railway Co. v. Raisett Chandmull* (4). This view proceeded largely upon the position of these Articles among a number of other Articles dealing with suits for damages for torts, and in his judgment in *Great Indian Peninsula Railway Co. v. Raisett*

Chandmull (4) Mr. Justice Farran (as he then was) expressed the opinion that this was a rather fallacious test and that in these rulings the Courts had not given effect to the intention of the Legislature, but stated, having regard to the current of decisions, it was rather for the Legislature to make its meaning more clear if it had been misinterpreted than for the Court to run counter to the decisions of the other High Courts. This was in the year 1894 and acting as we cannot doubt on this suggestion, the Legislature in 1899 amended Article 31 by inserting the words "non-delivery of or," so as to make the Article run: "against a carrier for compensation for non-delivery of, or delay in delivering goods." It seems to us that by this amendment the Legislature clearly indicated its intention that Article 31 should apply to a claim against a carrier for compensation for non-delivery of goods, irrespective of the question whether the suit was laid in contract or in tort. Even so it may be, as pointed out by one of the learned Judges who have referred the case, that Article 31 only deals with claims for compensation, and that Article 49 applies when in a proper case a claim is made against a carrier for the return of a specific moveable which, as already pointed out, is not this case. In so far, however, as Article 49 applies to suits for compensation for wrongfully taking or injuring or wrongfully detaining the same," it is in any case inapplicable to the facts here, and even if it were applicable, its operation would be excluded by the provisions of the special Article 31 as amended, on the principle '*generalia specialibus non derogant*.'

Our answer to these questions is that the suit must be regarded as a suit for compensation and as such it comes under Article 31.

This Letters Patent Appeal coming on for hearing on 7th of August 1915, after the expression of the opinion of the Full Bench, the Court (Spencer and Seshagiri Aiyar, J.J.) delivered the following

JUDGMENT.—The Letters Patent Appeal is dismissed with costs.

Appeal dismissed.

KANWAN v. NATHU SINGH.

ABDUL RAHIM SAHIB v. KULLAPPA GOWNDEN.

COURT OF THE FINANCIAL COMMISSIONERS, PUNJAB.

REVENUE REVISION PETITION No. 110 OF 1914-15.

April 26, 1915.

Present:—Mr. Fenton, F. C.

KANWAN—PLAINTIFF—APPLICANT
versus

NATHU SINGH—DEFENDANT—RESPONDENT.

Punjab Tenancy Act (XVI of 1887), s. 5 (1) (a), 5 (2)
—Presumption not rebutted, effect of.

Where the presumption given in clause 5 (2) of the Punjab Tenancy Act, has not been rebutted, the plaintiff is entitled to occupancy rights under section 5 (1) (a).

Petition forwarded by the Commissioner of Amballa on 6th March 1915 for orders of the Financial Commissioner, with the recommendation that plaintiff-petitioner's suit may be decreed.

FACTS.—The facts of the case are that Nathu Singh, landlord, got a notice of ejectment as regards 5 *bighas* 9 *biswas* issued against Kanwan, a tenant. The tenant brought a suit to contest the notice of ejectment, on the ground that he was an occupancy tenant under section 5 (1) (a) of the Tenancy Act and was not liable to ejectment, as he had been holding the land for more than two generations and for a period of more than 20 years.

The landlord met the suit by saying that the tenant was not a tenant at all, as he was not an heir of the last owner in possession.

The first Court dismissed the suit on the ground that the last holder was a widow of the male holder, etc., and on appeal the learned Collector upheld the finding of the first Court. On revision the learned Commissioner forwarded the case for orders to the Financial Commissioner, with the recommendation that the revision may be accepted and that as Kanwan has shown that he is a tenant under section 5 (1) (a) that he may be declared to be a tenant under that section.

Mr. Nihal Chand Mehra, for the Appellant.
Lala Durga Das, for the Respondent.

JUDGMENT.—The Commissioner's order of reference clearly shows that the lower Courts erred in not applying section 5 (2) of the Tenancy Act to the facts of the case. The presumption given by that clause has not been rebutted so that the plaintiff Kanwan must be held entitled to occupancy rights

under section 5 (1) (a) in the 5 *bighas* 9 *biswas* to which the ejectment notice relates. I set aside the orders of the lower Courts and cancel the notice of ejectment and I declare that the plaintiff is entitled to occupancy rights as above explained. I decree costs to plaintiff in all Courts.

Petition allowed

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 283 OF 1915.

July 23, 1915.

Present:—Mr. Justice Kumaraswami Sastri.
ABDUL RAHIM SAHIB—DEFENDANT No. 1
—PETITIONER

versus

KULLAPPA GOWNDEN—PLAINTIFF—
RESPONDENT.*Court Fees Act (VII of 1870), s. 7, cl. V (a), (b), (c)*
and (e)—Plot of land with cocoanut trees, whether a "garden" within the meaning of cl. V (e)—Question of fact—Revision—Case open to appeal—High Court, power of, to interfere.

In ascertaining the value of a piece of land on which cocoanut trees have been planted for the purpose of determining the jurisdiction of a Court, the question whether it came under clause V (c) or clause V (e) of section 7 of the Court Fees Act is a question of fact to be determined on the evidence as to whether having regard to the position of the land and the number of trees thereon the plot of land can be said to be a garden. [p. 846, col. 2; p. 847, col. 1.]

Assessment is not the criterion in determining the question whether a land is garden or not. Assessed or unassessed it will fall under clause V (e) if it can be defined as a "garden". [p. 847, col. 1.]

A few isolated trees on a piece of land will not make it a garden, but where a number of trees are planted on a particular piece of land which is well-defined and can be marked off from the rest of the land, that particular plot may be treated as a garden if the land is used for the cultivation of flowers, fruits or vegetables. [p. 847, col. 1.]

Audathodan Moidin v. Pullambath Mamally, 12 M. 301, explained.

While the High Court, will not generally interfere in revision where an equally efficacious remedy is open to the party by way of appeal it will do so where it would not be possible to put the parties in the same position in appeal as they would have been if the irregularities had been set right in the lower Court by timely interference. [p. 847, col. 2; p. 848, col. 1.]

Petition, under section 115 of Act V of 1908 and section 15 of the Charter Act, praying the High Court to revise the order of the Court of the District Munsif of

ABDUL RAHIM SAHIB v. KULLAPPA GOWNDEN.

Tirupathur in Original Suit No. 94 of 1914, dated the 24th March 1915.

Mr. N. S. Narasimhachari, for the Petitioner.

Mr. K. R. Subramania Sastri, for the Respondent.

JUDGMENT.—This is a petition filed under section 115, Civil Procedure Code, and section 15 of the Charter Act to revise the order of the District Munsif of Tirupathur, dated the 24th April 1915, wherein he held that the property in dispute fell under section 7, clause V (b), of the Court Fees Act (Act VII of 1870) and that the suit was rightly valued and was within the pecuniary limits of his jurisdiction.

The plaintiff, claiming to be the purchaser of the properties mentioned in the plaint for Rs. 7,000, sued for a declaration of title, for an injunction restraining the defendants from interfering with his enjoyment of the plaint properties and for possession of the properties if the Court was of opinion that the plaintiff was not in possession. The plaintiff valued the suit at Rs. 1,000, the details of the valuation being Rs. 5 for the injunction asked for, Rs. 364-11-0 for possession, Rs. 115 value of three wells, Rs. 500 value of cocoanut trees and Rs. 27 value of plantain trees. The defendants objected to the valuation and *inter alia* stated that the value of the cocoanut *tope* was Rs. 4,500. The contention for the defendants, so far as it is material for the purpose of this petition, is that part of the property claimed is a cocoanut garden on which there are several cocoanut trees (plaintiff admitting at least 500) and that the case falls under section 7, clause V (e), which provides that where the subject-matter is a house or garden the fee is payable on its market value. The District Munsif was of opinion that, even assuming there was a cocoanut garden on the property, it did not fall within the definition of a "garden" in section 7, clause V (e), but that it should be treated as assessed land.

Under the Suits Valuation Act, VII of 1887, the value for purposes of jurisdiction and of Court-fees is the same, and the point for determination is whether clause V (c) of section 7 is to be applied or clause V (e) of the Court Fees Act. The District Munsif seems to treat the question as a dry question of law, but I think that this is a question of fact to be determined on the evidence in

each case. A garden has been defined in Murray's Dictionary as "an enclosed piece of ground devoted to the cultivation of flowers, fruits or vegetables" and there can be little doubt that cocoanuts are edible fruits and that they are largely used for culinary purposes in this country. If the trees stand on a well-defined portion of the property which is marked off from the rest, I do not see why the land on which the trees stand should not be a cocoanut garden. The District Munsif was of opinion that the Full Bench decision of this Court in *Audathodan Moidin v. Pullambath Mamally* (1) decided that the word "garden" is to be taken as meaning ornamental, pleasure or vegetable garden: but I do not think that the District Munsif is right in his view. The question in the above case related to the valuation of a *paramba* on which there were cocoanut trees. The land (being in Malabar) was not assessed and all that their Lordships decided was that the case fell either under clause V (c) or clause V (e) of section 7 of the Court Fees Act, according as the *paramba* was of a description that would come under the definition of a garden or not. The following observations of their Lordships at page 304 make this clear: "In fact in Malabar a tree tax is substituted for the land assessment, and whether or not a *paramba* is assessed depends on the nature of the trees grown therein. It is, therefore, evident that *parambas* should either be classed as lands paying no revenue or as gardens. The word 'garden' is nowhere defined in Act VII of 1870 but from its occurring in connection with the word 'houses', we are of opinion that the term refers primarily to a garden in the English sense,—ornamental or pleasure or vegetable, and that *parambas* do not ordinarily come under that category. We do not, however, wish it to be understood that in no case should a *paramba* be treated as a garden for the purpose of the Court Fees Act. Whether or not the *paramba* sued for is to be regarded as a garden or as land which pays no revenue, is a question of fact which must be decided in each case." I think the proper course that the District Munsif should have taken was to have called for evidence as to whether, having regard to the position of the land on which stand the

(1) 12 M. 301.

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stand and the number of trees thereon, the plot of land can be said to be a 'garden' or not. A few isolated trees on a piece of land will not make it a garden: but where a number of trees are planted on a particular piece of land which is well defined and can be marked off from the rest of the land, it is difficult to see why that particular plot should not be treated as a garden if the land is used for the cultivation of flowers, fruits or vegetables.

It has been argued by the respondent's Vakil that, if the case falls under clause V (a), (b) or (c), the market value is no test for determining the Court fees payable even though the property may fall under the definition of "garden" and that clause V (e) applies only where clause V (a) (b) and (c) cannot apply. I am unable to follow this argument, for a garden must be situated on some land or other and all land must be assessed or unassessed. If, therefore, assessment was the criterion, clause V (e) is perfectly unnecessary. In my opinion the proper construction of the section is that whether the land is assessed or unassessed it will fall under clause V (e) if it can be defined as a "garden".

There is very little authority directly in point. The only case in point, *Bhug Bhari v. Jawahir Singh* (2), is in favour of the view I have taken.

A preliminary objection was taken that no revision lay, as the petitioner would have the right of appeal against the decree if it went against him. Cases have been quoted on both sides in some of which the High Court declined to interfere with interlocutory orders and in some of which the High Court did so. For the petitioner reference has been made to *Veerabadran Chetty v. Nataraja Desikar* (3), *Somasundaram Chettiar v. Manicka Vasaka Desika Anana Sammanda Pandara Sannidi* (4), *Nagaraja Pillai v. Vythinatha Iyer* (5), *Subbrumana Pattar v. Narayana Pattar* (6), *Venkatachallam Pattar v. Parasu*

Pattar (7) and *Yatindra Nath v. Hari Charan* (8).

For the respondents reference has been made to *In re Nizam of Hyderabad* (9), *Ramamurthi v. Kunchuvorthy Venkata Sita Ramachandra Row Garu* (10), *Venkata Subbiah v. Seshachalam* (11), *Chidambaram Chetty v. Nagappa Chetty* (12), *Jagannatha Mudaliar v. Vathiyar Appasawmy* (13), *Rudrappa v. Narsing Rao* (14) and *A. Gaeble v. Ramayi Animal* (15).

It is difficult to reconcile all the observations made by the learned Judges who took part in the cases above referred to. In case of discretionary powers vested in Court, I do not think any hard and fast rule can be laid down so as to fetter that discretion in advance in all cases that may arise in future. The observation of Jenkins, C. J., in *Hume v. Poresch Chunder Ghose* (16), that discretion given in the widest terms by the Legislature ought not to be crystallised or restricted by a series of cases but should remain "free and untrammelled, to be fairly exercised according to the exigencies of each case" may well be borne in mind. It seems to me that the power of superintendence and the powers given by section 115 were intended to give the High Court jurisdiction to see that the proceedings before the lower Courts were properly conducted, and I see no reason why the High Court should refuse to set right matters if by doing so it would save unnecessary expense or delay or a multiplicity of proceedings. The correct rule, in my opinion, seems to be that while Courts will not generally interfere in revision where an equally efficacious remedy is open to the party by way of appeal, it will do so where it would not be possible to put the

(2) 25 Ind. Cas. 545; 71 P. R. 1914; 241 P. L. R. 1914; 155 P. W. R. 1914.

(3) 28 M. 28; 14 M. L. J. 329.

(4) 31 M. 60; 3 M. L. T. 246.

(5) 9 Ind. Cas. 672; 21 M. L. J. 484; 9 M. L. T. 273; (1911) 2 M. W. N. 369.

(6) 28 Ind. Cas. 189; 2 L. W. 230.

(7) 26 Ind. Cas. 106; (1914) M. W. N. 614; 15 M. L. T. 156.

(8) 26 Ind. Cas. 954; 20 C. L. J. 426.

(9) 9 M. 256.

(10) 22 Ind. Cas. 279; (1914) M. W. N. 95.

(11) 12 Ind. Cas. 173; 22 M. L. J. 136; (1914) 2 M. W. N. 257; 10 M. L. T. 549.

(12) 16 Ind. Cas. 820; 24 M. L. J. 73; 38 M. 15.

(13) 24 Ind. Cas. 782; 1 L. W. 233.

(14) 29 B. 213; 7 Bom. L. R. 12.

(15) 24 Ind. Cas. 781; 1 L. W. 232.

(16) 22 Ind. Cas. 321; 41 C. 446 at p. 457; 15 Cr. L. J. 49.

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parties in the same position in appeal as they would have been if the irregularities had been set right in the lower Court by timely interference.

Having regard to the provisions of the Suits Valuation Act, it seems to me that the relief which the petitioner will get in appeal would not be co-extensive with the relief which he will get now. There can be little doubt that a party is entitled, as a matter of right, to have a suit tried before a Court which has got pecuniary jurisdiction to try it and that, where a Court on an erroneous view of the law proceeds to exercise a jurisdiction which it does not possess, there is nothing to prevent the party from immediately taking such steps as the law allows to set aside the order of the lower Court. If, however, he chooses to wait until the trial is over and to take the chance of a decision in his favour, section 11 of the Suits Valuation Act steps in to prevent him from getting the proceedings of the lower Court set aside simply on the ground of error as to jurisdiction, unless he can show that he is prejudicially affected in the disposal of the suit on its merits. The fact that a restricted right is given to the party after judgment had been pronounced is no reason for depriving him of his right to take immediate steps and have his suit tried by a Court which, in law, has pecuniary jurisdiction.

The plaintiff admits in his plaint that he purchased the property for Rs. 7,000 and he values the relief at Rs. 1,000. The District Munsif, without taking any evidence on the objections of the defendants and without determining whether the suit is one which would fall within his jurisdiction, has, in my opinion, erroneously treated the question as a dry question of law and held that he has jurisdiction over the subject-matter in dispute.

Under these circumstances I think that this is a fit case for the High Court to interfere in revision and to direct at the early stage of the suit that the provisions of law as to jurisdiction are satisfied. I set aside the order of the lower Court and direct the District Munsif to dispose of the objections of the defendants as to jurisdiction according to law in the light of the observations above

made. Costs of this petition will abide and follow the result.

Revision allowed; Case remanded.

COURT OF THE FINANCIAL COMMISSIONERS, PUNJAB.

REVENUE REVISION PETITION No. 253 OF 1913-14.

November 16, 1914.

Present:—Mr. Fenton, F. C.

WASAYA—PLAINTIFF—APPLICANT

versus

ISA AND OTHERS—DEFENDANTS—RESPONDENTS.

Punjab Tenancy (Act XVI of 1887), ss. 70, 70 (2), 74, 84 (5)—Notice of ejectment—Landlord and tenant—Compensation for improvement—Court-fee for the amount claimed—Revision.

Courts have no power to ask a tenant to pay Court-fee for improvements claimed by him, but are bound to determine the amount in a suit to contest a notice of ejectment.

A finding on merits cannot be disturbed in revision.

It is a material irregularity justifying revision not to determine the question of compensation in pursuance of section 70 (2) of the Punjab Tenancy Act.

Petition from the order of the Commissioner, Multan, dated 3rd December 1913, upholding that of the Collector, Muzafargarh, ejecting the plaintiff.

Mr. Akbur Umar, for the Applicant.

Mr. Nehal Chand Mehra, for the Respondents.

JUDGMENT.—I see no reason for interference by way of revision as regards the findings on the merits, but it is a material irregularity justifying revision not to determine the question of compensation in pursuance of section 70 (2) of the Tenancy Act. The first Court has evaded its obligations in this matter on the ground that the tenant failed to pay an enhanced Court-fee calculated on the amount which he claimed as compensation. I know of no provision of law requiring a Court-fee to be paid in respect of compensation so claimed, and the Court was wrong in evading the issue on that ground. Accordingly under section 84 (5) of the Tenancy Act I now direct that the Assistant Collector shall now under section 70 or 74, Tenancy Act, as the case may be, determine the amount of compensation due from defendants to plaintiff.

Petition remanded.

RAJWANT PRASAD PANDE v. RAM RATAN GIR.

PRIVY COUNCIL.

APPEAL FROM THE ALLAHABAD HIGH COURT.

June 8, 1915.

Present:—Lord Shaw, Sir George Farwell,
Sir John Edge and Mr. Ameer Ali.
RAJWANT PRASAD PANDE AND OTHERS
APPELLANTS

versus

Mahant RAM RATAN GIR AND OTHERS—
RESPONDENTS.

Decree, suit to set aside, maintainability of—Jurisdiction, method of exercise of, challenge of—Denial of jurisdiction—Fraud.

It is not open to suitors, who have exhausted the remedies competent to them, and after final decree has been obtained against them, to institute a fresh suit, or series of suits, the object of which is to declare that a decree, competently and with adequate jurisdiction obtained therein, is not applicable to them, although they are named in that decree. [p. 852, col. 1.]

A challenge of the method of the exercise of the jurisdiction of a Court can never in law justify a denial of the existence of such jurisdiction. [p. 852, col. 2.]

A suit for the rescission and destruction of a former decree of a competent Court can be obtained on the ground of fraud "practised on the Courts," but where fraud has been eliminated, the suit is a mere colour for a fresh suit on matters already competently settled by law. [p. 852, col. 2; p. 853, col. 1.]

Appeal from a judgment and decree of the Allahabad High Court, dated February 23rd, 1911, reversing those of the Subordinate Judge of Gorakhpur, dated August 17th, 1909.

FACTS.—One Prag Dat Pande and his two sons, Rajwant and Bhagwant, and their sons constituted a joint Hindu family. Prag Dat was the manager of the property and in 1884 executed a deed of mortgage over the joint property in favour of the predecessor-in-title of the respondents. In 1897 the mortgagee instituted a suit against all the members of the joint family. This suit was heard *ex parte* and a decree was given against all on April 30, 1897 and was affirmed by the High Court in 1900. Prag Dat applied under section 108 of the Civil Procedure Code of 1882 to have the decree set aside, but his application was rejected and the High Court upheld the rejection. Prag Dat then brought a suit to set aside the decree of April 1897 on the ground of fraud, but he lost the day both in the lower Court as well as in the High Court. In 1901 Bhagwant and his two sons made

an application under section 108 of the Code of Civil Procedure of 1882 to have the decree of April 30, 1897, set aside. This application was granted. Prag Dat applied to the Court for permission to defend the suit on his own behalf, but this was not granted to him and the High Court upheld the order of the lower Court. The case proceeded against Bhagwant and his sons only and on September 22, 1902, a decree was passed against them and others as well as against the mortgaged property under section 88 of the Transfer of Property Act, 1882. This was affirmed by the High Court in 1905. In 1906 an application was made for an order to make the decree of September 1902 absolute. To this Prag Dat, Rajwant and his sons objected on the ground that the decree was made against them while they were not parties to the suit. The Subordinate Judge having disallowed their objection an appeal was unsuccessfully preferred to the High Court. They then brought a fresh suit in 1909 to have the decree of September 1902 set aside. The Subordinate Judge decided in their favour, but on appeal to the High Court his decision was reversed. An appeal was then preferred to the Judicial Committee of the Privy Council in due course.

Mr. Loundes, for the Appellants, contended that neither Prag Dat nor the appellants were parties to the re-trial of the mortgage suit and the Court by which the same was heard had no jurisdiction upon such re-trial to pass any decree against them. The decree of 1897 was never set aside and in consequence the decree of 1902, a second decree for the same cause of action, could not stand. There could not be two decrees in respect of the same cause of action against the same person. A binding decree was passed against Prag Dat and the appellants on April 30, 1897, an order absolute for sale of the mortgage property was made on September 22, 1900, and, therefore, it was not competent to any Court to pass a second decree against them in respect of the same subject-matter. Though the second decree was for a larger sum than the first decree there could be no question of merger. How could the decrees merge into each other when they related to different

RAJWANT PRASAD PANDE V. RAM RATAN GIR.

sums and to different parties? Besides the decree of September 1902 was a preliminary decree, the appellants could take no steps till 1906. They never had any chance of appealing nor did they know of it till 1906. In September 1902 they were no party to the suit. Having regard to this fact there could be no execution against them. As the decree was according to judgment, the Court had to order execution of the decree which it could not amend, being according to judgment but what would be the effect of execution was a different matter. It really ought to have refused execution but it did not. The appellants could not appeal as they were not a party to the suit. Bringing a fresh suit was the only remedy.

[MR. AMEER ALI: The respondents say as you did not appeal you have no right to bring a suit to set aside judgment. The contention is that you ought to have appealed to the Privy Council and as you did not you could not bring an action to have it set aside.]

[SIR GEORGE FARWELL: Why did you not apply for leave to appeal?]

The point was whether the issue on which the decree was passed and in which the appellants were not parties would be binding upon them. They first asked to amend the decree and then not to execute it. The Court said that as the decree stood against them, it must be executed. They then brought a suit to set aside the judgment.

[SIR GEORGE FARWELL: A judgment, however erroneous, is an error of the Court and must be set aside by appeal only.]

It was out of time and they had to come here and throw themselves at the clemency of the Crown and apply for leave to appeal. No appeal had ever been allowed here from the judgment of the Subordinate Judge.

[MR. AMEER ALI: There has been appeal from the Court of Deputy Commissioner, but that is different.]

Reference was made to *Ashfaq Husain v. Gauri Sahai* (1); *Sundar Koer v. Rai* (1) 9 Ind. Cas. 975; 15 C. W. N. 370; 8 A. L. J. 332; 13 C. L. J. 351; 9 M. L. T. 380; 13 Bom. L. R. 367; 33 A. 264; 4 Bur. L. T. 121; 21 M. L. J. 1140; (1911) 2 M. W. N. 177; 38 I. A. 37.

Sham Krishen (2), sections 109, 110 and 244 of the Civil Procedure Code of 1882.

Messrs. *De Gruyther, K. C.*, and *Dube*, for the Respondents, contended that the decree was against all parties. If it was wrongly made against some, others who were party to it had no right to appeal now.

[MR. AMEER ALI: If they do not proceed by appeal they have no right to proceed.]

There was an appeal from the decree but the High Court dismissed it in 1905. The decree passed in 1902 was not disputed till 1905. It was held that there was fraud. This was the stage when the precise point raised now ought to have been raised. The case was re-opened and the decree was against all the members of the joint family. The appellants could not now re-open the order by a subsequent suit. It ought to have been done by appeal and by appeal only. It would be inequitable if such a procedure were allowed by any Court.

Reference was made to *Mungul Pershad v. Grija Kant Lahiri* (3); *Ram Kirpal v. Rup Kuari* (4); *Mulkarjun v. Narhari* (5); *Ashfaq Husain v. Gauri Sahai* (1).

Mr. Lowndes, in reply.

JUDGMENT.

LORD SHAW.—This is an appeal from a decree of the 23rd February 1911 of the High Court of Judicature for the North-Western Provinces (Allahabad), which reversed a decree dated the 17th August 1909 of the Court of the Additional Subordinate Judge of Gorakhpur. The Court of first instance allowed the plaintiffs' claim. On appeal the claim was dismissed.

The object of the present suit is, by its terms, declared to be three-fold. But upon examination the substantial and only object is for a declaration in favour of the plaintiffs against the defendants to the effect that the plaintiffs are no party to a certain order which was passed *ex facie* against them on the 22nd September 1902. Further declara-

(2) 34 I. A. 9; 11 C. W. N. 249; 4 A. L. J. 109; 9 Bom. L. R. 304; 17 M. L. J. 43; 34 C. 150; 5 C. L. J. 106; 2 M. L. T. 75.

(3) 8 I. A. 123; 11 C. L. R. 113; 8 C. 51; 4 Sar. P. C. J. 249.

(4) 11 I. A. 37; 6 A. 269; 4 Saraswati's P. C. J. 489.

(5) 27 I. A. 216; 25 B. 337; 12 Bom. L. R. 927; 5 C. W. N. 10; 10 M. L. J. 368.

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tions are asked that the decree is ineffectual, and null and void against them, and so forth. In substance, as has been said, the object of the present suit is for a declaration that a decree pronounced by a Court of competent jurisdiction on the 22nd September 1902, and bearing to apply to the present appellants, does not in fact apply to them.

The circumstances of the case are these. In 1884 Prag Dat Pande executed a mortgage over certain family property, of which he was himself manager, in favour of the predecessor-in-title of the respondents. He had two sons, Rajwant Prasad and Bhagwant Prasad. In 1897 a suit for sale under the mortgage, and directed against, *inter alios*, these three persons, was instituted. It was heard *ex parte*, and on 30th April 1897 a decree was made allowing the plaintiffs' claim. An order absolute was made on the 22nd September 1900.

In 1901, however, (to put aside altogether the proceedings at the instance of Prag Dat, and to keep to the actual relevant challenges made in the course of these litigations), Bhagwant and his two sons obtained an order under section 108 of the Code of Civil Procedure, 1882, to have the decree of the 30th April 1897 set aside, on the ground that there had been insufficient service upon them. It was found that the objection taken on the point of service was sound. The Court in India was accordingly confronted with this situation, that in regard to a mortgage over a joint property a suit had been instituted and decree had been taken against all of the joint family, but that one member thereof had been properly served with the suit and another had not. A certain embarrassment arose in consequence, and these proceedings, so protracted, ensued.

So far as Rajwant, the present appellant, was concerned, the original suit was found to have been properly initiated, and the summons properly served. The Courts below adopted the view that the decree obtained in those circumstances was a decree practically final as regards Rajwant, and that with regard to the subsequent stages therein occasioned by Bhagwant's application, Rajwant had no

right of compeering. Their Lordships are of opinion, however, that such questions, confusing as they appear, have no relation whatsoever to the point which is to be considered in this appeal.

On the 22nd September 1902 the Subordinate Judge delivered judgment, and he made another decree. Notwithstanding the decree which had already, as has been stated, been pronounced in April 1897, he granted a complete decree to the respondents in this appeal, against all the members of the joint family. The situation that thus arose was that in September 1902 a decree was comprehensively directed against all the joint family of which Rajwant, the appellant, was one member, Rajwant, however, being already bound by the decree which was passed in April 1897.

It would have been clear to the Board that there must have been, and could have been, no intention upon the part of the plaintiffs to put in operation the earlier decree of 1897; but the Board is surprised to observe that on the 23rd June 1903, namely, after the second and comprehensive decree had been obtained, an application was actually made for execution of the decree—not the second and comprehensive one of 1902—but the original decree of 1897. Their Lordships think it right to record that in that application this statement was made:—

"In the beginning the name of Bhagwant Parshad also is entered as a defendant, but on his application this decree was set aside against him, and consequently his name was not entered in the column of judgment-debtors. Another decree has been passed as against him. It will be executed separately."

Under those circumstances their Lordships are not surprised to find that in the year 1906, when an order was asked to make the decree of September 1902 absolute as against all the members of the joint family, the appellants took steps to have the situation cleared up. Accordingly, on the 7th July 1906, that application having been made, Rajwant preferred objections to it. Those objections, however, were disallowed, and the decree was made absolute by the Subordinate

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Judge on the 3rd November 1906. Their Lordships are clearly of opinion that in that suit each and all of the points stated upon this appeal were, or ought to have been, brought before the Court below. But if any doubt existed in their Lordships' minds on that topic it would be removed by a perusal of the terms of the judgments of the Subordinate Judge and of the High Court; because after the Subordinate Judge had made his order on the 3rd November 1906 the objectors, the present appellants, appealed to the High Court, and did so upon the same arguments as they now propound in support of the present appeal to this Board. The grounds of judgment of the High Court make it clear beyond all question that the very points which are now urged were points then taken. The objections were disallowed.

It is contended before their Lordships, however, that this matter cannot be dealt with as *res judicata*; that it is open to suitors in India, who have exhausted the remedies competent to them, and after final decree has been obtained against them, to institute a fresh suit, or series of suits, the object of which is to declare that a decree, competently and with adequate jurisdiction obtained therein, is not applicable to them, although they are named in that decree. Their Lordships have no sympathy with this procedure. It is radically incompetent.

The objections can be stated *seriatim*. The objections that are now taken are, first, that the decree of 1897 has never been set aside, and that, accordingly, the later decree of 1902 cannot stand. The answer made is that the former has been impliedly set aside by the latter. The second objection is practically to the same effect. The matter of the second decree was *res judicata*, and, therefore, they are two decrees against the same Indian subject. The answer made to that, in the view of the High Court, is that there is a merger by the second decree of the first. The third objection is that the latter decree is for a definite sum of money; larger than the sum of money contained in the former. The answer is that the interest accounts for the differ-

ence, and, secondly, that the doctrine of merger also applies.

Their Lordships are of opinion that upon none of those points ought they to make a pronouncement in this case. The judgment of the Court below has been particularly canvassed on the doctrine of merger, as there treated. Their Lordships desire to make it clear that in the judgment now given no affirmance is given of the doctrine or application in the High Court of merger, either in a general sense or in the sense of a *vox signata*. The decree of the 26th February 1908 sufficiently covers each and all of the points which have just been enumerated. The case under which these objections were brought forward was competently before the Court; it had jurisdiction to entertain them.

It is said that the Court below decided the objections wrongly, and that the decree was erroneous. Their Lordships think it is very trite and very familiar that a challenge of the method of the exercise of the jurisdiction of a Court can never in law justify a denial of the existence of such jurisdiction. The former has reference to the merits of the case, and the merits of this case have been in all points directly and substantially determined between the same parties as are now in contention at their Lordships' Bar. The familiar principle is laid down in a series of cases, of which the judgment of Lord Hobhouse in *Malkarjun v. Narhari* (5) is not a very remote example. Their Lordships cannot countenance the laying aside of all that has happened in previous litigations, the allowing of a process to become final, and the institution of a fresh suit, the object of which is to declare that, although in terms it was applicable to a particular subject of the King who was a party to the proceedings, still, upon a new application to Courts of Justice, a different result should be reached, and it should be decided that the proceedings and decree did not apply to him.

This suit, in their Lordships' judgment, is equivalent to a suit for the rescission and destruction of a former decree of a competent Court. That rescission and

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destruction could be obtained on the ground of fraud "practised on the Courts below;" but fraud has been eliminated from this case. And accordingly these proceedings are, in their Lordships' judgment, a mere colour for a fresh suit on matters already competently settled by law.

Their Lordships will humbly advise His Majesty that the appeal should be dismissed with costs.

Appeal dismissed.

Solicitor for the Appellants: Mr. Douglas Grant.

Solicitors for the Respondents: Messrs. Barrow, Rogers and Nevill.

MADRAS HIGH COURT.

SECOND CIVIL APPEALS NOS. 1058 AND 1059 OF 1914.

August 17, 1915.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Phillips.

IN S. A. No. 1058 OF 1914

MUDDUSAMI SIDDAPPA—DEFENDANT

No. 1—APPELLANT

IN S. A. No. 1059 OF 1914

KRAMADHATHI SOORAPPA AND OTHERS—

DEFENDANTS—APPELLANTS

versus

BHASKARA LAKSHMI NARASAPPA

AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Hindu Law—Widow's power to alienate husband's properties in order to pay off his debts—Motive—Alienee, when can claim value of improvements—Transfer of Property Act (IV of 1882), s. 51.

A Hindu widow can validly sell her husband's properties in order to discharge her husband's debts, but she cannot take advantage of the existence of a few debts to sell away her husband's properties for less than their value in order to get ready money into her own hands. [p. 854, col. 2.]

Muthukrishnan Chetty v. Annapurnathachi, 9 Ind. Cas. 803, 9 M. L. T. 313, distinguished.

Where a widow alienates her husband's properties with the improper motive of preferring one creditor over another, that creditor is not entitled to profit by such fraud. [p. 855, col. 1.]

A person who cannot in good faith believe that he is absolutely entitled to the properties alienated to him is not a *bona fide* transferee within the meaning of section 51, Transfer of Property Act, and is not entitled to claim the value of improvements effected by him. [p. 855, col. 1.]

Kidar Nath v. Mathu Mal, 18 Ind. Cas. 946; 40 C. 555; (1913) M. W. N. 473; 13 M. L. T. 434; 127 P. L. R. 1913; 17 C. W. N. 797; 15 Bom. L. R. 437; 77 P. R. 1913; 25 M. L. J. 176, distinguished.

Second appeals against the decrees of the District Court of North Arcot, in Appeal Suits Nos. 424 and 425 of 1913, preferred against those of the Court of the District Munsif of Madanapalli, in Original Suits Nos. 538 and 539 of 1907.

FACTS.—The plaintiffs, the reversioners of the husband of a Hindu widow, sued to recover properties alienated by her, on the ground that there was no real necessity for such sale. The alienees contended that the sale was valid because the widow is entitled to discharge her husband's debts by an alienation of his properties. The District Munsif found the sale to have been for consideration, but held under the circumstances that it was not for legal necessity. He decreed the plaintiffs' claim but allowed the defendants the value of improvements effected by them to the lands.

On appeal the District Judge of North Arcot confirmed the finding of the District Munsif with regard to necessity and disallowed the defendants' claim for improvements also. The present appeal is against that decree.

Messrs. S. Srinivasa Aiyangar and A. Swaminatha Aiyar, for the Appellants, contended (1) that apart from any necessity for the sale, a Hindu widow was competent to alienate her husband's property for the discharge of her husband's debts. (2) When she could alienate her property for the purpose of discharging the barred debts of her husband and for other religious ceremonial purposes, her right to alienate to discharge debts even when there is no legal necessity must be upheld. (3) As to improvements the Privy Council case *Kidar Nath v. Mathu Mal* (1) was decisive on the point that the alienee was entitled to the value of improvements.

Messrs. T. R. Ramachandra Aiyar, for the Respondents, contended that the question was one of fact and that it was not a case for interference in second appeal.

JUDGMENT.

SADASIVA AIYAR, J.—The defendants are the appellants in these two connected second appeals. The suit was brought by the reversioners after the death of a Hindu

(1) 18 Ind. Cas. 946; 40 C. 555; (1913) M. W. N. 403; 12 M. L. T. 434; 127 P. L. R. 1913; 17 C. W. N. 797; 15 Bom. L. R. 437; 77 P. R. 1913; 25 M. L. J. 176.

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widow for possession of properties improperly alienated by her to the appellants. The alienations are evidenced by the documents Exhibits XII, XIII and XIV, dated 5th February 1876.

The lower Appellate Court came to the following findings of fact:—

(a) Of the Rs. 1,600, the total purchase-money mentioned in these three documents, about Rs. 1,300 went towards the discharge of debts which had been incurred by the last male owner. (See Exhibits I, II series, IV series, VII, VIII and XVI.)

(b) Rupees 115 was due under a document, Exhibit XI, executed by the widow herself and Rs. 175 was paid in cash.

Out of the Rs. 1,300 which went towards the discharge of the husband's debts, Rs. 1,200 was due under two usufructuary mortgage-bonds and a conditional sale-deed (see Exhibits I, II and IV), which had been executed for a total principal sum of Rs. 2,100. This sum of Rs. 2,100 had become reduced to Rs. 1,200 owing to the very favourable terms contained in the two usufructuary mortgage-deeds, namely, that the usufruct of the land should go wholly in satisfaction of the principal amounts without any liability on the mortgagor's part to pay interest unless he obstructed the enjoyment of the lands by the mortgagees.

The lower Courts found that there was no necessity for selling the lands (which had been mortgaged for a sum of Rs. 1,900) for the low price of Rs. 1,000 in order to discharge debts, which were being gradually wiped out from the usufruct, that the widow's real object was not to discharge her husband's debts but to get some ready cash into her own hands, as was shown by her conduct throughout during the space of about eight years after her husband's death (such conduct including the sale even of her husband's dwelling houses), that the defendants could not be treated as *bona fide* alienees, that is, alienees who were ignorant of the widow's real object and that, therefore, the alienations were invalid against the reversioners. The learned District Judge further disallowed the defendants' claim for compensation for the improvements made by them on the lands sold to them,

I do not think that the appellants are entitled to question in second appeal the finding of fact by both the Courts that there was no necessity for the sales made by the widow and that the defendants knew that there was no necessity.

Mr. S. Srinivasa Aiyangar, however, argued that there was, what he called, a "technical" necessity for the sales, in other words, that on the finding that there was a debt of Rs. 1,300 due by the husband's estate on the date of the sales, the widow was entitled to sell away a portion of her husband's estate to discharge that debt even though the transaction might have been imprudent. He relied on certain authorities of which I need notice only two namely Mayne's Hindu Law, paragraph 633, and the judgment in *Muthukrishnan Chetty v. Annapurnathachi* (2). The passage in Mayne's Hindu Law states that a Hindu widow can validly sell her husband's properties in order to discharge her husband's debts. But I do not think that the learned author intended to lay down that a widow could take advantage of the existence of a few debts to sell away her husband's properties for less than their value in order to get ready money into her own hands and while the debts were being discharged from the usufruct of the lands mortgaged for those debts. The observation in the case of *Muthukrishnan Chetty v. Annapurnathachi* (2) that "actual demand by a creditor need not be proved to justify a widow in selling her husband's property to discharge his debt," must be read in the light of the facts found in that case, namely, that the debt was carrying interest and the principal amount of Rs. 400 had swollen to a sum of Rs. 700 by the addition of Rs. 300 on account of interest, and that "the widow acted prudently in taking steps to discharge the debt". I do not think that the authorities quoted can support the alienation made by the widow in this case, namely, a wholly imprudent alienation made about 10 years after the husband's death, not with the religious motive of freeing her husband's soul in his after-death state from the burden of his debts, but with a view to get some ready cash into her own hands, the mortgage-creditors

(2) 9 Ind. Cas. 803; 9 M. L. T. 313.

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having no right to sue for their moneys. Mr. Mayne, in the same paragraph 633, relied on by the appellants' learned Vakil, says that the widow's right to pay debts by alienating the properties must be "exercised *bona fide* in discharge of the duty to pay her husband's debts" and that when she enters into transactions with the improper motive of even preferring one creditor over another, that creditor would not be entitled to profit by such fraud. On the findings of fact in this case, therefore, it seems to me that the lower Courts were justified in treating the alienations void as against the reversioners.

The last question to be considered relates to the appellants' right to claim improvements. The case, *Nanjappa Gounden v. Peruma Gounden* (3), clearly negatives the defendants' right to claim the value of improvements. Reliance was, however, placed on the Privy Council decision *Kidar Nath v. Mathu Mal* (1), for the contention that if the market value of the alienated properties had been raised by the improvements made by the alienees, they were entitled to claim the cost of the improvements not exceeding such increase in the market value. Their Lordships of the Privy Council had not in that case to deal with the question whether the alienees, in that case were *bona fide* alienees who, within the meaning of section 51 of the Transfer of Property Act, really believed in good faith that they were absolutely entitled to the property. The appeal to their Lordships was made by the alienee who claimed more compensation than the Indian Courts had given him and their Lordships, without calling upon the respondents, dismissed the appeal on the ground that the appellant had not been given less than he was entitled to claim. That case is, therefore, no authority for the proposition that a person who could not have believed in good faith that he was absolutely entitled to the property can claim the value of the improvements effected by him.

In the result I would dismiss the second appeals with costs.

PHILLIPS, J.—I concur.

Appeals dismissed.

(3) 4 Ind. Cas. 18; 6 M. L. T. 284; 19 M. L. J. 454; 32 M 530.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL SIDE DECREE No. 46
OF 1914.

April 28, 1915.

Present:—Sir Lawrence Jenkins, Kt., Chief
Justice, Mr. Justice Woodroffe and
Justice Sir Asutosh Mookerjee, Kt.
JAMAHAR KUMARI BIBI—PLAINTIFF—

APPELLANT

versus

ASKARAN BOID AND OTHERS—DEFENDANTS

—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXI, r. 63, suit under—Method of obtaining review—Burden of proof—Not merely ostensible but real title to be proved.

A plaintiff who is calling in question in a suit contemplated by Order XXI, rule 63 of the Civil Procedure Code an adverse decision of a Court, has to show affirmatively that not only the ostensible but the real title also is in him. He cannot discharge the burden of proof cast on him by merely pointing to the innocent appearance of the instruments under which he claims, he must show that they are as good as they look. [p. 860, col. 2.]

Such a suit is to alter or set aside a summary decision or order of the Court, and it is a method of obtaining review. [p. 860, col. 2.]

Appeal against the following Judgment of the Hon'ble Mr. Justice Chitty, dated the 9th March 1914:—

"This is a suit filed by Jamahar Kumari Bibi, wife of Chatrapat Singh Dugar, for a declaration that she is the absolute owner in her own right of the premises No. 147, Cotton Street, Calcutta, and praying that the said premises maybe released from attachment. On 17th December 1908 the property in suit was attached in execution of a decree dated 1st June 1896 (Suit No. 203 of 1896) against Chatrapat in favour of the present defendants (other than Sripat Singh).

In February 1909 the plaintiff preferred a claim to the property, which was disallowed on 21st June 1909.

She filed this suit on the 27th May 1910. The defendant Askaran Boid, who has acquired the rights of the other Boid defendants, alone defends the suit. His case is that the property is really the property of Chatrapat and the plaintiff is merely Chatrapat's *benamidar*. It is for the plaintiff to make out her title to the property, and the only question for my determination is whether she has done so. It is conceded that she is the ostensible owner, that the various transfers and deal-

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ings with the property have been put through in her name. It is, therefore, incumbent on the contesting defendants to satisfy the Court that, not the plaintiff, but her husband, Chatrapat Singh Dugar, was the real owner.

The allegations in paragraphs 1 to 7 of the plaint are admittedly correct, and I need not set out again the facts there stated.

On 2nd March 1896 Saraswati Dasi, widow and executrix of Jadu Lal Mullick, assigned the mortgage decree in Suit No. 253 of 1889 to the plaintiff for Rs. 1,10,000. That decree was against Chatrapat. The Cotton Street property was, with other property, the subject of that suit and was to be brought to sale under the decree. The plaintiff as decree-holder was given leave to bid, and on 5th March 1898 the premises 147, Cotton Street, were knocked down to her for Rs. 50,000. The sale certificate was issued in the name of the plaintiff, and possession was given by the Sheriff on 9th February 1900. No money was actually paid by the plaintiff for the purchase, but the decree was satisfied to that extent. No further steps were taken by the plaintiff to execute that decree, and the balance of her alleged purchase-money, Rs. 60,000, is still outstanding. She has made no effort to recover it from her husband or his property.

The question then arises, where did the Rs. 1,10,000 come from, which was paid to Saraswati Dasi for the decree. The plaintiff says that she obtained it by mortgaging the Suksena *zemin-dari* to Raja Satis Chandra of Pakur for Rs. 3,00,000. Now, Suksena was undoubtedly so mortgaged on 16th March 1895, but there are various circumstances in this connection which give rise to suspicion. In the first place, the Rs. 3,00,000, were not borrowed for the express purpose of purchasing the decree. There was no talk of the purchase at that time and it was not made until just a year later. The plaintiff gives no explanation of why she borrowed this large sum of Rs. 3,00,000.

Chatrapat, in his evidence here, has stated that it was borrowed to purchase jewellery. No purchase of any jewellery

with this money or any part of it is proved, nor is any explanation forthcoming why the plaintiff should require such an enormous amount of jewellery at that time. There is no evidence to show what was done with the remaining Rs. 1,90,000. On the other hand, it is in evidence that about a year before the mortgage the plaintiff had pledged her jewellery to raise Rs. 1,00,000 to meet some pressing claims upon her husband, Chatrapat. There is nothing to show that that jewellery was ever redeemed.

In any case the plaintiff must show her title to Suksena before she can hope that any Court would hold that the Rs. 3,00,000 were her own. This she has attempted to do on several occasions, and on each occasion she has failed. Suksena, it is true, stood in her name, but there can be no doubt whatever that she was merely the *b-namidar* of her husband.

Her alleged title to it is made out as follows:—

In the year 1880 Luchmipat Singh, the father of Chatrapat Singh, had become very heavily involved in debt. On 13th November 1880 he purported to sell three of the Baluchar properties, the Clock Tower, the family dwelling house and what was known as Dharam Chand's *kothi*, to his wife, Jarao Kumari, for Rs. 50,000. This was not paid in cash but was said to have been deducted from a debt of Rs. 3,46,000 due to her from her husband. There can be no doubt (and it has been so held) that this was a sham transaction and that the ownership of the Baluchar properties remained with Luchmipat Singh. Two days later, on 15th November 1880, Luchmipat and Chatrapat joined in selling to the Maharaja Sir Jotindra Mohun Tagore four *zemin-daris*, Poladasi, Suksena, Mamdanipur and Fatehpur Singia, for Rs. 13,50,000. At the same time a *putni* was granted by the Maharaja of the four *zemin-daris* in the name of Jarao Kumari at a *salami* of Rs. 2,04,000. This was said to have been paid by Jarao Kumari by deduction from the book-debt owing to her. It was, however, in reality a *putni* in favour of Luchmipat Singh. Luchmipat Singh died in May 1886, leaving debts to the

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extent of 15 or 20 lakhs. To these Chatrapat Singh succeeded and he has ever since been fighting his creditors with varying success. In 1893 an arrangement was made with the Maharaja Tagore with regard to the *zemindaris* of Suksena and Fatehpur Singia. On 15th August 1913 Jarao Kumari relinquished the *putni* in Fatehpur Singia to the Maharaja and four days later, on 19th August 1893, the Maharaja executed a deed of gift of Suksena to the plaintiff, Jamahar Kumari. The effect of these deeds was to leave the *zemindari* of Suksena in the name of the plaintiff, and the *putni* of Suksena in the name of Jarao Kumari. In September 1894 the Maharaja filed a suit in the Hughli Court to set aside this arrangement. That suit was twice transferred, first to Rajmahal and then to Alipore. Eventually it was withdrawn on the Maharaja being paid Rs. 20,000. The recitals in the deed of transfer of the *putni* (Exhibit 17) by Jarao Kumari are palpably false, I mean, the recitals indicating the motives and reasons for the two transfers. There can be no doubt that the transaction was, so far as the Maharaja was concerned, purely a business transaction. It was entered into on the faith of representations by Chatrapat and others, and when the Maharaja found that he had been deceived, he at once took steps to have it rescinded with the result as above stated. The *putni* of Fatehpur Singia did not really belong to Jarao Kumari and there was no possible reason why Jarao Kumari should wish to make a gift to her daughter-in-law, the plaintiff, unless it were to screen some property from Chatrapat's creditors. Still less reason was there for the Maharaja to make a gift to the plaintiff, a lady whom he did not and could not personally know. The Maharaja, moreover, swore in 1897 that the first *putni* was granted to Jarao Kumari not for her own benefit but for that of Luchmipat's family, he believed Luchmipat to be the real beneficiary in the transfers.

On the 2nd February 1895 a deed was executed by which Jarao Kumari is said to have sold the *putni* in Suksena and the Clock Tower at Baluchar to Jamahar Kumari for Rs. 1,00,000, Rs. 90,000 in 3,000 gold *mohurs* and 11,000 in cash. The Clock Tower was not valued, but was

thrown in in order to enable the deed to be registered at Baluchar. The effect of this deed was to put Suksena in its entirety in the name of the plaintiff. This is a most suspicious transaction. It is said that these two *pardanashin* ladies settled the whole matter, including the price, between themselves without the intervention and assistance of any one. It is further said that the gold *mohurs* were transferred from the plaintiff's chest to Jarao Kumari's also entirely at the ladies' own initiative.

No satisfactory explanation is forthcoming of how the plaintiff came to have this large sum in her safe, especially as not long before she had pledged her ornaments to raise Rs. 1,00,000 for her husband. The statement that she had received it in gifts from Luchmipat cannot be accepted. Moreover, some six weeks later, we find her raising Rs. 3,00,000 from the Pakur Raj on mortgage of Suksena. It is conceded that the release of the *putni* was put through only to facilitate that object by concentrating the nominal title to Suksena in one individual.

It is clear that this transfer of the *putni* was also a sham transaction.

The question, however, is, to whom did Suksena really belong. This has been determined by the Courts on several occasions.

Decree had been obtained by Harendra Kumar Roy and Sarat Kumar Roy against Chatrapat on the Original Side of this Court. In execution the three Baluchar properties were attached. Jarao Kumari, Jamahar Kumari and Jagatpat, son of Chatrapat, respectively filed claims which were disallowed. They then filed six suits under section 283, Civil Procedure Code, 1882. These suits were tried together and all were dismissed. We are concerned only with the suit of Jamahar in respect of the Clock Tower and incidentally of Suksena. It was held by the Subordinate Judge that she had on claim to the Clock Tower, and that the transfer of Suksena to her by the Maharaja was *benami* and that the transfer of the *putni* by Jarao Kumari was not *bona fide*. This was upheld by the District Judge on appeal, and a second appeal to this Court was not pressed.

In claim Case No. 1 of 1903 the present plaintiff put in a claim of various *towjees*

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in Suksena which had been attached by Bejoy Singh Dhudhuria, in execution of a decree against Chatrapat. The question there was the same, whether she was the *bona fide* possessor of the estates attached or only a *benamidar* for her husband, Chatrapat. The latter was found to be the case and her claim was disallowed. She applied to this Court in revision, when the learned Judges remarked that "it is perfectly clear that the applicant is not a *bona fide* claimant, and that the claim is only one of a series of transactions by which Chatrapat Singh is attempting to put his property beyond the reach of his creditors." An application by the plaintiff, for leave to appeal to His Majesty in Council, was refused. She then filed a Title Suit No. 3 of 1904, but eventually withdrew it, Bejoy Singh Dudhuria's decree having been in some way satisfied. Lastly, on 20th November 1903, when in Bombay with his family, Chatrapat joined with Jamahar Kumari in conveying *Towjee* No. 429 in Suksena to Mansukhbhai Bhagabhai, a wealthy mill-owner of Ahmedabad. Bejoy Singh Dudhuria, as assignee of a decree against Chatrapat, had attached this *towjee*, and a claim by Munsukhbhai Bhagabhai to it, under the conveyance of 1903, was allowed. Bejoy Singh Dudhuria accordingly filed a suit for a declaration that it was really the property of Chatrapat and so liable to attachment. The Subordinate Judge dismissed the suit, but on appeal to this Court it was held on 13th February 1914 that the conveyance to Mansukhbhai Bhagabhai was a sham transaction. It is worthy of note that in this conveyance Chatrapat joined, an entirely unnecessary precaution if the property really belonged solely to his wife. It is clear that the whole transaction was Chatrapat's and not the plaintiff's.

In the present case the plaintiff has put no fresh evidence before the Court. Chatrapat has been examined, but the plaintiff's Counsel very candidly admitted that he could not ask the Court to regard him as a witness of truth. It would be quite impossible to believe a word he says without corroboration, and that is not forthcoming. He evaded every question, taking refuge under an alleged failure of memory, although when it suited his purpose he volunteered long statements which

showed that he could remember well enough.

As I have said, the evidence before me is the same as has been laid before the Court on previous occasions. There is nothing fresh at all to better the plaintiff's case. I need not, therefore, discuss the evidence in detail, suffice to say that it is clear to demonstration that the plaintiff was never really the owner of Suksena but merely the *benamidar*. It was not acquired with her money, and neither the possession nor the mode of management were ever changed. It has been Chatrapat's throughout.

That being so, it is clear that the Rs. 3,00,000, out of which Saraswati's decree was purchased (if it was so purchased), was not the plaintiff's money, but Chatrapat's and the proceedings in execution of that decree were nominally the plaintiff's, in reality Chatrapat's.

The fact that the Rs. 60,000 is unaccounted for, and that the decree was never again executed, is significant. Also we have the fact that Sripat's suit of 1895 has never been proceeded with, and the title-deeds of 147, Cotton Street, are still with the mortgagee with whom they were deposited by Chatrapat by way of equitable mortgage in February 1893. There can be no doubt that Chatrapat regarded, 147 Cotton, Street as his Calcutta family dwelling house, as appears from the insolvency proceedings and other documents.

It is said that he and his wife are not now on good terms, but that is a matter of the last five or six years and does not affect the transactions now in question which date back to far beyond that.

On a consideration of the whole case, I find that the plaintiff has completely failed to prove her title to the property, 147, Cotton Street, and dismiss her suit with costs on scale 2.

The costs of suit will include reserved costs, if any, and the costs of the commission to examine the plaintiff. With regard to these costs, however, the plaintiff is entitled to have her costs of the first day's sitting of the commission, 30th December 1912, from the defendant Askaran Boid, to be set off against the other costs awarded against her."

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The plaintiff preferred an appeal against the above decision.

Messrs. S. R. Das and K. P. Basu, for the Appellant.

Messrs. N. Sircar, B. L. Mitter and Gossain, for the Respondents.

JUDGMENT.

JENKINS, C. J.—This is a suit occasioned by the determination adversely to the plaintiff, Jamahar Kumari Bibi, of a claim to property preferred by her in execution proceedings.

This property is No. 147, Cotton Street, and Chitty, J., has held that Jamahar, though ostensibly its owner, is in truth merely a *benamidar* for the judgment-debtor, her husband, Chatrapat Singh. He accordingly has dismissed the suit. From this judgment the present appeal has been preferred.

The house was put up for sale in execution of a decree against Chatrapat Singh and was ostensibly bought by Jamahar on the 10th of April 1897 for Rs. 50,000. No cash passed and the explanation is that on the 2nd of March 1896 the decree was expressed to be assigned to Jamahar in consideration of Rs. 1,10,000, and the Rs. 50,000 was set off against a corresponding part of what was due under the decree.

Jamahar contends that the assignment to her of the decree is free from flaw and that the defendants have not established its invalidity.

How then did Jamahar get this sum of Rs. 1,10,000 with which to buy this decree against her husband? Her case is that it is a part of a sum of three lacs raised by her on the 26th March 1895 by a mortgage to the Pakur Rajah. It is recited in that instrument of mortgage that she was absolutely and beneficially seized and possessed in her own right and as her own property free from incumbrances of both the *zemindari* and *putni* rights in the *zemindari* Parganah Suksena and these rights she purported to mortgage for Rupees 3 lacs.

The question then arises, were these *zemindari* and *putni* rights really hers? To answer this, it is necessary to look into certain transactions of 1893 and 1895.

On the 15th August 1893 Jarao, Chatrapat's mother, relinquished in favour of the Maharajah Sir Jotindra Mohun Tagore her *putni* right in Fatehpur Singia and conveyed

to him the arrears of rent due to her from the tenants. In the instrument of relinquishment it is recited that she had learnt that it would be beneficial to her to acquire the *maliki* right of Suksena by relinquishing the *putni* right to Fatehpur Singia and then the recitals proceed as follows: 'So I applied to the Maharajah Bahadur for the conveyance of the *maliki* right of Suksena by relinquishing the said Fatehpur Singia, whereupon both myself and the Maharajah Bahadur would be benefited by this transaction, and we both agreed to the same. Accordingly with the object of fulfilling my long-cherished desire of making a gift of a *zemindari* in favour of my daughter-in-law Srimati Jamahar Kumari Bibi,—which for various reasons I could not fulfil (so long)—I applied to the Maharaja Bahadur for making over the *zemindari* right to the said Suksena to the aforesaid Jamahar Kumari Bibi by a deed of gift, believing that my desire would be fulfilled and that it would bring me pleasure if the Maharajah Bahadur would now give away the *maliki* right to the aforesaid Suksena *zemindari* by a deed of gift in favour of my daughter-in-law, Jamahar Kumari Bibi, instead of me, and the Maharajah Bahadur having agreed thereto and having executed a deed of gift in favour of the said Bibi.' Then there follows the relinquishment. On the same date an instrument described as a deed of gift was executed by the Maharaja in favour of Jamahar. It is there recited as follows: 'At present the said Bibi Saheba having proposed that she should surrender the *putni* right which she has in the aforesaid Fatehpur Singia by executing a separate deed of surrender in my favour and that in lieu of the same I should make an absolute gift of the proprietary right in the said *zemindari* Suksena to you, who are her daughter-in-law, and expressed that the Bibi Saheba would be pleased with and benefited by it, I have agreed to the said proposal and have taken *khas* possession of the said *putni mahal* and I have been benefited thereby. I being pleased with this act of your mother-in-law's and owing to the friendship of my deceased paternal grandfather and deceased paternal uncle and myself with your husband's paternal grandfather, the late Babu Protap Singh, and your husband's deceased father, I have,

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with the desire of doing you a good turn at the present time, agreed cheerfully to make a gift to you of the proprietary and other rights, title, interest and concern which I have in respect of the said *zemindari* Suksena in accordance with the said proposal and you have agreed to accept the same." Then there followed the gift of *zemindari* Suksena to Jamahar.

By an instrument, dated the 2nd February 1895, Jarao assigned to Jamahar her *putni* rights in Suksena as also the Girjaghar in Baluchar for Rs. 1,01,000. This is the title Jamahar claims to show to the *zemindari* and *putni* rights mortgaged to the Pakur Rajah. To complete the history of the family's dealings with the property it is necessary to refer to certain instruments executed in 1880.

The first is dated the 13th of November, and it purports to be a sale by Luchmiput, Chatrapat's father, to his wife, Jarao, of three properties specified in the instrument including the Girjaghar for Rs. 50,000. No cash passed, but the price was treated as a partial payment of a debt due to her from her husband. On the 15th November, Luchmipat and Chatrapat executed in favour of the Maharajah Sir Jotindra Mohun Tagore an assignment of the *zemindaris* Fatehpur Singia, Suksena, Mamdanipur and Poladasi for Rs. 13,50,000. At the same time there was a grant by the Maharajah to Jarao of the *putni* right in these four *zemindaris* for Rs. 2,04,000. This sum was not paid but was kept back by the Maharajah from the purchase-money for the *zemindaris* and allowed in account between Jarao and her husband by way of deduction from the debt alleged to have been due to her.

This then is the history of the material transactions and the view of Chitty, J., was that the intervention of both Jarao and Jamahar was as *benamidars*. I recognize that the value of this opinion is in some measure discounted by the fact that it was in part based on the view expressed in earlier litigations, a class of evidence that was used by the learned Judge to an extent that the law does not permit. But apart from this evidence, there are circumstances which clearly fall for explanation and the onus in this case is on Jamahar to show affirmatively that not

only the ostensible but the real title also is in her.

She is a plaintiff who is calling in question in a suit contemplated by the Code (Order XXI, rule 63) an adverse decision of the Court given, it is true, in a summary proceeding, but conclusive subject to the result of this suit. This is a suit, therefore, to alter or set aside a summary decision or order of the Court, and it is a method of obtaining review: *Phul Kumari v. Ghanshyam Misra* (1).-

The plaintiff in the circumstances of this case cannot discharge the burden of proof cast on her by merely pointing to the innocent appearance of the instruments under which she claims: she must show that they are as good as they look. If specific authority for this is needed, it is furnished by many cases, among which are the decisions of Sir Richard Couch in *Roop Ram Doss v. Saseeram Nath Kurmoker* (2) and of Sir Charles Sargent in *Govind Atmaram v. Santai* (3).

It is then useless for Jamahar to contend that the actual deeds under which she claims are free from appearance of unreality and, therefore, it rests on the defendants to make out that they are colourable. Moreover, these deeds are so interwoven with the earlier transactions that they cannot be considered apart from them, and it cannot be claimed that the examination of the dealings disclosed on the record inspires confidence in Jamahar's case. Nor are matters mended when the later dealings are closely examined. Thus, to deal with the alleged purchase by Jamahar of Saraswati's decree. No doubt the price was made in cash, but why should Jamahar have brought on her own account this decree against her husband, a decree which she has never been able to realize, whether she has made real endeavours in that direction or not?

The question has naturally been asked, where did she get the money to pay the price, Rs. 1,10,000? The answer has been that it was a part of the Pakur Raj loan, and in support of this our attention has been

(1) 35 C. 202; 7 C. L. J. 36 (P. C.); 12 C. W. N. 169; 10 Bom. L. R. 1; 17 M. L. J. 618; 14 Bur. L. R. 41; 35 J. A. 22; 5 A. L. J. 10; 2 M. L. T. 508.

(2) 23 W. R. 141.

(3) 12 B. 270.

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invited to the fact that four of the Rs. 10,000 notes handed over in payment for the transfer of the decree are identical with four notes received on the occasion of the Pakur Rajah's mortgage. But it would seem that of the Rs. 10,000 notes paid on the transfer of the decree some were not received in connection with the Pakur Rajah's mortgage.

This is apparent from the entry, Exhibit DI, in Jamahar's *rokur*, where we find that of nine notes of Rs. 10,000 each five were not received on the execution of the Pakur Rajah's mortgage. In fact of the 30 notes of Rs. 10,000 then received from the Pakur Rajah only four formed part of the price paid for Saraswati's decree.

This does not agree with the explanation given by Jamahar and her witnesses, nor is there any suggestion made of intermediate dealings between the 16th of March 1895 and the 2nd of March 1896 which might account for the change in the notes representing the Pakur Rajah's advance.

Nor is this the only difficulty. No explanation is given why in March 1895 Jamahar should have borrowed three lacs, or having borrowed it, should have kept so large a sum as Rs. 1,04,000 in her custody apparently uninvested.

Moreover, the mode in which the entry is made on the 3rd *Falgun* 1302 (14th February 1896) only serves to increase the difficulty, especially when it is borne in mind that the entry is in her *rokur*. And the same remark applies to the subsequent entry of the 21st of March.

A speculative explanation has been tendered for our acceptance, but it does not accord with the opening entry of September 1895 in the corresponding ledger. The true position might have been disclosed by the next preceding *rokur* and ledger, but they are not forthcoming. It is said that they are lost, but why they alone should have suffered that fate does not appear.

The later matters only serve to emphasise the necessity for clear and convincing proof of the genuineness of the transactions on which Jamahar relies and when she fails to produce the books that should disclose the truth, she cannot complain if an adverse presumption be drawn. What is disclosed suggests that though the Pakur Rajah's

advance ostensibly came into Jamahar's hands it merely passed through them, and that the payment for Saraswati's decree merely passed through Jamahar's *rokur* as a matter of form. Nor is the failure to produce evidence limited to these account books. Jarao, if all that is represented regarding her be true, played an important part, and yet she was not called as a witness. True it is that she is a *pardahnashin* lady and advanced in years, but there can have been no difficulty in her evidence being taken on commission, as Jamahar's was.

Then, Jamahar's ignorance of the transactions in which she is supposed to have been the principal person concerned is not without its significance, and in so saying I have particularly in mind her rambling story as to the Rs. 50,000, the price of 147, Cotton Street.

Each side has claimed that the evidence of possession favours it. But at most its effect is negative, and all that one can say is that it is not inconsistent with the case of either side.

I recognize the force of Jamahar's contention that a gift to her was within the Maharajah's competence, but all the circumstances have to be considered, and when this is done the validity of her title requires more cogent proof than this to establish its reality.

The evidence of Ganguly, it is true, is to some extent inadmissible as resting on what was told him by others. But there are matters on which he is able to give relevant evidence of importance, and this so far as it goes is adverse to the plaintiff's case, and to the genuine character of the Maharajah's assurance to her.

The result, then, is that though I hold some of the evidence on which Chitty, J., acted was not relevant, still I agree with him that the suit ought to be dismissed.

And I come to that conclusion because the plaintiff has wholly failed to prove that the transactions under which she claims were real and genuine, a burden that rested on her in view of the result of the summary proceedings and the circumstances of the case. Therefore, I think, this appeal should be dismissed with costs.

WOODROFFE, J.—I agree.

MOOKERJEE, J.—I agree.

Appeal dismissed.

PEARY LALL DAW v. MANAMALI DEY.

DHAKESHWAR PROSAD NARAIN SINGH v. ISWARDHARI SINGH.

CALCUTTA HIGH COURT.

APPEAL FROM ORDER No. 76 OF 1910.

June 21, 1911.

Present:—Sir Lawrence Jenkins, Kt., Chief Justice, and Mr. Justice Woodroffe.

PEARY LALL DAW—PLAINTIFF—APPLICANT
APPELLANT

versus

BANAMALI DEY AND ANOTHER—

DEFENDANTS—OPPOSITE PARTY—RESPONDENTS.
Civil Procedure Code (Act. V of 1908), s. 115—
Appeal against order refusing application to revise
decree of Small Cause Court.

No appeal lies either under the Code of Civil Procedure or the Letters Patent from an order of a single Judge of the High Court refusing an application under section 115 of the Code to revise a decree of the Calcutta Small Cause Court.

Appeal against an order of Mr. Justice Stephen, dated 21st November 1910, refusing an application to set aside an order in the matter of Suit No. 12314 of 1910 of the Calcutta Small Cause Court.

JUDGMENT.

JENKINS, C. J.—This is an appeal from an order of Mr. Justice Stephen under section 115 of the Code of Civil Procedure. An application was made to the learned Judge for a Rule, calling on the opposite party to show cause why an order of the Small Cause Court should not be set aside. The learned Judge refused to grant the Rule. It is from that order of refusal that the present appeal is preferred.

A preliminary objection has been taken that no appeal lies. Certainly it does not lie under the Code. The only question is whether it lies under the Letters Patent. But in order that it may lie under the Letters Patent there must be a 'judgment.' In my opinion, the order of which complaint is made cannot be regarded as a 'judgment.' Therefore, I think the preliminary objection must prevail and this appeal must be dismissed with costs.

WOODROFFE, J.—I agree.

Appeal dismissed.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 1302 OF 1912.

June 30, 1914.

Present:—Mr. Justice N. Chatterjea and Mr. Justice Mullick.

DHAKESHWAR PROSAD NARAIN
SINGH *alias* HARIHAR PROSAD
NARAIN SINGH—PLAINTIFF—APPELLANT

versus

ISWARDHARI SINGH AND OTHERS—

DEFENDANTS—RESPONDENTS.

Court Fees Act (VII of 1870), s. 28—Suit for declaration—Correction of rent entry in Settlement Record—Rent payable by defendants varying according to their castes and occupations—Power of Revenue Officer in revision to direct payment of Court-fee—Bengal Tenancy Act (VIII of 1885), ss. 105, 105 A, 106, 107, 108.

Under section 108 of the Bengal Tenancy Act, a Revenue Officer specially empowered by the Local Government in this behalf has the power of revising any order or decision passed under sections 105, 105A, 106 or 107 made by himself or any other Revenue Officer. This power is not restricted to revision of the decision or order on the merits. [p. 863, col. 1.]

In a suit for correction of an entry as to rent in a *furd rewaz* where the defendants belonged to different castes and followed different occupations and the rents payable by them varied accordingly:

Held, that as the *furd rewaz*, if the plaintiff's prayer were granted, would show different rents payable by different classes of tenants, one suit with a Court-fee of ten rupees might be instituted against such of the tenants only as belonged to the same caste or followed the same occupation, and with respect to each class of tenants a separate suit ought to be instituted. [p. 863, col. 2.]

A Revenue Officer has the power under section 28 of the Court Fees Act to direct the payment of Court-fee in revision when no objection has been raised as to the same in the Court of first instance. [p. 864, col. 1.]

Appeal against the decree of the Special Judge of Patna, dated the 7th May 1912, affirming that of the Settlement Officer of Patna, dated the 30th November 1911.

Dr. Rash Behary Ghose and Babu Ambika-pada Chowdhury, for the Appellant.

Babu Kulwant Sahai, for the Respondents.

JUDGMENT.—This appeal arises out of a suit under section 106 of the Bengal Tenancy Act. The plaintiff-appellant is the landlord, and realises produce rents from about 130 *rai-yats*. In the Record of Rights of the village, it was recorded that half the produce of the land is paid as rent to the landlord. The further incidents of the system of produce-rent were recorded in full in a separate *khatian*, called the *furd rewaz bhowli*, to which reference was made in the *khatian* of each tenant. The plaintiff thereupon instituted the suit against all the

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tenants in a body upon one plaint with a Court-fee of Rs. 10 only, for a declaration that the rates of rent payable by the tenants varied according to the occupation and caste to which they belonged (the rates varying from 20 seers to 22½ seers in a maund). The tenants entered into compromise with the plaintiff and the Assistant Settlement Officer made a decree according to the compromise. The matter came up before the Settlement Officer, who by his order dated the 15th September 1911, upheld the compromise and the decree passed by the Assistant Settlement Officer.

Subsequently it appears that the Settlement Officer acting under section 108 of the Bengal Tenancy Act, by his order dated the 30th November 1911, held that the plaintiff ought to have instituted a separate suit against each tenant claiming to have both his *khatian* and the *furd rewaz bhowli* corrected and should have paid separate Court-fees on each, and that even if by consent of parties the suits are tried jointly he should pay the same Court-fee as if he had instituted a suit against each *raiya*. The Settlement Officer accordingly set aside "the order allowing the suit" and directed the plaintiff to pay additional Court-fees to the value of Rs. 1,290 within a certain time.

On appeal by the plaintiff, the learned Special Judge upheld the order of the Settlement Officer, and the plaintiff has appealed to this Court.

It is contended on behalf of the appellant that the order, purported to be made under section 108 of the Bengal Tenancy Act by the Settlement Officer, could not be properly made under that section.

Under section 108 of the Bengal Tenancy Act, a Revenue Officer specially empowered by the Local Government in this behalf has the power of revising any order or decision passed under sections 105, 105A, 106 or 107 made by himself or any other Revenue Officer. This power is not restricted to revision of the decision or order on the merits, and we are unable to hold that the Revenue Officer's order under section 108 was unauthorised.

The next question is, what is the Court-fee payable on the plaint. It was contended

that under Order I, rule 3, all the defendants could be joined in one suit. That rule runs as follows :—"All persons may be joined as defendants against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where, if separate suits were brought against such persons any common question of law or fact would arise." The suit instituted by the plaintiff was for a declaration to the effect that the entry in the *furd rewaz* that the proprietor's share is 20 seers and the tenants' share is 20 seers in the maund was wrong, and in lieu thereof it be declared that after deduction of costs, the proprietor's share is realised at the rate of 21 seers a maund from the Rajput Mahtawars, 21½ seers from the Kurmi Mahtawars, 20 seers from the *amlas*, 22½ seers from the ordinary tenants, and 22 seers from the Rajput tenants, besides cesses. As the defendants belong to different castes and follow different occupations, the rents payable by the defendants would be different, and although in the *khatian* the rent payable is stated to be one-half, the *furd rewaz*, if the plaintiff's prayer were granted, would show different rents payable by different tenants and the rent-note appended to each *khatian* will have to be altered. One suit, however, might be instituted against such of the tenants as belong to the same caste or follow the same occupation. For instance, the plaintiff alleged that the Rajput Mahtawars pay rent at rate of 21 seers. If there are ten such tenants, we think one suit might have been brought against the ten tenants with a Court-fee of ten rupees, because the same declaration would have to be made with respect to all the said ten tenants. We are of opinion, therefore, that a separate suit ought to have been instituted with respect to each class of tenants as indicated above. Only one suit appears to have been instituted against all the tenants jointly apparently without any objection on the part of the tenants who compromised the case with the plaintiff, and the Revenue Officer did not insist upon the presentation of a separate plaint in each case, but directed the plaintiff to pay a Court-fee of Rs. 10 as in a separate case against each tenant. In the view we have taken a separate Court-fee

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should have been paid for each class of tenants as stated above.

The last question is, whether the Revenue Officer had any power to direct the payment of Court-fee in revision when no objection was raised as to the same in the Court of first instance. We are of opinion that he had the power under section 28 of the Court Fees Act to order that the plaint be properly stamped. In the case of *Chedi Lal v. Kirath Chand* (1), the plaint in a suit bore insufficient Court-fee. In second appeal it was held by the Full Bench that if a document which ought to bear a stamp under the Court Fees Act has been used in the High Court, and the mistake or inadvertence which permitted its reception in a lower Court without being properly stamped comes to light in the High Court, any Judge of that Court may under section 28 of the Court Fees Act direct that it should be properly stamped. Following the principle of that decision we hold that the Revenue Officer had the power to order the plaint to be properly stamped.

The order of the Special Judge and the order of the Revenue Officer, dated the 30th November 1911, are accordingly modified as indicated above. If the Court-fee as indicated above be not paid on or before the 1st September 1914, the suit will stand dismissed. If the Court-fee be paid within the time aforesaid, the compromise decree passed by the Assistant Settlement Officer will stand confirmed. We make no order as to costs of this appeal. Let the record be sent down at once.

Decree modified.

(1) 2 A. 682.

BOMBAY HIGH COURT.

ORIGINAL CIVIL SUIT No. 1168 OF 1914.

July 17, 1915.

Present:—Mr. Justice Beaman.

B. GIOVANI GORIO AND Co.—PLAINTIFFS
versus

VALLABHDAS KALIANJI AND OTHERS—
DEFENDANTS.

Contract Act (IX of 1872), s. 264—"Persons dealing with," meaning of—Dissolution of partnership—Public notice not given, effect of—Partners, who are—Question of fact—Court, power of.

The words "persons dealing with a firm" in section 264 of the Contract Act mean "persons who have been in the habit of dealing with and at the time of the dissolution were contemplating further dealing with the firm, on the faith of the firm remaining the same as that with which their dealings commenced." [p. 865, col. 2.]

Therefore persons dealing with a firm cannot be affected by any dissolution of which public notice had not been given unless they have had actual notice. [p. 866, col. 2.]

It is always a question of fact, who were or were not partners at the time the persons dealing with the firm commenced and carried on their dealings. The Courts are authorized to adjudge their claims against the firm which seeks to evade them on the ground that the only solvent partner ceased to be a partner during the continuance of the dealings, as though such partners had not been secretly withdrawn. [p. 867, col. 1.]

Messrs. Wadia, Desai and Taraporewalla, for the Plaintiffs.

Messrs. Weldon and Setalvad, for Defendant No. 3.

JUDGMENT.—This suit is brought by Messrs. B. G. Gorio and Company, a firm, against the three defendants, Vallabhdas Kalianji, Manilal Premchand and Dwarkadas Naranji, as members constituting the firm of Lakhmidas Vallabhdas and Co., to recover the losses on certain indent dealings. Defendants Nos. 1 and 2 appear and admit the plaintiffs' claim in full.

The only question which I have been asked to try so far in this Court is, whether defendant No. 3, Dwarkadas Naranji, was a partner in the firm of Lakhmidas Vallabhdas, and as such was, and still is, liable to the plaintiffs.

We start from the admitted proposition that defendant No. 3 was a partner of the firm up to the 9th of November 1912. I say that this is admitted, because there is nothing in the written statement to suggest the contrary and the fact has been explicitly admitted by defendant No. 3 in his own correspondence exhibited in the suit. It is true that at the trial his Counsel sought to start an entirely new defence, namely that he never was at any time a partner in this firm. I cannot encourage a deliberate falsehood of this kind, nor can I allow pleadings to be so far extended as to embrace an entirely new and, on the face of it, an entirely false defence. I, therefore, confined defendant No. 3 strictly to his pleadings and his admissions. In my opinion, the written statement itself could

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mean nothing else than that defendant No. 3 had never thought of denying that he had been a partner in Messrs. Lakhmidas Vallabhdas and Co., and that construction is amply borne out by the admissions contained in his letters, notably the letter of the 19th November 1914. When he decided to contest the suit, he evidently relied upon the special doctrine of the English Law, namely, that as a sleeping partner, of whose existence no indication was given by the name of the firm, he would not fall within the scope of section 264 of the Indian Contract Act; and so advised, he framed and limited his defence. Coming to trial, I suppose, after the usual consultations, his legal advisers probably thought that that defence was not so sound as it might be, and, therefore, wished to supplement it by striking out an entirely new line and putting the plaintiffs to the proof of the fact that defendant No. 3 had at any time been a partner in the firm of Lakhmidas Vallabhdas.

Now, the present dealings, out of which the firm's indebtedness arose, commenced on the 20th November 1914; and the plaintiffs have sought to strengthen their case by alleging and proving that defendant No. 3 was not only a partner in the firm of Lakhmidas Vallabhdas up to the 9th November 1912, but continued to be so at all times material to the fixing of the liability in this suit. To that end witnesses have been examined: Vallabhdas and Manilal, the two admitted partners in the firm, and one Morarji Keshavji, who prove that defendant No. 3 continued to be a partner in this firm of Lakhmidas and Vallabhdas long after the completion of the indent contract with the plaintiff firm. The evidence of Morarji, as being that of a disinterested outsider, is of special value. He swears that his firm had dealings with Lakhmidas Vallabhdas and Co. at about the same time as the dealings in suit and that the indebtedness therein incurred by the firm of Lakhmidas Vallabhdas was settled in 1913 by defendant No. 3, Dwarkadas Naranji, at his own house and after the intervention of his brother, Lalji Naranji. If that story be true, it would certainly go far to prove that the defendants' present case is untrue. Then, there is the direct and positive evidence of Vallabhdas and Manilal, which

may be to some extent interested and, therefore, open to suspicion. It is certainly very direct and positive evidence, and I think it is a great deal better than the single unsupported word of defendant No. 3 to the contrary. I should, therefore, have very little hesitation in holding, if material, that the alleged dissolution of partnership and the consequent withdrawal from any further connection with the firm on the part of defendant No. 3, which is the sole basis of his defence, have been disproved and that, as a fact, he remained a partner at all times material to the present litigation. But I should be equally confident, had that finding been the other way, that he is still liable to the plaintiffs' claim. The plaintiffs were persons dealing with the firm within the meaning of section 264. Their dealings began in June 1912 and the business continued when, and during the time, the present contracts were entered into and carried through, that is to say, the settlements of the contracts made in June were not completed until December 1912 or January 1913. Therefore, for all the purposes of applying section 264, the plaintiffs were certainly persons dealing with the firm of Lakhmidas Vallabhdas; and the defendant No. 3 was admittedly a partner of that firm at the time the dealings commenced and were in progress. Now, section 264 of the Indian Contract Act is one of the simplest and plainest sections to be found in our Statutes. It runs:

"Persons dealing with a firm will not be affected by a dissolution of which no public notice has been given, unless they themselves had notice of such dissolution."

The only possible opening for an ingenious construction and interpretation of this section appears to me to lie in the words "persons dealing with"; and I have no doubt whatever that those words mean "persons who have been in the habit of dealing with and at the time of the dissolution were contemplating further dealing with the firm, on the faith of the firm remaining the same as that with which their dealings commenced" Now, that being so, it is perfectly clear that such persons cannot be affected by any dissolution of which public notice had not been given unless they have had actual notice. It is admitted that defendant No. 3 gave no public notice and no attempt has been made to prove that the plaintiff firm had actual

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notice of the alleged dissolution. The defendants' case is that the old firm was dissolved on the 9th of November and that on and from the 10th of November a new firm under the same name, style and title, but consisting of Vallabhdas and Manilal, carried on the business, in other words, that the only moneyed man in the firm, Dwarkadas Naranji, defendant No. 3, surreptitiously and covertly withdrew, leaving all those who had been dealing with the firm and contemplated further dealing with the firm in the belief that no change whatever had been made in the firm. Such persons are surely not to be affected by the fact, if it be a fact, that such a change had occurred, and that a firm bearing a definite name and having a certain constitution, which continues under that name, has, in fact, been dissolved without public notice being given and without actual notice being had. Where that occurs, it makes no difference whether the fact be as alleged or not; for the liabilities of the original members constituting the firm must remain the same since the persons dealing with that firm are not to be affected by the dissolution. I am unable to agree with the decision of Tyabji, J., in the case of *Greaves v. Purshotam* (1) to which my attention was invited. That learned Judge appears to have had no difficulty in holding that section 264 did not override the special rule of the English Law in respect to dormant partners. That rule is founded on very good reasons and is specially referable to the principles of estoppel, but section 264 of the Indian Contract Act has been conceived in a much wider spirit and has a much wider scope. Where its language is perfectly plain and covers every case, quite irrespective of special deductions to be drawn from the principles of estoppel, I do not feel, as a Judge, I ought to exercise my ingenuity over cases which plainly fall within it, in endeavouring to put limitations and interpretations upon its language with the effect of making the Legislature say one thing and mean quite another. Moreover, I conceive that this section has been framed designedly in this comprehensive way to strike at a very wide and well-recognized evil that infects commercial dealings in this country. It is true that the English rule arises in this way. Old

customers, it is said, who had dealt with the firm on the faith of its constitution being of a certain quality, could not be deprived of the security given them by that peculiar constitution as a result of any private breaking-up or dissolution of the firm, unless special notice had been given to each of them. Public notice was generally considered sufficient for the casual, or merely intending, customer. Underlying all this is clearly the principle of estoppel, viz., that the firm, holding itself out to consist of several individuals, in any one or more of whom persons dealing with the firm have peculiar faith, cannot make any change in the constitution of the firm, while dealings with them still continue, to the detriment of those persons, without giving any notice that such a change has been made. And out of this, the special rule applied to dormant partners naturally evolves; for it is said that where the name of the firm gives no indication of the inclusion among its members of a certain person (that person being so more than a sleeping partner taking no active part in the business) then the old customers, or the public in general, dealing with the firm cannot be influenced in giving the firm their business by any considerations peculiar to the presence of the partner thus totally unknown to them. So that in the event of such a person being withdrawn from the firm no notice, either public or actual, is required. But had it been the intention of the Legislature in India to enforce such a rule in this country, nothing could have been easier than to say so by adding a few words to section 264. In this country, however, where firms are very often of an extremely complex character and there is no law, as there certainly ought to be, compelling the registration of partnerships, and where such firms are constituted without any writing and appear to be in a constant process of change, partners retiring and partners being added without any dissolution, what the Legislature aims at preventing is the establishment of firms on an originally sound basis and the subsequent secret withdrawal of that basis. When firms are established in this way and customers' transactions are referable to the continuance of the old firm, from which the only member who ever possessed any money secretly withdraws, it is not necessary in applying section 264 to have recourse to

(1) 5 Bom. L. R. 366.

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any principles of estoppel. There is not a single word in the section to suggest that the persons or the public dealing with the firm should have any knowledge of its actual constitution or should have been influenced by the fact that the particular individual was a partner in it; and that too for a very good reason that the names of the firms in this country hardly ever do indicate who are the actual partners. But when a firm is started, if it is ever to have any career at all, it is almost certain that some one in the partnership must have a certain amount of capital. The firm then gradually establishes itself on a real solid money basis, and, being so established, the only member of the firm who really possesses capital secretly withdraws, leaving the firm under the same name and, to all outward appearances, the same, to trade on its reputation with the public, although now it is nothing but a shell and a sham. The public cannot always be inquiring as to the changes going on in the constitution of these Indian firms, and, therefore, our Statute leaves it always to be a question of fact, who were or were not partners at the time the persons dealing with the firm commenced and carried on their dealings, and directs that Courts shall adjudge their claims against the firm, which seeks to evade them on the ground that the only solvent partner ceased to be a partner during the continuance of the dealings, as though such partners had not been secretly withdrawn. Here, we have a typical instance. The name of the firm indicates the name of one person, and one person only, Vallabhdas. The firm appears to have established itself for a short period, owing, no doubt, to the private inquiries made by those who dealt with it and the ascertainment by them of the fact that one of the partners was Dwarkadas Naranji—so establishes itself, I say, for a short period under a decent appearance in the local market. Then, when it had business relations on a large scale with reputable firms like the plaintiffs, Dwarkadas Naranji, the 3rd defendant, the only man in the firm with any capital at all, covertly withdraws, and the plaintiffs are left to risk their money upon an adventure, which, should it turn out disastrously, would leave them creditors of a sham bankrupt firm. The

firm, on the other hand, has everything to gain and nothing to lose. If the adventure turns out well, the firm makes its profits and all the partners come in for a share of these profits. Now, this is precisely the evil which section 264 of the Indian Contract Act is intended to correct. I can see no advantage whatever in excluding from its operation cases which might be excluded in England from the general principles governing the rights and liabilities of dissolved firms in respect to their old customers and the public generally. I do not admit that the section requires any interpretation whatever. I know that, as far back as 1882, it was critically considered in Calcutta in the case of *Chundee Churn Dutt v. Edduljee Cowasjee Bijnee* (2) and its interpretation in that Court was governed largely, if not exclusively, by reference to the English Law, but there the point was only whether this section puts old customers in a worse position than they would be under the English Law; and no question ever was made, unless indeed the judgment of Tyabji, J., were taken to be an exception, that customers of a firm were to be damnified by a dissolution without either a public or an actual notice. In the present case, we have the plaintiffs fulfilling all the requirements of that section being persons dealing with the firm at the time defendant No. 3 was a partner. According to defendant No. 3 the firm dissolved during the progress of those dealings and at a time when the plaintiff firm was giving very large credit to Lakhmidas Vallabhdas on the faith of the original dealings and the information obtained in the inquiries they had instituted. It is a clear case, then, of a firm being dissolved with the intention of damnifying persons dealing with it at the time. Those persons claim the protection of section 264 of the Indian Contract Act. It is admitted that no notice was given to them, and they had no notice in fact of the alleged dissolution. They appear to me to be entitled to the fullest protection of that section. Therefore, quite apart from the further fact that defendant No. 3 is shown not to have ceased to be a partner at any time material to the present suit, his liability in law would, in my opinion, be as clearly and firmly established. On this point, therefore

(2) 8 C. 678; 11 C. L. R. 225.

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I must find that the defence of defendant No. 3 entirely fails, that for all the purposes of this suit he is a partner of the firm of Lakhmidas Vallabhdas, and equally liable with the other partners for the indebtedness of that firm to the plaintiffs.

[Note.—The remainder of the judgment is not required for the purpose of this report—*Ed.*]

Suit decreed.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 3148 OF 1913.

April 7, 1915.

Present:—Justice Sir Asutosh Mookerjee, Kt., and Mr. Justice Newbould.

AMBIKA CHARAN CHAKRABARTI AND ANOTHER—DEFENDANTS—APPELLANTS

versus

SASITARA DEBI AND OTHERS—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XLI, rr. 4, 33—Powers of Appellate Court—Succession Act (X of 1865), ss. 82, 121—Will by Hindu in favour of grandson by daughter—Condition of residence with testator, interpretation of.

To justify the application of rule 4 of Order XLI of the Code of Civil Procedure it is essential that the appeal should have been preferred against the whole decree. [p. 869, col. 1.]

For the application of rule 33 of Order XLI of the Code, it is not essential that the appeal should be directed against the entire decree, nor need the order be made in favour of persons who are parties to the appeal or have filed objections in the Court below. [p. 869, col. 1.]

Where property is bequeathed to any person he is entitled to the whole interest of the testator therein unless it appears from the Will that only a restricted interest was intended for him. [p. 869, col. 2.]

Where according to the Will the devisee was to have an interest so long as he resided in the house of the testator his maternal grandfather: [p. 869, col. 1.]

Held, that the restriction was imposed as a condition, and not as an indication that the interest created was a life-estate; [p. 870, col. 1.]

that the condition was perfectly legal under section 121 of the Indian Succession Act. [p. 870, col. 1.]

The presumption that a Hindu does not desire that any portion of his property should pass beyond his own family is not an inflexible guiding principle of universal application. [p. 870, col. 1.]

Appeal against the decree of the District Judge of Dacca, dated the 18th August 1913, reversing that of the Subordinate Judge of Dacca, dated the 8th July 1912.

Babu Akshoy Kumar Banerjee, for the Appellants.

Babus Rajendra Chandra Guha and Trailokhya Nath Ghose, for the Respondents.

JUDGMENT.—This is an appeal by two of the defendants in a suit for partition of joint property. The property originally belonged to one Ramlochan Ganguly, who made a testamentary disposition on the 5th November 1850. He left three sons—Tarini, Guru Charan and Ishan, and a grandson by a daughter, named Nilmoney. Tarini left two sons—Sasi Kumar and Basanta. The plaintiffs-respondents are the legal representatives of Sasi Kumar. The eighth and ninth defendants are the representatives of Basanta. The defendants-appellants have acquired the interest of Nilmoney in the portion of the property in dispute. The substantial question in controversy between the parties was, whether Nilmoney took a life-interest in the estate of his maternal grandfather, which terminated upon his death, or whether he took an absolute interest (subject to a condition which was fulfilled by him) which, upon his death, passed to his representatives. The Court of first instance decided in favour of the present appellants. That decree was assailed in appeal by the plaintiffs who claim by right of inheritance a half share of the interest which was vested in Nilmoney during his life-time. The eighth and ninth defendants, who set up a precisely similar claim in the primary Court, were not joined as respondents, nor did they prefer an appeal on their own account. Upon the appeal of the plaintiffs, the District Judge has reversed the decision of the Subordinate Judge and has made a decree, not only in favour of the appellants before him, but also in favour of the two defendants who were not parties to that appeal. On the present appeal, the decree of the District Judge has been assailed on two grounds, namely, *first*, that it was not competent to him to vary the decree of the Court of first instance in favour of persons who were neither appellants nor respondents before him; and, *secondly*, that upon a true construction of the Will of the original proprietor, he should have affirmed the decision of the Subordinate Judge.

As regards the first ground, it is plain

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that neither rule 4 nor rule 20 of Order XLI of the Code is of any assistance to the respondents. Rule 4 is in these terms: "Where there are more plaintiffs or more defendants than one in a suit, and the decree appealed from proceeds on any ground common to all the plaintiffs or to all the defendants, any one of the plaintiffs or of the defendants, may appeal from the whole decree, and thereupon the Appellate Court may reverse or vary the decree in favour of all the plaintiffs or defendants, as the case may be." Consequently, to justify the application of this rule, it is essential that the appeal should have been preferred against the whole decree. In the case before us, the decree of the Court of first instance was assailed by the plaintiffs alone, and only to the extent that they were prejudicially affected thereby. Rule 20 is in these terms: "Where it appears to the Court at the hearing that any person who was a party to the suit in the Court from whose decree the appeal is preferred, but who has not been made a party to the appeal, is interested in the result of the appeal, the Court may adjourn the hearing to a future date to be fixed by the Court and direct that such person be made a respondent."

This rule has obviously no application to this case, and the District Judge did not take action under it.

Rule 33, however, is expressed in much wider terms as follows: "The Appellate Court shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require, and this power may be exercised by the Court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or objection." For the application of this rule, consequently, it is not essential that the appeal should be directed against the entire decree; nor need the order be made in favour of persons who are parties to the appeal or have filed objections in the Court below. In the case before us, plaintiffs as the representatives of Sasi Kumar

and the eighth and ninth defendants as the representatives of Basanta were in an identical position with regard to the estate of Nilmoney; in other words, if the contention prevailed that Nilmoney had an interest terminable with his life, that interest would vest, after his death, equally in the representatives of Sasi Kumar and Basanta. Consequently, if upon the appeal of the plaintiffs, the Court was satisfied that the decree of the primary Court was erroneous and was based upon an incorrect interpretation of the Will of the original proprietor, the ends of justice required that the benefit of such decision should accrue not merely to the plaintiffs-appellants before the lower Appellate Court, but also to the representatives of Basanta, although the latter were neither parties respondents to the appeal nor appellants in an appeal preferred by themselves. The first ground upon which the decree of the District Judge is assailed cannot consequently be supported.

As regards the second ground, the validity of the respective contentions of the parties must be tested with reference to the terms of the Will. On behalf of the representatives of Basanta, it has been argued that Nilmoney had nothing beyond a right of residence in a portion of the property of his maternal grandfather. On behalf of the plaintiffs-respondents a higher status has been conceded to him; and it has been contended that he took a life-interest in the estate of his maternal grandfather, which terminated on his death. In opposition to these contentions, the appellants have argued that Nilmoney was given an absolute interest subject to a condition, namely, that he should have an interest so long as he resided in the house of his maternal grandfather. Under section 82 of the Indian Succession Act, it is plain that where property is bequeathed to any person, he is entitled to the whole interest of the testator therein, unless it appears from the Will that only a restricted interest was intended for him. *Prima facie*, Nilmoney had an absolute interest. The question is, whether he took, as is argued by the appellants, an absolute interest subject to a condition, or whether, as is argued by the plaintiffs-respondents, he took a life-interest. The terms of the Will are by no means free from ambiguity, as is indicated

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by the fact that the Courts below have taken divergent views upon this the most material point in the case. After anxious consideration of the arguments addressed to us on both sides, we have arrived at the conclusion that the view taken by the Subordinate Judge is correct. In our opinion, the intention of the testator was to give an absolute interest to Nilmoney, his grandson by daughter, who lived with him and was brought up by him. It is plain that he intended to make a provision for him; but he insisted, as was not unnatural, that his grandson should reside in his house. This was imposed as a condition, and not as an indication that the interest created was a life-estate. It would further be an unreasonable interpretation of all the provisions of the Will to hold that the testator intended to enforce the condition of residence even after the death of Nilmoney. The condition was perfectly legal under section 121 of the Indian Succession Act [*Ganendro Mohun Tagore v. Rajah Juttendro Mohun Tagore* (1), *Bhoba Tarini Debya v. Peary Lall Sanyal* (2), *Shyama Charan v. Naba Chandra* (3)] and it was fulfilled by Nilmoney because there is no dispute that, during his life-time, he continued to reside in the dwelling house of his maternal grandfather. The result was that, upon his death, his interest passed to his representatives and has now vested, not in the respondents, but in the appellants.

Reference has finally been made to the observations of their Lordships of the Judicial Committee in the case of *Mohamed Shumscol Hooda v. Shewukram* (4); and it has been argued that as there is a presumption that a Hindu does not desire that any portion of his property should pass beyond his own family, every effort should be made to avoid a contrary result. That, however, is not an inflexible guiding principle of universal application, as is made manifest by contrasting the decisions in *Surajmani v. Rabi Nath Ojha* (5) and *Radha Prasad v. Ramee*

Mani Dassee (6). Where, as here, the terms of the Will indicate that an absolute interest, subject to a condition, was intended to be granted to a grandson by a daughter, it would be wrong to interpret its provisions so as to restrict that interest and thus defeat the intention of the testator.

The result is that this appeal is allowed, the decree of the District Judge set aside and that of the Court of first instance restored. In view, however, of the obscurity in the terms of the Will, which justifies a contest, we direct that each party pay his costs both here and in the Court of Appeal below.

Appeal allowed.

(6) 35 I. A. 118; 35 C. 836; 10 Bom. L. R. 604 (P. C.); 12 C. W. N. 729; 8 C. L. J. 48; 5 A. L. J. 469; 18 M. L. J. 287; 4 M. L. T. 23.

BOMBAY HIGH COURT.

FIRST CIVIL APPEAL NO. 191 OF 1913.

July 15, 1915.

Present:—Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Shah.

MAJIDMIAN BAXUMIAN—

DEFENDANT NO. 1—APPELLANT

versus

BIBI SAHEB JAN AND OTHERS—PLAINTIFFS

—RESPONDENTS.

Muhammadan Law—Dower—Widow in possession of property in lieu of dower with consent of heirs, right of—Substantial right—Heritable—Wrongful dispossession—Suit for possession, maintainability of.

A right acquired by a Muhammadan widow in possession of the property of her deceased husband with the consent of the heirs in lieu of her dower is a substantial right amounting in certain circumstances to a right in substitution of the claim for dower and is heritable and devolves on her heirs. [p. 874, col. 2.]

A widow in possession of her deceased husband's property in lieu of dower with the consent of the heirs has a right to claim back the possession if it has been wrongfully disturbed by anybody. [p. 875, col. 1.]

First appeal from the decision of the Joint first Class Subordinate Judge at Surat in Suit No. 978 of 1909.

Mr. *Manubhai Nanabhai*, for the Appellant.

Mr. *B. G. Rao*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit for the declaration of a certain lien over a house and for confirmation and recovery of possession of different parts of the same house. The owner of the house was one Nanumiyani, a Sunni Muhammadan, who died in May 1897. He left behind him his mother, Misri Bibi

(1) 1 I. A. 387; 14 B. L. R. 60; 22 W. R. 377.

(2) 24 C. 646; 1 C. W. N. 578.

(3) 14 Ind. Cas. 708; 17 C. W. N. 39.

(4) 2 I. A. 7; 14 B. L. R. 226; 22 W. R. 479.

(5) 35 I. A. 17 (P. C.); 30 A. 84; 5 A. L. J. 67; 18 M. L. J. 7; 12 C. W. N. 231; 10 Bom. L. R. 59; 7 C. L. J. 131; 3 M. L. T. 144.

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two widows, Bibi Lalkhatun and Bibi Saheb Jan, one daughter, Bibi Fazl-un-nissa, and one brother, Majidmiyan. The mother died a year or two later. The senior widow, Lalkhatun died in December 1906. The widows lived in the house at the time of their husband's death and their case is that they continued to live there until their return to Shikarpur in Sind to their paternal relations in 1906. The junior widow, Saheb Jan, and the heirs of the senior widow join in bringing the present suit against the brother and daughter of Nanumiyan. Their case is that the dower fixed for Lalkhatun at the time of her marriage was Rs. 50,000 and that fixed for Saheb Jan was Rs. 7,500, that Nanumiyan died without paying any part of the said dower, that the widows remained in possession of the house in lieu of their dower until 1906 and that thereafter the surviving widow and the heirs of the deceased widow had been in peaceful possession of the house until 1908, when the brother disputed their claim to retain possession of the house and tried to disturb them in their possession. They filed the suit on the 23rd April 1909 asserting their claim to the house in respect of the whole dower of Rs. 57,500. The brother disputed the claim on various grounds. He contended that the amount of the dower was not fixed as stated by the plaintiffs, that the widows had renounced their claim to the dower at the time of Nanumiyan's death, that the house in suit did not belong to his deceased brother exclusively but to both of them jointly, that the widows had never been in possession of the house in lieu of their dower, and that according to the Muhammadan Law they had no right to the house. He also maintained that the two rooms, which were admittedly in his possession, were not held by him with the permission of the widows but in his own right. The daughter, defendant No. 2, admitted the plaintiffs' claim.

The trial Court raised several issues of fact and law and decided them in favour of the plaintiffs except as to two rooms. The learned first class Subordinate Judge held that the dower due to the two widows was Rs. 57,500, that the widows had

been in possession of the house except the two rooms, which were found to be lawfully in the possession of defendant No. 1, in lieu of their dower, that the plaintiffs were in possession up to 1908 when the cause of action arose against defendant No. 1 and that they were entitled to the reliefs claimed. He disallowed the plaintiffs' claim as to the two rooms in the possession of defendant No. 1. A decree was passed on the 25th April 1913 giving effect to the findings in favour of the plaintiffs.

The defendant No. 1 has appealed against this decree in respect of the main part of the house, and the plaintiffs have filed cross-objections in respect of the two rooms. The cross-objections, however, are not pressed, and we have only to consider the points urged in support of the appeal. It will be convenient to keep the questions of fact and law distinct and to deal with the former in the first instance.

As regards the amount of dower, it has been urged generally that the evidence is all oral and relates to events which occurred several years ago, and that it is interested and not reliable. It is true that Nanumiyan's marriage with Lalkhatun took place in 1870 and that with Saheb Jan in 1891. But there is a large body of evidence in the case, and it is quite impossible to treat the whole of it as being either interested or unreliable. It is obvious from the agreement, which Nanumiyan passed at the time of his marriage with Lalkhatun, that he valued this connection very highly and was prepared to submit to any terms in order to secure it.

The position of Lalkhatun's father's family was such that there is no inherent improbability in such a large amount being fixed for her dower. The evidence of Sadakali, brother of Lalkhatun, also explains the circumstances under which Nanumiyan's marriage with Saheb Jan was brought about. We see no reasons to distrust the oral evidence adduced in support of the plaintiffs' allegations on this point, and we accept the conclusion arrived at by the lower Court, viz., that the dower for Lalkhatun was Rs. 50,000 and that for Saheb Jan was Rs. 7,500.

It is not necessary to consider, and the

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point was not mentioned in the argument, whether the dower was prompt or deferred. It makes no difference in the result, as it is not suggested that any part of the dower was demanded during the husband's life-time. The plea of remission by the widows of their claim to dower has been wisely abandoned in this appeal.

Next, as regards the ownership of the house, the lower Court has found, and in our opinion rightly found, that it belonged exclusively to Nanumiyan. It has been conceded by Mr. Manubhai for the appellant that the whole money spent in building the house belonged to Nanumiyan, and that nothing was proved to have been paid by his client. It was urged, however, that the house-site originally belonged to the ancestors of the two brothers, and that he had an interest in the land over which the house was built. But a careful perusal of the evidence of defendant No. 1 and of his step-brother, Shaikh Bahadur, on this point shows that this account of the house-site having originally belonged to the ancestors of Nanumiyan is really past history and has nothing to do with the present question. The lower Court seems to us to be quite right in holding that after changing hands it ultimately came in the hands of Nanumiyan as owner from his step-brother, Shaikh Bahadur, for valuable consideration.

On the question of possession of the house, however, there has been more serious argument. It has been urged by Mr. Manubhai that though the widows obtained possession of the house, they did not obtain it in lieu of dower with the consent of defendant No. 1. The fact of the possession having been with the widows up to 1906 is not disputed; and it cannot be disputed, in view of the clear admission of defendant No. 1 in his cross-examination, that "they (*i. e.*, the widows) lived in the house after Nanumiyan's death till the death of Lalkhatun in 1906." There is nothing to show that their possession was not peaceful. Defendant No. 1 knew about their possession, and was himself in possession of a part of the upper story, *viz.*, the two rooms already mentioned. There was no protest from him, and no dispute at the time. The matter, however, does not rest there. He says he "used to let out the hall on

the ground-floor of the premises in suit, but the rent used to be accumulated with the Bibis." It seems to us to be futile to suggest under these circumstances that the widows' possession was without the consent of the heirs. The mother of Nanumiyan died in 1898 or 1899 and never disputed the widows' claim. The daughter does not dispute it. The only heir who disputes the fact of their having been in possession with the consent of the heirs is defendant No. 1. The evidence clearly shows that the defendant No. 1 not only acquiesced in, but accepted the fact of the possession of the house (two rooms of course excepted) being with the widows.

It was further urged that though they might have been in possession with the consent of defendant No. 1, they never asserted that they held the property in lieu of dower. This contention has no force. All the assets of Nanumiyan were exhausted in discharging his debts, which (debts) amounted to about Rs. 10,000. The house and furniture were the only assets left; and the widows were in possession of the house from the time of Nanumiyan's death. Under the circumstances it would be a fair inference to hold that they were in possession in lieu of dower. It is common ground that the widows were helped by Sadakali, brother of Lalkhatun; and it is difficult to understand why they should have stayed at Surat up to the year 1906 instead of returning to their parental house in Sind, if it were not for the purpose of asserting their right to the only substantial property which was left after paying off Nanumiyan's debts. In connection with this point Mr. Manubhai relied upon the circumstance that the estate of Nanumiyan was jointly administered by all the heirs, as the two sale-deeds and the succession certificate in the names of the widows and defendant No. 1 would show, and that the widows really took possession of the house in lieu of dower after the debts were discharged. The fact that defendant No. 1 joined the widows in selling certain properties and recovering certain outstandings of Nanumiyan is not inconsistent with the widows having been in possession of the house in lieu of their dower. It seems to us on the evidence that the widows really discharged the debts,

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and defendant No. 1 simply helped them in conveying the properties and in recovering the few outstandings of Nanumiyan. Besides, in view of the fact that they were in possession of the house from the beginning, it is difficult to see how their possession in lieu of dower can in point of fact be treated as commencing from the date when all the debts were discharged. Here we are speaking only of the fact, and do not mean to suggest that as a matter of law it would make any difference whether they purported to hold in lieu of dower or not and whether their possession in lieu of dower commenced in 1897 after Nanumiyan's death or somewhere in 1901, when all the debts are said to have been satisfied. We, therefore, agree with the lower Court that the widows were in possession of the house with the consent of the other heirs in lieu of their dower.

It has been urged, however, that even if the widows were in possession in 1906 there is nothing to show that the heirs of Lalkhatun had possession since 1906, when both the widows returned to Shikarpur leaving the house in charge of their servant, Khan Mahomed. It is clear that Saheb Jan continued in possession through her servant Khan Mahomed even after 1906. But it is urged that the heirs were never in possession. It seems to us that there is no substance in this contention. In the first place it was never suggested in the lower Court that the heirs of Lalkhatun were not in possession since 1906 though Saheb Jan was. All along the defendant pleaded that he was in possession and not the widows. Having failed to substantiate that plea, he now contends that Lalkhatun's heirs were not in possession. But it is common ground that Sadakali, who is one of the heirs of Lalkhatun and the principal man among her paternal relations, has throughout helped the two widows after Nanumiyan's death. It is established that Sadakali had been to Surat after Lalkhatun's death in 1907, when he occupied the house in suit. It is clear from the evidence of Sadakali, Saheb Jan and Khan Mahomed that all the Municipal taxes for the house have been paid by Sadakali after 1906 up to the date of this suit. Defendant No. 1 also admits the fact in his evidence. Khan Mahomed looked to Sadakali for instructions when there was

any occasion for it, and Sadakali says distinctly that Khan Mahomed had charge of the house on behalf of the heirs of Lalkhatun and on behalf of Bibi Saheb Jan. This definite statement is met by defendant No. 1 by no specific denial but by the assertion that "he (Khan Mahomed) is still in service either of Saheb Jan or Sadakali." Surely defendant No. 1 is expected to know the position of the servant. Sadakali in fact took defendant No. 1 with him in 1907 to Khairpur for some employment and his equivocal statement under the circumstances seems to us to be virtually an admission that the servant was in possession of the house on behalf of all the plaintiffs and not only on behalf of Saheb Jan. In 1907 Sadakali took certain articles from the house, which he could do only if he was in possession; and it is in evidence that he had the keys with him when he went there. We are, therefore, of opinion that the present plaintiffs continued to have possession of the house after Lalkhatun's death until the disputes arose between the parties in 1908, that the possession of the ground floor of the house has been throughout with them, and that their possession of the upper story, excepting the two rooms in the possession of defendant No. 1, was disturbed after the plaint was filed, as stated in the amended plaint.

Before dealing with the points of law argued in this case, we desire to state generally that the evidence of the plaintiffs Nos. 1 and 2 in this case appears to us to be much more reliable than that of defendant No. 1. The readiness with which he has committed himself to altogether untenable positions, particularly with reference to the question of the ownership of the house and of the amount and remission of dower, is sufficient to shake one's confidence in his case generally.

It is urged by Mr. Manubhai on his behalf that the widows would have no right to retain possession of the house in respect of dower, unless they obtained it with the consent of the other heirs in lieu of dower, that in any case this right to retain possession is entirely personal and does not descend to the heirs of Lalkhatun, and that the right, which

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is in the nature of a lien, is a right of defence and not a right of action, and that, therefore, the claim to recover possession, which is in fact lost by the plaintiffs, is not good.

As regards the *first* of these contentions it is enough to say that it does not arise, as it is found that the widows had obtained possession in lieu of dower with the consent of the other heirs of Nanumiyān. Mr. B. G. Rao has urged in support of the plaintiffs' case that even if the consent of the heirs were not proved and even if it were not established that the possession was in lieu of dower, the widows would still have a right to hold the property of their husband until their claim to dower was satisfied, provided they had obtained possession lawfully and without force or fraud. He has relied upon *Ramzan Ali Khan v. Asghari Begam* (1) and *Sabjan Bewa v. Ansaruddin* (2). These decisions are in conflict with the case of *Amanat-un-nissa v. Bashir-un-nissa* (3). It is not necessary to decide this question in view of the finding that in this case the widows obtained possession of the property with the consent of the heirs in lieu of their dower.

The *second* contention is that so far as the heirs of Lalkhatun are concerned they have no claim, as the right of Lalkhatun was personal and could not devolve upon her heirs on her death. There is a conflict of decisions of the Allahabad High Court on this point. The right is held to be heritable in *Azizullah Khan v. Ahmad Ali Khan* (4) and *Ali Bakhsh v. Allahdad Khan* (5). A different view is taken in *Hadi Ali v. Akbar Ali* (6) and *Muzaffar Ali Khan v. Parbati* (7). There is no decision directly on this point which is binding upon us. It is necessary, therefore, to consider the nature of the right which the widow, having a claim to dower, acquires on obtaining possession of her husband's property. This right has been described by their Lordships of the Privy Council in *Musammāt*

Bebee Bachun v. Sheikh Hamid Hossein (8) as follows:—"It is not necessary to say, whether this right of the widow in possession is a lien in the strict sense of the term, although no doubt the right is so stated in a judgment of the High Court in a case of *Ahmed Hossein v. Musammāt Khadija* (9). Whatever the right may be called, it appears to be founded on the power of the widow, as a creditor for her dower, to hold the property of her husband, of which she has lawfully, and without force or fraud, obtained possession, until her debt is satisfied, with the liability to account to those entitled to the property, subject to the claim for the profits received." This is, in our opinion, a substantial right and under certain circumstances it would practically be a right in substitution of the claim for dower. Where the amount of dower is large and far in excess of the value of the property of which the widow has obtained possession, and where there is no other property of the husband, as in the present case, the right of the widow to hold the property in lieu of her dower is the only right left, and, in our opinion, as substantial a right as her claim to dower. It is not disputed and cannot be disputed that the claim to dower is heritable and would devolve on her heirs. It is difficult to understand why the right, which is an incident of the claim to dower and is capable of being enjoyed as a substantive right in substitution of the claim to dower under certain circumstances, should be treated as a mere personal right, when the principal right of which it is an incident is not so treated according to the Muhammadan Law. It may be, as in this case, that after the widow has had possession for several years, her claim to dower may be time-barred; and she would care only for the right to hold the property in lieu of dower. The heirs would not care to have any accounts taken when it is clear that the proceeds fall far short of the amount due to the widow. The right to the possession of property appears to be quite a substantive right, and we see no reason to treat it as personal, when the claim to dower is a heritable

(8) 14 M. L. A. 377 at p. 384; 17 W. R. 113; 10 B. L. R. 45; 2 Suth. P. C. J. 531; 3 Sar. P. C. J. 39; 20 E. R. 828.

(9) 10 W. R. 368 at p. 363; 3 B. L. R. 28n.

(1) 6 Ind. Cas. 405; 32 A. 563; 7 A. L. J. 614.

(2) 9 Ind. Cas. 1031; 38 C. 475; 13 C. L. J. 427.

(3) 17 A. 77; A. W. N. (1895) 7.

(4) 7 A. 353; A. W. N. (1885) 54.

(5) 6 Ind. Cas. 376; 32 A. 551; 7 A. L. J. 567.

(6) 20 A. 262; A. W. N. (1898) 32.

(7) 29 A. 640; A. W. N. (1907) 221; 4 A. L. J. 521.

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right. For instance, if a widow does not obtain possession of her husband's property and sues the heirs in respect of her dower, she can obtain a decree and bring the property to sale. She would obtain the proceeds of the sale, and these proceeds would devolve on her heirs. There is no reason why the alternative right, which a Mubam-madan widow has of holding the property of her husband, with the liability to account, in lieu of her dower, should not devolve on her heirs on her death. This contention must, therefore, be disallowed.

It remains to consider the *last* contention, that the plaintiffs having been dispossessed of the portion of the upper story other than the two rooms, which were already in the possession of defendant No. 1, they cannot maintain an action to recover it, though they may be able to retain possession, which they have already got. This contention is based upon the analogy of lien. It seems to be unnecessary to determine whether it is a lien or the position is more analogous to that of mortgagee. Taking the right as described in the passage already quoted from the judgment in *Musammatt Bebee Bachun's* case (8), and treating it as a matter of substance and not of words, it seems to us that if the right is to be a real one the widow should have the right to claim back the possession, if it has been wrongfully disturbed by anybody. In this case the plaintiffs are found to have been in peaceful possession for a long time, and the wrongful dispossession by defendant No. 1 is no answer to their right to possession. No doubt, in most of the cases cited before us the widow was in possession and was resisting the claim to oust her. But it is no ground for holding that after having peaceful possession for a long time, if she were wrongfully dispossessed, she could not sue to recover the possession. In the case of *Azizullah Khan v. Ahmad Ali Khan* (4) to which we have referred in connection with another point, it has been held by Oldfield and Mahmood, JJ., that the heirs of the widow, who were held to be entitled to succeed her in possession, have a right to maintain a suit for the recovery of the possession, if wrongfully deprived thereof.

All the points urged in support of the appeal fail.

We, therefore, affirm the decree of the lower Court and dismiss the appeal and cross-objections with costs.

Appeal dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM ORDER NO. 535 OF 1913.

March 26, 1915.

Present:—Justice Sir Asutosh Mookerjee, Kt.,
and Mr. Justice Newbould.

KAMAKSHA BASINI CHOWDHURANI

—OBJECTOR—APPELLANT

versus

JAGAT SUNDARI CHOWDHURANI—

APPLICANT—RESPONDENT.

Guardians and Wards Act (VIII of 1890), s. 47 (g) — Order for removal till decision of a particular case — Appeal—Inquiry, if necessary before removal.

One of the two joint guardians appointed under the Guardians and Wards Act applied for the removal of the other on the allegation that she had made an application for Letters of Administration to the estate of the father of the minor and thereby had acted in a manner which disqualified her from holding the office of guardian. The District Judge made the following order: "The elder widow (the applicant) is permitted to manage the minor's estate singly, until the disposal of the case for the next three months." Two months after another order was recorded: "Put up after disposal of the Letters of Administration case. Order regarding the management of the estate by the petitioner will remain for the present." An appeal was preferred against these orders.

Held, that the appeal was competent under clause (g) of section 47 of the Guardians and Wards Act; [p. 876, col. 1.]

that an order of this description should not be made without some inquiry into the allegations made; [p. 876, col. 2.]

that the matter should not remain in abeyance till the disposal of the Letters of Administration case. [p. 876, col. 2.]

Appeal against the orders of the District Judge of Mymensingh, dated the 15th September and 19th November 1913.

Babu Taruk Chunder Chuckerbutty, for the Appellant.

Babu Mukund Nath Roy, for the Respondent.

JUDGMENT.—This appeal is directed against two orders passed under the Guardians and Wards Act, 1890. On the 31st August 1912, two ladies, who were the widows of

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one Kalikumar Sen Chowdhury and are the appellant and the respondent respectively in this appeal, were appointed joint guardians of the person and property of an infant, Hemendra Nath Sen Chowdhury, who had been taken in adoption by the respondent. The two guardians could not long act in harmony, and not many months had elapsed when on the 16th June 1913 the respondent applied to the District Judge for removal of the co-widow from the office of joint guardians. The application was promptly opposed. On the 30th August 1913 the respondent brought to the notice of the District Judge that the appellant had made an application for Letters of Administration to the estate of the father of the infant with a copy of an alleged Will and urged that thereby she had acted in a manner which disqualified her from holding the office of guardian. The District Judge thereupon, on the 15th September 1913, made the following order: "The elder widow is permitted to manage the minor's estate singly, until the disposal of the case for the next three months." On the 19th November another order to the following effect was recorded: "Put up after disposal of the Letters of Administration case. Order regarding the management of the estate by the petitioner on the 15th September will remain for the present." This appeal is directed against the orders of the 15th September and 19th November.

On behalf of the respondent, a preliminary objection has been taken that the appeal is incompetent. In answer it has been argued by the appellant that the appeal is competent under clauses (f), (g) and (i) of section 47 of the Guardians and Wards Act. In our opinion, it is plain that the appeal is competent under clause (g). The real effect of the orders in question is to remove the appellant from the office of guardian of person and property of the infant, for the order of the 19th November is to remain in operation for an indefinite length of time. It may also be plausibly contended that the case is covered by clause (f). But it is not necessary, for our present purpose, to determine whether clause (f) or (i) is also applicable to the case.

As regards the merits we are of opinion that the orders cannot be sustained, as they

were made without any inquiry into the truth or otherwise of the respective allegations of the guardian. On behalf of the respondent, the view has been pressed upon us that as the appellant has made an application for Letters of Administration to the estate of her husband on the basis of an alleged Will, she has become hostile to the infant and is consequently no longer fit to continue as guardian of his property. No information, however, is available as to the terms of the Will and we are unable on the materials before us to say that the conduct imputed to the appellant is of such a description as necessarily disqualifies her for the office of guardian. It is plain that an order of this description should not be made without some inquiry into the allegations made. It is also obvious that the matter should not remain in abeyance till the disposal of the Letters of Administration case, which, it is not improbable, may continue for some length of time. It is desirable that the question of guardianship should be settled as early as practicable.

The result is, that this appeal is allowed and the orders of the 15th September and 19th November set aside. The case will be remitted to the District Judge in order that he may inquire into the allegations made in the application of the 6th June 1913 and determine, upon evidence to be adduced by both parties, whether the appellant should be removed from the office of guardian. In the examination of this question, her conduct as applicant in the Letters of Administration case will necessarily have to be taken into account. There will be no order as to costs of this appeal.

Appeal allowed; Case remanded.

YAKUB ALI v. DURGA PRASAD.

ALLAHABAD HIGH COURT.

EXECUTION SECOND APPEAL No. 1380 OF
1914.

May 11, 1915.

Present:—Mr. Justice Chamier and
Mr. Justice Piggott.YAKUB ALI—JUDGMENT-DEBTOR—
APPELLANT*versus*DURGA PRASAD AND OTHERS—DECREE-
HOLDERS—RESPONDENTS.*Execution—Application to revise former application—Former application consigned to record room—Limitation.*

In execution of a decree certain property was put up for sale. An objection was filed that a part of the property belonged to a third person. The Court asked the Pleader of the decree-holder to make statement as to that by a certain date. The Pleader failed to make such statement. The Court struck off the application for execution and sent the file to the record room. Three years afterwards another application for execution was made:

Held, that the second application must be treated as an application to revive the former proceedings and was not barred by time.

Execution second appeal against an order of the Additional District Judge of Meerut.

Dr. S. M. Sulaiman, for the Appellant.

Mr. A. P. Dube, for the Respondents.

JUDGMENT.—The respondents on August 27th, 1908, obtained a decree absolute for sale of certain property. On December 1st, 1908, they applied for execution of the decree by sale of the property of the the appellant judgment-debtor and also of the share of *Musammât Qulsum Bibi* and two ladies named *Jafri Begum* and *Askari Begum*. The share of *Musammât Qulsum Bibi* had been definitely excluded from the decree for sale by the decree of an Appellate Court. When the fact was brought to notice that the decree-holders wished to sell the share of *Musammât Qulsum Bibi*, an order was passed exempting her share from sale. Later on the Collector to whom the proceedings had been transferred discovered that the decree-holders had applied for the sale of the shares of *Musammât Jafri Begum* and *Askari Begum* also, and in January 1911 he sent the record back to the Subordinate Judge for orders. On February 2nd, 1911, the Subordinate Judge called upon the Pleader for the decree-holders to make a statement regarding the shares of the two ladies. Further time was

allowed to the Pleader more than once and the last date fixed for the purpose of receiving his statement was March 1st, 1911. On May 11th, 1911, the application for execution was struck off and the file was sent to the record room. The present application for execution was made on December 20th, 1913. It was presented more than three years after the date of the last application to the Court for execution or to take some step-in-aid of execution, and the judgment-debtor has pleaded that the application is barred by limitation. The decree-holders, on the other hand, have contended, and their contention has been accepted by both the Courts below, that the present application should be regarded as one made for the purpose of reviving and carrying on an execution proceeding which had been suspended by no act of default on their part. It is true that the decree-holders' Pleader failed to make a statement to the Court regarding the shares of the two ladies *Jafri Begum* and *Askari Begum*, but it does not appear that the case was called on for hearing on March 1st, 1911, the last date fixed for receiving the statement of the Pleader. It does not appear that either the decree-holders or their Pleader were even aware of the penalty which would be imposed if they failed to make the statement, and it seems to us that when the Pleader failed to make the statement, the proper course to adopt was to direct that the shares of the two women should not be sold and not to throw out the application altogether. Both the Courts below have held that it was not owing to the default of the decree-holders that their application was consigned to the record room. On the whole, we are of opinion that the view taken by the Courts below is correct and we are not satisfied that the Court, when sending the case to the record room, intended to dismiss the application for execution altogether. In the circumstances we think that the present application may properly be treated as an application to revive the proceedings which were suspended on May 11th, 1911, by the order of the Subordinate Judge consigning the record to the record room. The appeal is dismissed with costs.

Appeal dismissed.

NANDA KUMAR BARUA v. NABIN CHANDRA. INUGANTI KASTURAMMA v. CHELIKANI VENKATASURAYYA.

CALCUTTA HIGH COURT.

APPEAL FROM ORDER NO. 469 OF 1910.

November 26, 1914.

Present:—Mr. Justice N. Chatterjea and
Mr. Justice Greaves.

NANDA KUMAR BARUA—PLAINTIFF—
APPELLANT

versus

NABIN CHANDRA BARUA AND OTHERS—
DEFENDANTS—RESPONDENTS.

*Civil Procedure Code (Act V of 1908), O. XLI, r. 17—
Appearance—Illness of Pleader—Party present asking
for postponement—Appeal dismissed without hearing.*

On the date fixed for the hearing of an appeal, the appellant's Pleader was ill and did not appear in Court. The appellant happened to be present in Court and, on the case having been called on, he asked for time to get his Pleader. This was disallowed and the appeal was dismissed without hearing.

Held, that the Court apparently acted under Order XLI, rule 17; that under the circumstances the appeal should be re-admitted; and

that the mere presence of the appellant in the Court-room on the day of hearing and his having asked the Court for time to get his Pleader did not constitute appearance of the appellant within the meaning of the Civil Procedure Code.

Appeal against an order of the District Judge of Chittagong, dated the 1st July 1910.

Babu Probodh Chandra Das, for the Appellant.

Babu Khitish Chandra Sen, for the Respondents.

JUDGMENT.—This appeal arises out of an application under Order XLI, rule 19, of the Civil Procedure Code for re-admission of an appeal dismissed for default. A preliminary objection has been taken on behalf of the respondents that no appeal lies in this Court as the appeal was not dismissed under Order XLI, rule 17. The whole question is, whether there was appearance of the appellant within the meaning of Order XLI, rule 17, Civil Procedure Code. It appears that 13th of June 1910 was fixed for the hearing of the appeal. The appellant's Pleader was ill that day and did not appear in Court. The appellant happened to be present in Court and, on the case having been called on, he asked for time to get his Pleader. This was disallowed and the appeal was dismissed without hearing. Thereupon, on the 1st of July 1910, the appellant made an application under Order XLI, rule 17, and that application was

dismissed by the learned District Judge, on the ground that the appellant had appeared in the case and that the application, therefore, could not come within the scope of Order XLI, rule 19. No doubt the appellant was present in Court. But he had engaged a Pleader to appear at the hearing and argue the appeal for him presumably because he himself could not do so. We are of opinion that the mere presence of the appellant in the Court-room on the day of hearing and his having asked the Court for time to get his Pleader did not constitute appearance of the appellant within the meaning of the Civil Procedure Code. The Court at once dismissed the appeal without any hearing and apparently acted under Order XLI, rule 17. Under the circumstances, we think that the order of the lower Court dated the 1st of July 1910 should be set aside and the appeal re-admitted. But this must be upon the appellant depositing in the lower Appellate Court within one month of the arrival of the record in the said Court (if not already deposited by him) the costs he was directed to pay by the Judge on the 13th of June 1910. In default, the appeal will stand dismissed with costs. Costs of this appeal will abide the result, the hearing fee being assessed at two gold mohurs.

It is not necessary to pass any order in the Rule.

Appeal allowed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL NO. 1587 OF 1913.

August 20, 1915.

Present:—Mr. Justice Tyabji and
Mr. Justice Phillips.

Sri Rajah INUGANTI KASTURAMMA
BAHADUR, Zemindarini—
DEFENDANT—APPELLANT

versus

CHELIKANI VENKATASURAYYA

GARU—PLAINTIFF—RESPONDENT.

*Contract Act (IX of 1872), ss. 2 (d), 37 ill. (a), 40
M. (a)—Consideration—Past services—Suit by bene-
ficiary, not party to contract—Trust, creation of—
Transfer of Property Act (IV of 1882) ss. 101, 124, 126,*

INUGANTI KASTURAMMA v. CHALIKANI VENKATASURAYYA.

The mere fact that at the desire of the promisor the promisee has already done something prior to any agreement is not sufficient to make any subsequent agreement - a contract, nor will such agreement amount to a contract if it was no more than a promise to make a gift at the mere will of the promisor. [p. 881, col. 1.]

A promisee cannot, by any act of his own, oblige the promisor to fulfil his promise, nor can there be a legal obligation to do anything, unless a liability to perform the promise, not depending on the mere will of the promisor, is imposed by the promisor upon himself by an agreement, and unless such liability is made to rest upon the services already rendered by the promisee. [p. 881, col. 1.]

In order to determine whether or not the promisor intended to impose upon himself a legal liability, the following points have to be considered, viz., the nature of the services rendered, whether at the time the promise was made there was any outstanding liability on the part of the promisor to remunerate the promisee, whether the services were of a nature for which no compensation was expected and whether they had already been fully compensated for. If there was an outstanding liability, the subsequent promise will be almost conclusive evidence of the value which the parties intended to put upon the liability. [p. 881, col. 2.]

In re Casey's Patents, Stewart v. Casey, (1892) 1 Ch. D. 104 at p. 115; 61 L. J. Ch. 61; 66 L. T. 93; 40 W. R. 180, followed.

A mere direction in a document to which the plaintiff is not a party, to pay a certain sum to the plaintiff, is not enough to create a trust in his favour. [p. 883, col. 1.]

Where A contracts with B to pay a sum of money to C, the latter cannot sue A merely on the basis of such a contract. In order to enable C to sue, the contract must be intended to secure a benefit to him so that he may be entitled to say that he has a beneficial interest as *cestui que trust*. It is not possible to lay down categorically and exhaustively the circumstances which have to be considered in order to determine whether or not a contract is intended to secure such a benefit. [p. 882, col. 1.]

In re Empress Engineering Co., (1880) 16 Ch. D. 125; 43 L. T. 742; 29 W. R. 342; *Wall v. Bright*, (1820) 1 Jac. & W. 494; 37 E. R. 456; 21 R. R. 219; *Iswaram Pillai v. Taregan*, 23 Ind. Cas. 951; 26 M. L. J. 127, followed.

In consideration of great services rendered to him by the plaintiff and his father, the husband of the defendant (a *zemindar*) had agreed to pay the plaintiff a salary of Rs. 20 a month during the life-time of the plaintiff. This agreement was adverted to in a deed whereunder the *zemindar* usufructually mortgaged his estate in favour of his wife, the latter being asked to pay the salary to the plaintiff. This arrangement was acted upon by the defendant till some time after her husband's death, when she refused to continue the payment. The plaintiff thereupon sued for the recovery of the salary:

Held, that there was an enforceable contract between the plaintiff and the defendant's husband, and that the clause in the mortgage-deed constituted a trust in favour of the plaintiff. [p. 885, col. 2; p. 886, col. 1.]

Second appeal against the decree of the Court of the Temporary Subordinate Judge

of Rajahmundry, in Appeal Suit No. 129 of 1912, preferred against the decree of the Court of the District Munsif of Peddapur, in Original Suit No. 211 of 1909.

FACTS.—The facts of the case appear sufficiently from the judgment.

Mr. K. Bhashyam Iyengar, with him Mr. S. Srinivasa Iyengar, for the Appellant:—The Courts below have confused the position of the defendant. She is not only the late *zemindar*'s legal representative, but was also his mortgagee. If the claim against the defendant is based on the ground that she was the mortgagee and was directed by the instrument of mortgage to make the payment to the plaintiff, the simple answer is that unless he can show that there was a trust in his favour, he has no *locus standi* to sue, as he was not privy to the contract. See *Iswaram Pillai v. Taregan* (1). Clause 31 of the mortgage-deed, which is the only relevant provision, can hardly be said to create a trust. That evidences only an obligation undertaken by the defendant to continue the payment to the plaintiff. It does not create any charge upon any property, nor is there a trust. There is absolutely no evidence that the contract between the husband and the wife was communicated to the plaintiff and accepted by him so as to constitute a *novatio*. A novation presupposes the existence of a legal, valid and binding contract between the plaintiff and the *zemindar*. The consideration alleged for the original contract is services rendered to the *zemindar*. They could not give rise to any obligation to pay unless they had been rendered with the expectation of being remunerated therefor. It may be that the payments are mere gifts and are to be made only during the pleasure of the *zemindar*. If so the defendant was entitled to revoke the promise. It, therefore, becomes necessary to inquire into the circumstances which led up to the contract. The nature of the services and the relationship of the parties are in favour of the inference that the payments are revocable. In any event the judgment of the lower Appellate Court is defective in not having considered all the above facts. (The question of merger of mortgage was not pressed.)

Mr. P. Narayanamurti, for the Respondent:—That there was a contract between the

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plaintiff and the late *zemindar* is beyond all doubt. It has been so found by the Court. Then, the *zemindar* became involved and had to execute the mortgage, Exhibit B. As part of the arrangement it was expressly agreed that plaintiff was to be paid the Rs. 20 a month which had been agreed to be paid to him. The principle that a third person cannot sue on a contract to which he was not a party does not apply in this case, as the defendant was a transferee of all the properties of the *zemindar*. Moreover, the contract is under section 37 of the Indian Contract Act enforceable against the defendant as the legal representative of the promisor. The services having been rendered and accepted there was an outstanding obligation on the part of the *zemindar* to pay for them and a binding contract can, therefore, be presumed. The contract to pay is irrevocable as it is not subject to any condition or defeasance. The alleged revocation by the *zemindar* (Exhibit I) has been found against. The defendant cannot be allowed to set up any other revocation at this stage of the case.

This second appeal coming on for hearing on 26th day of November 1914, and having stood over for consideration till the 9th day of December 1914, the Court (Oldfield and Tyabji, JJ.) delivered the following

JUDGMENT.—The plaint is to the effect (1) that the plaintiff and his father rendered great services to the defendant's husband, the late *zemindar* of Kirlampudi; (2) that in consideration of such services the late *zemindar* agreed to give to the plaintiff a salary of Rs. 20 per mensem during the plaintiff's life-time; (3) that "accordingly the defendant's husband gave possession of his estate to the defendant and executed a deed of mortgage with possession" (*viz.*, Exhibit B on the record) "and asked the defendant to pay the allowances payable to the plaintiff." There is a reference to natural love and affection, but there is no registered document between the plaintiff and the *zemindar* and section 25 (1) of the Indian Contract Act has not been relied upon. The prayer is that a decree be passed for recovery of the arrears of the alleged allowances after July 1907 from the estate of the late *zemindar* (who died on 2nd November 1906) in the hands of the defendant.

The written statement denies both (1) the alleged consideration and (2) generally the

agreement to pay during the plaintiff's life-time, and raises the contentions (3) that Exhibit B is "indefinite and cannot be legally enforced" and that (4) its terms were controlled by a letter, Exhibit I, alleged to be written by the late *zemindar* to the defendant, which made the alleged salary payable only during the plaintiff's good behaviour. This last contention need not be dealt with any further, as Exhibit I has been held to be spurious. It is admitted that the defendant is the heir of the deceased *zemindar*, and it is not denied that she has assets from his estate out of which the plaintiff's claim may be satisfied.

Two entirely distinct cases are alluded to in the plaint and issues which have to be considered separately, though in our opinion they ultimately depend on a determination of the same facts.

One case open to the plaintiff is that there was an unconditional and irrevocable contract between the *zemindar* and himself for payment to him of Rs. 20 per month so long as he lived; that as the *zemindar* predeceased the plaintiff, part of the contract has to be performed after the death of the promisor; that that part would be enforceable against the defendant as the legal representative of the promisor under section 37 of the Indian Contract Act, illustration (a), and section 40, illustration (a); and that the fact that the consideration had already been executed prior to the contract would not affect its enforceability.

The finding of the lower Appellate Court that there was a contract to the effect mentioned on which the plaintiff may sue cannot, however, be accepted, as (1) Exhibit B has been referred to even for this aspect of the case not merely as evidence of the contract between the *zemindar* and the plaintiff, but as if Exhibit B were itself the contract on which the plaintiff could sue, though he is not a party to it; (2) the defendant's position as the legal representative of the *zemindar* and as a party to Exhibit B have been confused; and (3) no attention has been paid to the question whether the promise by the *zemindar* was intended to be irrevocable or to be subject to any condition of good behaviour on the part of the plaintiff, or revocable at the mere will of the promisor. This last question is distinct from the defence based on Exhibit I, which was that, as a matter of fact, the promise had been revoked or validly altered.

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The question whether or not the promise by the *zemindar* was revocable is of great importance to the question whether the promise amounts to a contract, and requires detailed examination.

The only consideration alleged for the contract is past services. The plaintiff could not, therefore, have insisted on the performance of the contract by threatening not to perform his own part of the alleged contract, as there was nothing for the plaintiff to perform. In such a case the promisee cannot, by any act of his own, oblige the promisor to fulfil his promise, nor can there be any legal obligation to do anything, unless a liability to perform the promise (not depending on the mere will of the promisor) is imposed by the promisor upon himself by his agreement, and unless such liability is made to rest upon the acts already done by the promisee.

The mere fact that at the desire of the promisor the promisee has already done something prior to any agreement [Indian Contract Act, section 2 (d)] cannot be sufficient to make any subsequent agreement a contract. It would not amount to a contract if it was no more than a promise to make a gift at the mere will of the promisor [Transfer of Property Act, sections 124, 126]. Whether the *zemindar* intended to impose a legally enforceable liability upon himself, or whether he merely promised to make a series of gifts, has not been considered by the lower Appellate Court. It is clear that if the *zemindar* left to himself the option of revoking the promise at his mere will, or of otherwise putting an end to the duration of the promise, that in itself would negative any intention of imposing upon himself a legal liability (which would necessarily be independent of his own will); such a revocable promise could not, therefore, be called a contract at all.

In order to determine whether or not the *zemindar* intended to impose upon himself a legal liability, the lower Appellate Court ought to have considered (1) the nature of the services rendered by the plaintiff to the *zemindar*, (2) whether at the time that the *zemindar* made the promise upon which the plaintiff relies, there was any outstanding liability on the part of the *zemindar* to remunerate the plaintiff or (3) whether the services were of a nature for which no compensation was expected or (4) which

had already been fully compensated for. If there was an outstanding liability, then, as pointed out by Bowen, L. J., in *In re Casey's Patents*, *Stewart v. Casey* (2), the subsequent promise may be almost conclusive evidence of the value that the parties intended to put upon the liability. On the other hand, there might have been no outstanding liability either because the remuneration which was legally due to the plaintiff had already been paid prior to the promise, or because, apart from an express promise to remunerate, the plaintiff did not expect any remuneration. Whether there was any expectation of remuneration would depend (amongst other things) upon the nature of the service. The effect of section 2 (d) of the Indian Contract Act upon each of these distinct sets of circumstances might be different. Where acts have been done in the past which might or might not (at the opinion of a party) support a contract, it has to be determined whether the party did, as a matter of fact, desire to place his liability on that foundation. There must be not only the intention to create a liability, but that intention must be given effect to by reference to consideration, though the consideration may be already executed.

None of these matters have been adverted to by the lower Appellate Court, nor are there findings on them from which any legal inference may be drawn either in favour of or against the plaintiff on the question, whether the *zemindar* intended to enter into an enforceable contract in consideration of past services, or whether the past services of the plaintiff were only a motive for promise, the performance of which was intended to depend on the mere will of the *zemindar*.

The second aspect of the case depends upon Exhibit B as its foundation.

In this aspect the plaintiff can succeed only if Exhibit B was such a transaction with reference to the plaintiff as to bring him within any exception to the rule which prevents a person who is not privy to a contract from enforcing it—for Exhibit B was a mortgage between the defendant and her husband, and the plaintiff

(2) (1832) 1 Ch. D. 104 at p. 115; 61 L. J. Ch. 61; 66 L. T. 93; 40 W. R. 180.

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is not a party to the document. The exceptions to that rule have been considered in *Iswaram Pillai v. Taregan* (1). For the present purpose it may be stated that this aspect of the plaintiff's case depends upon whether or not Exhibit B—or rather clause 31 thereof on which the plaintiff relies, "though in form it is a contract to which the plaintiff was not a party, was intended to secure a benefit to the plaintiff so that the plaintiff is entitled to say that he has a beneficial right as *cestui que trust* under that contract." [See per Cotton and Bowen, L. JJ., in *Gandy v. Gandy* (3).] To this aspect of the plaintiff's case the existence or non-existence of any prior contract binding the *zemindar* would be only indirectly relevant. The prior contract would merely indicate the history or the motive for the creation of the trust (assuming that a trust was created) by Exhibit B. The liability of the defendant would in this aspect arise (if at all) as a party to Exhibit B; her character as legal representative of the *zemindar* would not be material.

The direction in Exhibit B to pay to the plaintiff is not enough to create a trust in his favour. When A simply contracts with B to pay money to C, C cannot merely on the basis of such a contract sue A [*In re Empress Engineering Co.* (4)]. In order to enable C to sue, the contract must (as we have already said) be intended to secure benefit to the plaintiff, so that the plaintiff is entitled to say that he has a beneficial right *cestui que trust*. The circumstances which have to be considered in order to determine whether the contract is intended so to secure a benefit cannot, of course, be categorically and exhaustively laid down. But the following four considerations may be referred to [see *Wall v. Bright* (5), *Shaw v. Foster* (6) and the cases cited in *Iswaram Pillai v. Taregan* (1)]. It must be determined (1) whether the

defendant was made a trustee for the plaintiff by Exhibit B or whether her position was merely such that she might become a trustee if certain events were to take place which were contemplated in Exhibit B; (2) if she was made or had become a trustee, had she any personal and substantial interest in the property (*viz.*, as wife and presumptive heir of the *zemindar* or as mortgagee) which she had a right to protect, or did the contract override any interest of her own in the property; in other words; (3) was any specific property charged with the payment to the plaintiff in which the defendant was to have no beneficial interest whatever; (4) was Exhibit B communicated to the plaintiff, and did he accept it in lieu of any rights that he had prior to Exhibit B.

The defendant's position as the mortgagee and as the wife and presumptive heir of the *zemindar* might have important bearing on the question involved in the consideration above referred to. Assuming that she agreed to become a trustee for the plaintiff, did she agree to do so in derogation of her own present and presumptive interest in the property, or merely in so far as her rights as mortgagee and heir were not affected. For if the *zemindar* made the defendant trustee of so much of the property as would produce an income of Rs. 20 per month, and the trust was to subsist after the death of the *zemindar*, the defendant would not become absolutely entitled to that property until after the death of the plaintiff. Was that the intention of the parties? Was it intended by the *zemindar* and agreed by the defendant that the trust was to subsist only so long as the *zemindar* (and after him his representative) did not revoke the directions in Exhibit B, or was that payment to continue independently of the *zemindar's* will? Hence the real question in this aspect of the case also is whether the *zemindar* intended (at the time when Exhibit B was executed) to create a liability binding upon himself and the defendant in her dual capacity of mortgagee and the *zemindar's* representative, or whether it was a mere revocable promise without any legal obligation. This question cannot be conclusively decided by reference to clause 31 of Exhibit B, which is consistent with either view.

(3) (1884) 30 Ch. D. 57 at p. 67; 54 L. J. Ch. 1154; 53 L. T. 306; 33 W. R. 803.

(4) (1880) 16 Ch. D. 125; 43 L. T. 742; 29 W. R. 342.

(5) (1820) 1 Jac. & W. 494; 37 E. R. 456; 21 R. R. 219.

(6) (1872) 5 H. L. 321; 42 L. J. Ch. 49; 27 L. T. 281; 20 W. R. 907.

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What is important, however, is that the plaintiff, in order to rely upon Exhibit B, has to establish not only the same facts which he would have to establish for succeeding on the first aspect of his case, but if he wishes to rely upon Exhibit B as giving him a distinct cause of action, he would also have to establish in effect that the defendant consented to become a party to the *zemindar's* contract with the plaintiff.

This becomes clearer by referring to the facts. The plaintiff claims on a two-fold basis that the *zemindar* (1) agreed to pay, (2) made what may be called a trust for payment. The trust is not explicit, and in order to determine whether the clause in question did create a trust, it has to be determined, amongst other things, whether it was meant that the *zemindar* himself and his legal representative were to have no control over the property alleged to be impressed with the trust, or whether any option was reserved to the *zemindar* and this legal representative of not acting upon the clause, and thus liberating the property in question from the trust: in other words, did the *zemindar* intend to place on himself and his legal representative an irrevocable liability to pay or did he not. Section 78 of the Indian Trusts Act is not alleged to be applicable and clauses (b) and (c) need not be considered.

It was argued before us for the defendant that the plaintiff's right to receive the payment as against the defendant would be co-terminous with the existence of the mortgage created by Exhibit B and that as the defendant became owner of the properties mortgaged, the mortgage must be taken to have merged (Section 101 of the Transfer of Property Act). The argument is curiously inverted from the shape it took in *Gokaldas Gopaldas v. Purnamal Premeekhdas* (7) (and the shape it would ordinarily take), inasmuch as it is the mortgagee who asserts that the mortgage is merged and a third party who denies the merger. The question, however, whether the mortgage subsists or not, except in so far as that question is involved in those that we have already referred to, does not affect the rights of the plaintiff, for the

plaintiff can sue the defendant only if and in so far as she is either a representative of the *zemindar* or a trustee on behalf of himself. It may be that the mortgage has merged and yet the trust (if it was ever created) would subsist; on the other hand, if the direction to pay did not create a trust, then the subsistence of the mortgage would not create it. If it be the fact, as the plaintiff claims, that there was a trust created in his favour by Exhibit B, then the property impressed with the trust would go out of the private property of the *zemindar* and be held by the defendant not as the mortgaged property, nor as the *zemindar's* property after his death, but as trust property: to such property, consequently, the defendant would not become "absolutely entitled" (See Transfer of Property Act, section 101) on the *zemindar's* death, and no question of merger would arise. If there was no trust created, it is an academic question, so far as the plaintiff is concerned, whether the mortgage subsists or is merged. The question of trust is of no other importance except to establish the plaintiff's right to the allowance; for there is no question of want of assets, or of following the property in the hands of an alienee.

The lower Appellate Court must be asked to submit a finding on the question, whether the *zemindar* agreed to impose upon himself a legal liability to pay the sum of Rs. 20 a month to the plaintiff. In arriving at a finding on this question the lower Appellate Court will deal specifically with the various subsidiary questions of fact and law indicated above. The finding will be submitted in six weeks and seven days will be allowed for filing objections.

In compliance with—the order contained in the above judgment, the Temporary Subordinate Judge of Rajahmundry at Cocanada submitted the following

FINDING.—In obedience to the order of the High Court calling for a finding on the question

"Whether the *zemindar* agreed to impose upon himself a legal liability to pay the sum of Rs. 20-0-0 a month to the plaintiff"

I beg to submit the following finding:—

2. As observed by their Lordships the suit is to recover arrears of grant or

(7) 10 C. 1035; 11 I. A. 126; 8 Ind. Jur. 396; 4 Sar. P. C. J. 548.

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salary at the rate of Rs. 20-0-0 per mensem during the plaintiff's life-time. The claim is based on two grounds:—

(1) as the promise under a contract between the plaintiff and the *zemindar*;

(2) as a beneficiary under a trust created by means of Exhibit B.

The consideration for the contract is said to be the services rendered to the *zemindar* by the plaintiff.

3. The defendant's case is, not that the services rendered should in law be held inadequate for the purpose of invalidating the contract, but her plea is that no services were rendered at all. It leaves room, therefore, for the inference that, if the plaintiff had rendered any services, the defendant does not intend to question the value put upon such services.

4. As regards the value of the services rendered, I should think the value put upon them by the parties to the contract should be accepted, taking the position, the status and the remuneration offered and other things existing in the case into consideration, unless there is any evidence of any pressure or undue influence necessitating an over-valuation, or rendering the contract void or illegal. There is no evidence, or even an allegation, that any pressure or undue influence was brought to bear upon the *zemindar* with reference to the contract under consideration. It cannot be denied that the plaintiff's family has been connected with the estate of the *zemindar* for at least two generations. The plaintiff's father was the personal guardian of a late *zemindar*. Even the interested defendant's 1st witness admits it. When the defendant's witnesses say that the plaintiff and the *zemindar* were not friends, or that the plaintiff rendered no kind of service, they do not seem to state any truth. The plaintiff is not a beggar.....He is a relation of the *zemindar* and it may be a remote relation. The defendant's 1st witness states that the *zemindar* used to address the plaintiff as *bava* (Telugu). The defendant's 2nd witness and the plaintiff state that the plaintiff had his meals in the *zemindar's* kitchen.....The plaintiff states he was allowed to go as a *rajabandhu* (Telugu). The plaintiff in his evidence states that he was a personal attendant upon the *zemindar*, meaning that he was neither a menial servant nor a married person, but a poor relation of

the *zemindar*, entitled to have an equal status so far as social relations went. He also states that the *zemindar* used to consult him on some points and take advice. He swears that he gave up his paternal estate in favour of his brother and settled at the *zemindar's* head-quarters to keep him company and to render him any services he could do. The plaintiff and the *zemindar* were friends and companions from youth. The plaintiff had a position to maintain and a reputation to lose. He was Chairman for some years of Jagapathinagaram, which fact shows he had a social status. It is not possible to categorically state the services rendered during nearly a life-time, or to adduce any direct evidence thereof. As he made several sacrifices at the suggestion of the *zemindar*, he was promised a salary of Rs. 20 per month for his life and that promise was introduced in the mortgage-deed executed to the defendant. He swears that the understanding was that the salary agreed to be paid was not to last at the pleasure of the *zemindar* or of anybody else, but to last for his life. I do not see any reason to disbelieve the plaintiff, while there are ample grounds to discredit the evidence on the defendant's side. The defendant does not seem to dispute her liability if the plaintiff continued in her good graces. She wanted to make the contract a revocable one and put forward a document to prove the revocable nature of the contract, but that document has been held a spurious one, brought about at her instance by her interested witnesses. After all, the charge of misbehaviour brought against the plaintiff seems to be that he gave evidence on behalf of his cousin in a criminal case brought by the defendant against him. I am not sure that, if he has given true evidence, he could be charged with any misbehaviour. The frame of the 2nd issue shows that the plaintiff's case is that, primarily there was a contractual liability undertaken by the *zemindar* and subsequently a transfer thereof to the defendant with her consent. With reference to the contract between the *zemindar* and the plaintiff there is not much evidence. The plaintiff alone speaks to it and a lot of other circumstances are relied upon in corroboration of the plaintiff's evidence. There is no evidence to the contrary. The *zemindar*, the promisor, is dead and the liability has been transferred to the defendant under

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Exhibit B with her consent. The two facts account for the paucity of more direct evidence on the contract itself. The direction to pay the plaintiff in the document Exhibit B is a circumstance to presume a contract existing behind it as basis. No doubt the plaintiff, who was no party to Exhibit B, cannot rely upon that document as the contract itself, but from the allegations in the plaint, from the frame of the 2nd issue and from his evidence, it is clear that the plaintiff relies upon a contract apart from Exhibit B, and relies upon Exhibit B as some evidence of contract which formed as the basis of the trust he alleges in his favour. The plaintiff swears that the grant was to hold good for his life and irrevocable and the plaintiff was not only being paid the amount contracted for both during the interval between the date of Exhibit B and the *zemindar's* death but also for sometime after the *zemindar's* death. There is no reliable evidence to show that there was any valid revocation of the contract, even assuming for a moment that the *zemindar* had the option to withdraw. That the intention of the parties to the contract was that it was to be in force for the plaintiff's life, is inferable from clauses 31 and 33 of Exhibit B. Considering the services rendered and the sacrifices made to the knowledge of and at the suggestion of the *zemindar* himself, it looks to me that a man in the socially high position of a *zemindar* intended, and should have intended, to bind himself to that contract rendering himself liable to pay the petty monthly allowance to the plaintiff. The plaintiff did expect to be remunerated for whatever services he rendered and he was not disappointed in his expectations.

It might be that the plaintiff was remunerated to a certain extent when it was in the power of the *zemindar* to remunerate, but there is no proof that the plaintiff had been fully compensated for the services rendered by him. I, therefore, find that as a matter of contract between the plaintiff and the *zemindar*, the latter intended to contract, and contracted, to render himself liable to pay the monthly allowance for the plaintiff's life-time. I may in this connection refer to the absence of any qualifying clause in Exhibit B such as "so long as the plaintiff renders service or at the pleasure of the payer or until revoked" as adding strength to the above conclusion regarding the intention of the parties on the other

hand, past services being the consideration for the grant of a monthly allowance, no such qualifying clause was considered relevant or necessary. Exhibit I, by which the defendant attempted to qualify the grant, has been found spurious. The plaintiff admits he has not been rendering any service to the defendant now. All these only show that the grant of allowance was absolute and unconditional for the plaintiff's life. The defendant, as her husband's heir to the estate, is bound to perform her husband's contract.

5. Again, the defendant is sought to be held liable to the plaintiff in another aspect, namely, as a trustee. The author of the trust is the *zemindar*. The defendant, the alienee of the estate, is the trustee. The plaintiff is the beneficiary and the maintenance of the plaintiff is the purpose of the trust, which is not unlawful. Exhibit B clearly indicates an intention to create a trust. Exhibit B was not a hasty or an ill-considered document. It was brought into existence after some correspondence regarding the terms. Even the defendant's 2nd witness states that the allowances sought to be payable by the defendant were.....payable only if the defendant consented to the said terms in Exhibit B. The defendant had admittedly paid the plaintiff for several months and expressed her consent thereto; thus a clear intention to create a trust in favour of a poor relation and friend of the *zemindar* is clearly inferable from the evidence on record. The defendant took the mortgage subject to the plaintiff's liability. This suit was originally filed as a Small Cause Suit but since Small Cause Courts have no jurisdiction to try suits relating to trust, the plaint was returned and filed as an original suit in the Munsif's Court. So the plaintiff's claim, as put forward from its inception, has been a case of a trust in his favour. The circumstance that he has authorised the defendant to pledge the estate if the income therefrom should at any time fall short and be found deficient to pay any of these allowances, shows that the *zemindar* intended the grant to be binding on the estate. Reading sections 6 and 8 of the Indian Trusts Act, I find that the facts of this case go to establish a trust for the benefit of the plaintiff. I do not see any indefiniteness about it when the purpose of the trust suggests that that liability was

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to hold good for the life of the beneficiary. The wording is the same in regard to the payments to the *zemindar*, his mother and others provided for in Exhibit B. Exhibit B looks and reads as if it is a family settlement. The defendant's status as a wife is recognised in clause 29, as distinguished from that of a mortgagee. I also find that the trust is based on a prior enforceable contract. The plaintiff states that he was present at the registration of Exhibit B and there is no evidence to the contrary. Exhibit B has been proved to have been fair-copied from a draft made, approved of and sent by the defendant. The defendant has made payments of the allowances to the plaintiff for some time. Nothing more seems to be required to infer consent on the part of the trustee. The plaintiff, who knew of the execution of Exhibit B, has accepted the arrangement, which was also consented to by the defendant, but the trust, I should think, relates only to the period of the existence of the mortgagee's interest possessed by the defendant. The trust was completed when the defendant began to pay the plaintiff. In this case the defendant's rights are not only that of a mortgagee but also that of an heir to the estate. She would be a trustee as a mortgagee and not as the heir who succeeded to the equity of redemption. If the mortgage disappears, she would be the heir to the whole estate and would cease to be a trustee, but nonetheless she would be liable to pay the plaintiff as the heir of her husband, who had contracted this liability and who is not shown to have gone beyond his legal rights to charge the estate with his liability. (See Indian Contract Act, section 25, clause 2 and Explanation 2.) No doubt, the parties did not contemplate that the *zemindar* would die and that the mortgagee would become the heir. If the heir and the mortgagee should be two different persons and if the heir happens to be in possession after the discharge of the mortgage and the consequent extinguishment of the trust, he would be liable to pay on the basis of a contract and if the mortgage subsists the mortgagee or her assignees and heirs would be liable as trustee.

6. For these reasons my finding is that the *zemindar* agreed to impose upon him-

self a legal liability to pay the sum of Rs. 20 a month to the plaintiff.

[The second appeal was finally heard, after the return of the finding of the lower Appellate Court, by Tyabji and Phillips, JJ.]

Messrs. T. Prakasam and P. Chenchia, for the Appellant, argued that due consideration had not been given by the lower Appellate Court to the various points mentioned in the judgment of their Lordships calling for a finding in this case, that some of the points had not been alluded to and that such a finding could not be accepted.

Mr. G. Venkatramiah, for the Respondent, was not called upon.

JUDGMENT.—We accept the finding which is one purely of fact. We see no reason for thinking that the learned Subordinate Judge did not give due consideration to the various points mentioned in the judgment calling for findings. Several, though perhaps not all, of the points have been alluded to by him.

The result is that the appeal is dismissed with costs.

Appeal dismissed.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 1754 OF 1903.

June 21, 1905.

Present:—Mr. Justice Mitra.

GOPI NATH CHONGDAR—

PLAINTIFF—APPELLANT

versus

Shaiikh ABDUL GAFUR AND OTHERS—

DEFENDANTS—RESPONDENTS.

Landlord and tenant—Lease before Transfer of Property Act (IV of 1882)—Notice to quit—Time to be calculated according to Bengali Calendar.

With reference to notice to quit in cases of tenancy created before the passing of the Transfer of Property Act, six months should, according to the practice in this country, be calculated according to the Bengali Calendar. [p. 887, col. 1.]

Appeal against the decree of the Subordinate Judge, second Court, at Hooghly, dated the 26th May 1903, reversing that of the Munsif, second Court, Howrah, dated the 29th November 1902.

Babus Baidyanath Dutt and Nagendra Nath Mitra (Junior), for the Appellant.

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Maulvi Mahomed Yusuff, Babus Mahendra Nath Ray and Krishna Prasad Sarbadhicary, for the Respondents.

JUDGMENT.—This is an appeal in an action for ejectment on the ground of service of notice to quit. The tenancy was admittedly created before the passing of the Transfer of Property Act, 1882, and it is conceded before me that that Act has no operation as regards the rights of the parties.

The notice was served, I take it upon the findings, on the 30th *Aswin* 1308=16th October 1901. It required the tenants to quit after the 30th *Chait* 1308=13th April 1902. If we calculate according to the current Bengali Calendar, the notice was one to quit after the expiry of six months and after the end of the year of tenancy.

Since the decision of this Court in the case of *Kishori Mohun Roy Chowdhry v. Nund Kumar Ghosal* (1), it has been the practice in the country to cause notices to quit to be served in the month of *Aswin*, the notice requiring the tenants to quit at the end of *Chaitra* following, as six months intervene between 30th *Aswin* and 30th *Chait*. In the present case, however, the Subordinate Judge has, in calculating the period of six months, adopted the Gregorian year, or speaking more accurately, the English Calendar.

There is no Statute, Act or Regulation with reference to notices to quit in cases of tenancy created before the passing of the Transfer of Property Act. The General Clauses Acts of 1868 and 1887 and 1897 (Imperial Council) do not touch the question before me, as the terms "month" and "year" as there defined relate to words used in Statutes or Acts. The decision in *Kishori Mohun Roy Chowdhry v. Nund Kumar Ghosal* (1) does not lay down any positive rule of law. It merely indicates what equity and good conscience would dictate. Under such circumstances, I think, the lower Appellate Court is wrong in making the calculation of six months according to the English Calendar. The six months should according to the practice in this country be calculated according to the Bengali Calendar with which the people are familiar. There is nothing inequitable or unjust in the calculation of months according to the Bengali Calendar. The

decision of the lower Appellate Court should, therefore, be reversed and the case remitted to that Court for consideration of the other points raised. The appellant will be entitled to his costs of this appeal. The other costs will be dealt with by the lower Appellate Court.

Appeal allowed; Case remanded.

CALCUTTA HIGH COURT

SECOND CIVIL APPEAL No. 462 of 1914.

May 28, 1915.

Present:—Justice Sir Asutosh Mookerjee, Kt., and Mr. Justice Roe.

RAJ BEHARI NATH AND ANOTHER—
DEFENDANTS—APPELLANTS

versus

KAILAS CHANDRA DUTT—

PLAINTIFF—RESPONDENT.

Transfer of Property Act (IV of 1882), s. 106—Ejectment—Notice to quit—Calculation of time—Calendar year—Contract.

Where rent is made payable in instalments on certain specified dates which are the last days of months of the Bengali year, there is no room for doubt or controversy that the parties intended that the tenancy would be regulated according to the Bengali year. [p. 888, col. 2.]

The six months' notice to quit required by the provisions of the Transfer of Property Act, will be calculated according to the Bengali Calendar, expiring with the end of a year of the tenancy which terminates with the Bengali year. [p. 888, col. 2.]

Appeal against the decree of the Subordinate Judge of Dacca, dated the 27th September 1913, reversing that of the Munsif of Munshigunj, dated the 10th March 1913.

Babu Surendra Chunder Sen, for the Appellants.

Babu Rajendra Chunder Guha, for the Respondent.

JUDGMENT.—This is an appeal by the defendants in an action in ejectment. The sole question in controversy at this stage is, whether the notice to quit served by the plaintiff on the defendants is sufficient in law to terminate the tenancy. In the decision of this question, the assumption has been made that the defendants are entitled to a six months' notice terminating with a year of their tenancy, provided that it be ultimately found that the defendants hold a

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tenancy which can at all be legally terminated by a notice to quit. The Subordinate Judge has found on this basis that the notice is sufficient and has remanded the case for adjudication on the merits.

On the 19th *Aswin* 1318, which corresponded to the 16th October 1911, the plaintiff served the defendants with notice to quit on the last day of *Chaitra*, 1318, which corresponded to the 13th April, 1912. The defendants maintain that if they are at all liable to be ejected, they are entitled to six months' notice calculated according to the British Calendar. The contention of the plaintiff is that the defendants are entitled to notice of the requisite period calculated according to the Bengali Calendar. In support of the latter view, reliance has been placed upon the cases of *Gopi Nath Chongdar v. Abdul Gafur* (1), *Hari Das Tanti v. Upendra Narain Shaha* (2) and *Debendra Nath Bhowmik v. Syama Prosanna Bhowmik* (3). On behalf of the defendants-appellants, it has been contended that these cases are distinguishable, because in each of them the tenancy had been created before the Transfer of Property Act came into operation and consequently no question arises as to the rights and liabilities of the parties under section 106 thereof. In the present case, it is said that the tenancy must be deemed, for the decision of the present question at any rate, to have been created on the 11th December 1885, although it is not disputed that there was a pre-existing tenancy which dated back at least to the 8th March 1878, if not to an earlier period, and was confirmed on the 16th March 1879. It is needless to determine whether a new tenancy was or was not created in 1885; we shall assume, for the purposes of the present argument and for that purpose alone, that a new tenancy was then created and that the rights and obligations of the parties in respect of ejection must be determined according to the provisions of the Transfer of Property Act. The question arises, what is the effect of section 106?

Section 106 provides that in the absence of a contract or local law, or usage to the

contrary, a lease of immoveable property for agricultural purposes shall be deemed to be a lease from year to year, terminable on the part of either lessor or lessee by six months' notice expiring with the end of a year of the tenancy. On behalf of the appellants it is urged, with reference to section 4 sub-section (1), of the General Clauses Act, 1897, read with clauses (33) and (59) of section 3, that the terms 'year' and 'month' mean year and month calculated according to the British Calendar. In our opinion this contention is of no avail to the appellant. The terms of the lease of 1885 show that there was an implied contract that the tenancy would be held from year to year according to the Bengali Calendar. The rent is made payable in instalments on certain specified dates which are the last days of months of the Bengali year, and there is no room for doubt or controversy that the parties intended that the tenancy would be regulated according to the Bengali year. If, then, there is a tenancy from year to year on the basis of a year calculated according to the Bengali Calendar, it is impossible to maintain the view that a month of that year must be calculated according to the British Calendar; clearly the month must also be calculated according to the Bengali year. Consequently the defendants are entitled to six months' notice, calculated according to the Bengali Calendar, and expiring with the end of a year of their tenancy, which terminates with the Bengali year. From this point of view, the objection urged by the defendants turns out to be groundless. The notice was served on the 29th *Aswin* 1318 and the defendants were required to quit by the end of *Chaitra* 1318; consequently they had six months' notice terminating with a year of their tenancy. This was strict compliance with the requirements of the law.

The result is that the decree of the Subordinate Judge is affirmed and this appeal dismissed with costs.

Appeal dismissed.

(1) 30 Ind. Cas. 886; 22 C. L. J. 74.

(2) 16 Ind. Cas. 937; 22 C. L. J. 75; 16 C. L. J. 74.

(3) 11 C. W. N. 1124.

KARRI RAMAYYA v. VILLOORI JAGANNADHAM.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1636 OF 1912.

August 27, 1915.

Present:—Mr. Justice Spencer and
Mr. Justice Coutts-Trotter.KARRI RAMAYYA AND ANOTHER—
DEFENDANTS NOS. 4 AND 5—APPELLANTS
versusVILLOORI JAGANNADHAM AND OTHERS
—PLAINTIFFS AND DEFENDANTS NOS. 1 TO 3
AND 6 TO 11—RESPONDENTS.*Inam*—*Bariki service*—*Enfranchisement*, effect of—*Ancestral property*—*Property received by daughter's son*, if ancestral—*Alienation of service inam*, validity of—*Transfer of Property Act (IV of 1882)*, s. 43.The effect of enfranchisement of an *inam* is not to destroy the rights of any member of a joint family which has a hereditary interest in it. [p. 889, col. 2; p. 890, col. 1.]*Gunnaiyan v. Kamakchi Ayyar*, 26 M. 339; *Venkata v. Rama*, 7 M. 249; 9 Ind. Jur. 185, followed.

The property which descends on daughter's sons from their maternal grandfather is ancestral property in which the grandsons take an interest by birth. [p. 891, col. 1.]

Vythinatha Ayyar v. Yaggia Narayana Ayyar, 27 M. 382; *Venkayyanma Garu v. Venkalaramanayyanma Bahadur Garu*, 25 M. 678; 29 I. A. 156; 7 C. W. N. 1; 12 M. L. J. 299; *Karuppai Nachiar v. Sankara Narayanan Chetty*, 27 M. 300; 13 M. L. J. 398; *Sudarsanam Maistri v. Narasimhulu Maistri*, 25 M. 149 at pp. 155, 156; 11 M.L.J. 353; *Muniswami Chetty v. Maruthammal*, 7 Ind. Cas. 176; 34 M. 211 at p. 218; (1910) M. W. N. 233; 8 M. L. T. 124; 20 M. L. J. 687, followed.*Jamna Prasad v. Ram Partap*, 29 A. 667; 4 A. L. J. 582; A. W. N. (1907) 211, dissented from.*Muttayann Chetti v. Sangali Vira Pandia Chinna Tambiar*, 3 M. 370; 4 Ind. Jur. 444; *Sivaganga Zemindar v. Lakshmana*, 9 M. 188; *Atar Singh v. Thakar Singh*, 6 Ind. Cas. 721; 42 P. R. 1910; 35 I. A. 206; 12 C. W. N. 1049; 8 C. L. J. 359; 10 Bom. L. R. 790; 18 M. L. J. 379; 4 M. L. T. 207; 128 P. W. R. 1908 (P. C.); 35 C. 1039, distinguished from.An alienation of service *inam* is wholly void and the subsequent enfranchisement will not make it alienable under section 43 of the Transfer of Property Act. [p. 891, col. 2.]*Narahari Sahu v. Sira Korithan Naidu*, 19 Ind. Cas. 881; 24 M. L. J. 462; (1913) M. W. N. 415; *Batchu Ramayya v. Dara Satchi*, 21 Ind. Cas. 600; 14 M. L. T. 430; (1913) M. W. N. 999; *Ramasami Naik v. Ramasami Chetti*, 30 M. 255; 17 M. L. J. 201; 2 M. L. T. 167, followed.

Second appeal against the decree of the Court of the Temporary Subordinate Judge of Vizagapatam, in Appeal Suit No. 475 of 1911, preferred against that of the Court of the District Munsif of Vizagapatam, in Original Suit No. 100 of 1910.

The Hon'ble Mr. B. N. Sarma, for the Appellants.

Mr. V. Ramesam, for the Respondents.

JUDGMENT.—The suit was brought for the partition of a *bariki service inam*, which was enfranchised in 1905 in the name of the 1st defendant. The contesting defendants were the purchasers from the 1st defendant and three of his sons by a sale-deed executed in 1906. The plaintiff was a purchaser from the 1st defendant's eldest son and two of his brothers in 1909. The brothers' share in the joint family property being two-thirds and the 1st defendant's sons' being 1/15th, the claim of the plaintiff was to recover 11/15ths of the whole *inam*. He got a decree accordingly in the first Court which was confirmed in appeal.

The first question now raised is whether the defendants Nos. 2 and 3 had a saleable interest prior to enfranchisement. The short answer to this is that the sale through Exhibit B, having been executed on 21st September 1909 subsequent to the enfranchisement, passed all the rights which they then possessed. There was a previous agreement to sell in 1906, which does not affect the question. At that date Chellamma, the mother of defendants Nos. 1 to 3, was, it is suggested, alive. The Subordinate Judge found that she died five or six years ago, which comes to about 1906 or 1907. If she was alive at the time of the sale, it is argued that the defendants Nos. 2 and 3 had no right to convey the shares which were still in the holding of their mother. If the finding of the Subordinate Judge is correct, as we must assume it to be, Chellamma was certainly not alive at the date of the sale in 1909. But reliance is placed on section 10, clause 2, of Madras Act II of 1894, which runs as follows:—

"The succession to all hereditary village offices shall devolve on a single heir according to the general custom and rule of primogeniture governing succession to impartible *zemindaris* in Southern India." It is contended that this provision takes away the rights of any persons who claim any joint interest in the emoluments of the office. When the lands were enfranchised exclusively in the name of the 1st defendant after he had succeeded to the *bariki* appointments as the daughter's son of the original male holder, it is contended that none of his brothers retained any interest therein.

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We are clearly of opinion that the effect of enfranchisement is not to destroy the rights of any members of a joint family which has a hereditary interest in the *inam*. This question was fully considered in *Gunnaiyan v. Kamakchi Ayyar* (1) and the conclusion arrived at was, that service *inams* which are enfranchised are impressed in the hands of the registered holder with the same character as if they had devolved upon him as ordinary property, independently of the hereditary office, and the registered owner will hold them as joint family property liable to partition. Section 10, clause 2, of Madras Act II of 1894 in terms deals with the succession to village offices which it declares to be governed by the rule of primogeniture. There is nothing in the wording of the section to affect the family title to the lands which form the emoluments of the office, although in cases where the property gets into the hands of a stranger the Act contains provisions for its recovery. Such was the case dealt with in *Venkata v. Rama* (2). The subsequent decision in *Gunnaiyan v. Kamakchi Ayyar* (1) places the rights of the members of a joint family claiming an interest to a hereditary village office on a sound footing. In the present case, the history of the dealings of this family with the lands to which the lower Courts have referred does not admit of any question being raised at this stage as to the hereditary nature of the *inam* and the *mirasi* rights which the family possessed in it. Nor can we consider what the rights of the parties would be if the family had been divided when the succession opened, as there was no evidence or admission of division and the point has not been taken in the memorandum of second appeal.

The next question that has been raised is whether property which descends on daughter's sons from their maternal grandfather is ancestral property in which the grandsons take an interest at birth according to the *Mitakshara* Law. If this question is answered in the negative, the 1st defendant's son, who is the 7th defendant, had no right to sell a 1/15th share to the contesting respondents and all that they can rightly claim is the

(1) 26 M. 339.

(2) 8 M. 249 9 Ind. Jur. 185.

two-thirds share of the 2nd and 3rd defendants. This question was definitely answered in the affirmative in *Vythinatha Ayyar v. Yaggia Narayana Ayyar* (3), and the same question was answered in the negative in *Jamna Prasad v. Ram Partap* (4), and it is apparent from the notes to paragraph 275 in the 7th and 8th Editions of Mayne's Hindu Law and Usage, that the learned author and editor feels doubts as to the correctness of the Madras decision. We have been asked to refer the matter to a Full Bench. But we do not consider that this case is of sufficient importance to warrant a reference, or that the state of the law is really in any uncertainty so far as this Court is concerned.

It was pointed out by the learned Judges of the Allahabad High Court that, where the word 'ancestral' (estate) is used in Colebrook's *Mitakshara*, the correct translation is 'grand-paternal' and the word in the original text is 'paternal grandfather.' They proceeded to discuss the meaning of the words 'ancestral property' and decided that in the *Mitakshara* they were used in the limited sense of "property in which the sons acquire by birth a joint interest with their father;" and they observed: "It is a well known rule of the *Mitakshara* Law that property may be joint property without having been ancestral." They thus interpret the use, by the Privy Council, of the words 'ancestral property' in *Venkaityamma Garu v. Venkatarāmanayamma Bahadur Garu* (5), in the broad sense of property of a joint family to which the rule of survivorship applies.

In *Karuppai Nachiar v. Sankaranarayanan Chetty* (6), the question again arose as to what might be regarded as ancestral property, and the Full Bench observed: "Under the *Mitakshara* joint family system there can be no joint family property in respect of which the male issue of the joint owners will not by birth become joint owners with their father. [See *Sudarsanam Maistri v. Narasimhulu Maistri* (7)]. If, therefore, we are to understand

(3) 27 M. 382.

(4) 29 A. 667; 4 A. L. J. 582; A. W. N. (1907) 211.

(5) 25 M. 678; 29 I. A. 156; 7 C. W. N. 1; 12 M. L. J. 299.

(6) 27 M. 300; 13 M. L. J. 398.

(7) 25 M. 149 at pp. 155, 156; 11 M. L. J. 353.

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the expression 'ancestral property' in their Lordships' judgment otherwise than in its technical sense, according to which it is property in which a son on his birth becomes an equal owner with his father, the result of the ruling will be that a species of joint family property unknown to the *Mitakshara* will be brought into existence." Similar observations occur in *Muniswami Chetty v. Maruthammal* (8), which was also a case decided by a Full Bench.

It is urged that these observations are of the nature of *obiter dicta*. They may not have been necessary for the decision of the points arising in those cases, but they are sufficient to indicate a clear trend of decision by this Court in only one direction, and that is in favour of grandsons taking an interest at birth in property which descends from their maternal grandfather. The Full Bench also supported their opinion by reference to certain texts in which a daughter's son is treated as being as good as a son's son for spiritual purposes. The earlier decisions in *Muttayan Chetty v. Sangali Vira Pandia Chinna Tambiar* (9) and *Sivaganga Zemindar v. Lakshmana* (10) cannot be allowed to influence our decision, seeing that they were considered and discussed in the Full Bench decision in *Karuppai Nachiar v. Sankaranarayanan Chetty* (6), to which we have referred. Again, it is argued that a later decision of the Privy Council in *Atar Singh v. Thakar Singh* (11) throws light on what they meant by the use of the word 'ancestral', but we think that as their Lordships were here dealing with a case of Punjab Customary Law it would not be right to give the expressions employed the significance that they might otherwise bear.

The next argument put forward on behalf of the appellants is that they are entitled to remain in possession under a mortgage-deed dated 12th April 1900 until the mortgage is redeemed. This question was not raised in the written statement, nor was there any issue on the point. It

(8) 7 Ind. Cas. 176; 34 M. 211 at p. 218; (1910) M. W. N. 233; 8 M. L. T. 124; 20 M. L. J. 687.

(9) 3 M. 370; 4 Ind. Jur. 444.

(10) 9 M. 188.

(11) 6 Ind. Cas. 721; 42 P. R. 1910; 35 C. 1039; 128 P. W. R. 1908 (P. C.); 35 I. A. 206; 12 C. W. N. 1049; 8 C. L. J. 359; 10 Bom. L. R. 790; 18 M. L. J. 379; 4 M. L. T. 207.

is sufficient answer to this contention to say that section 5 of Madras Act III of 1895 makes it unlawful to alienate the emoluments of village offices or to encumber them in any manner whatsoever, and it was held in *Narahari Sahu v. Sira Korithan Naidu* (12) and in *Batchu Ramayya v. Dara Satchi* (13) that the alienation of a service *inam* was wholly void and that though the *inam* was, at a later date, enfranchised, the alienee could not invoke section 43 of the Transfer of Property Act in his favour. These decisions follow the decision in *Ramasami Naik v. Ramasami Chetty* (14) and make it clear that the appellants cannot set up any right on the strength of their usufructuary mortgage as against the purchasers under a valid sale-deed.

The last contention is that Rs. 10 was the figure arrived at as the mesne profits of the total holding and that, therefore, the plaintiff should not have been given a decree for mesne profits of more than 11/15ths of this sum. The District Munsif stated that the plaintiff claimed at the rate of Rs. 10 a year and that the contesting defendants did not object to it, and he found accordingly that Rs. 10 a year was the sum to which the plaintiff was entitled. The appellants cannot be allowed to raise the contention that by this finding of fact the District Munsif meant that the profits from the whole holding were only Rs. 10.

The second appeal is, therefore, dismissed with costs.

Appeal dismissed.

(12) 19 Ind. Cas. 881; (1913) M. W. N. 415; 24 M. L. J. 462.

(13) 21 Ind. Cas. 600; (1913) M. W. N. 999; 14 M. L. T. 430.

(14) 30 M. 255; 17 M. L. J. 201; 2 M. L. T. 167.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEALS NOS. 51 AND 53 OF 1912.

May 28, 1914.

Present:—Justice Sir Asutosh Mookerjee, Kt., and Mr. Justice Beachcroft.

RAJ KUMAR SARKAR—PLAINTIFF—
APPELLANT

versus

FAIZUDDI TARAFDAR AND OTHERS —
DEFENDANTS—RESPONDENTS.

Bengal Tenancy Act (VIII of 1885), s. 29—Kabuliyat

RAJ KUMAR SARKAR v. FAIZUDDI TARAFDAR.

—*Enhancement of rent—Agreement in favour of some of the landlords.*

A claim for recovery of arrears of rent was based on a *kabuliyat*. The *kabuliyat* recited that the tenants held an ancestral *jama* of ten *bighas* at an annual rent of Rs. 6-15 under the plaintiff, his co-sharers and a lady named Jadumonee Dasi. The tenants agreed by the *kabuliyat* that from the date thereof they would hold the land in the share of the plaintiff and his co-sharers at the rate of Rs. 18-6. The co-sharers were joined as defendants, and they did not object to the plaintiff's claim of his share only. Jadumonee was not made a party:

Held, that the agreement to pay enhanced rent was in contravention of section 29 of the Bengal Tenancy Act, and consequently unenforceable; [p. 892, col. 2.]

that the *kabuliyat* might, however, be used as evidence of an agreement that the defendants would from the date thereof pay rent to the plaintiff and his co-sharers separately from Jadumonee; and [p. 892, col. 2.]

that a decree might be made in favour of the plaintiff to the extent of his share. [p. 893, col. 1.]

Appeals against the decrees of the Sub-ordinate Judge of Khulna, dated the 23rd June 1911, reversing those of the Munsif, Bagerhat, dated the 28th February 1910.

Babu Surendra Madhub Mullick, for the Appellant.

Babu Sarat Chandra Ghose and Bhudeb Chandra Roy, for the Respondents.

JUDGMENT.—These are appeals by the plaintiff in a suit for recovery of arrears of rent. The claim is based on a *kabuliyat* executed on the 11th February 1898 by the tenants in favour of the plaintiff and his co-sharers, who have been joined as defendants in the suit. The tenants contend that the *kabuliyat* was in contravention of section 29 of the Bengal Tenancy Act and that they are consequently not liable to pay rent at the rate mentioned therein. In our opinion this contention is well founded and must prevail.

The *kabuliyat* recites that the tenants held an ancestral *jama* of 10 *bighas* at an annual rent of Rs. 6-15 under the plaintiff, his co-sharers and a lady named Jadumonee Dasi. The tenants agreed by the *kabuliyat* that from the date thereof they would hold the land in the share of the plaintiff and his co-sharers at the rate of Rs. 18-6. This was clearly in contravention of section 29 of the Bengal Tenancy Act. It cannot be maintained that a new tenancy was created by the *kabuliyat*. The land remained the same, as before, and yet the defendants undertook to pay to the plaintiff and his

co-sharers a much larger sum than what they used to pay to these persons and Jadumonee. In fact, if they had by this contract agreed to pay Rs. 18-6 to the plaintiff, his co-sharers and Jadumonee, the contract would have been in contravention of section 29 and consequently unenforceable. The position may be made obvious by a concrete illustration. If A holds 16 *bighas* under X and Y for Rs. 16 a year, the maximum enhancement to which he can consent is Rs. 2. If he executes a fresh *kabuliyat* in favour of X and agrees to pay him for his share of the land more than Rs. 9, the agreement is void. If this view were not taken wherever land is held under several landlords jointly, the object of section 29 may be defeated by the device of fresh distinct *kabuliyats* in favour of the different landlords. We hold, accordingly, in concurrence with the Courts below, that the plaintiff and his co-sharers are not entitled to claim rent at the rate of Rs. 18-6 from the defendants on the basis of the *kabuliyat* of the 11th February 1898.

We have next to consider another point on which the Courts below have taken divergent views.

The Court of first instance held that although Jadumonee had not been joined as a party to this litigation, the plaintiff was entitled to a decree for his share of the rent at the original rate. The Sub-ordinate Judge has held that as the contract of the 11th February 1898 for payment of increased rent was void under section 29, it was inoperative for all purposes and could not be deemed a valid agreement to pay rent separately thenceforward to the persons in whose favour the *kabuliyat* was executed. In our opinion, this view is unsound. The *kabuliyat* had a two-fold purpose, namely, to make the rent payable thereafter separately to the different landlords, and, *secondly*, to enhance the rate of rent; the second object may not have been achieved; but that is no reason why the first purpose should be defeated. We hold accordingly that the *kabuliyat* may be used as evidence of an agreement that the defendants would from the date thereof pay rent to the plaintiff and his co-sharers separately from Jadumonee. In this view, the plaintiff and his co-sharers are entitled to two-thirds of

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the rent, because, according to the defendants, Jadumonee was interested in the property only to the extent of one-third. The plaintiff, however, in this suit claims rent in respect of his share only, and as no objection appears to have been taken to that course by his co-sharers, a decree may be made in his favour to that extent. The Court of first instance held erroneously that the plaintiff was entitled to one-half, Rs. 6-15; he is really entitled only to one-third of that sum.

The result is that these appeals are allowed, the decrees of the Subordinate Judge set aside and decrees made in favour of the plaintiff for rent at the rate of Rs. 2-5 a year. Each party will be entitled to proportionate costs in all the Courts on the basis of the amount now decreed. A self-contained decree will be drawn up in this Court.

Appeals allowed.

BOMBAY HIGH COURT.

FIRST CIVIL APPEAL No. 172 OF 1914.

July 19, 1915.

Present:—Mr. Justice Batchelor and
Mr. Justice Hayward.

MADAPPA GANAPA HEGDE—
APPLICANT APPELLANT

versus

JAKI GHOSAL GABRI GHOSAL—

OPONENTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXI, r. 19, scope of—Claim of party entitled to larger sum barred—Party entitled to smaller sum, if can take out execution.

Order XXI, rule 19 of the Civil Procedure Code, 1908, contemplates that a decree under which two parties are entitled to recover sums of money from each other should be regarded as a single indivisible order of the Court enforceable only for the balance, that is, the difference between the two sums awarded, and that balance becomes awardable by the Court without the intervention of the parties as soon as the amount of the balance is determined. [p. 893, col. 2; p. 894, col. 1.]

Therefore, though the party entitled to the larger sum would be barred by limitation from recovering the larger sum awarded to him under the decree, that does not entitle the party claiming the smaller sum to take out execution. [p. 894, col. 1.]

First appeal from the decision of the first Class Subordinate Judge at Karwar, in *Darkhast* No. 153 of 1913.

Mr. S. S. Patkar, for the Appellant.

Messrs. G. S. Mulgaokar and Nilkanth Atmaram, for the Respondents.

JUDGMENT.

BATCHELOR, J.—This is an appeal in execution and the appellant was the original applicant for execution. He is the purchaser of the interest of the plaintiff and the 2nd defendant in Suit No. 74 of 1902, which was a partition suit. On the 31st March 1905, a decree was made in the suit, and the present application is for mesne profits owing under that decree from the 19th December 1900.

The lower Court has found that the mesne profits due amount to Rs. 346-2-8, but admittedly that calculation is incorrect, and the exact sum due for mesne profits would be Rs. 445-8-0. On the other hand, under the same decree the respondents were entitled to costs which, as has now been ascertained, amount to Rs. 855.

The case, therefore, appears to be one for the application of the rule enacted in Order XXI, rule 19. For, this application is made for the execution of the decree under which two parties are entitled to recover sums of money from each other. The sums being unequal, clause (b) of the rule provides that "execution may be taken out only by the party entitled to the larger sum and for so much only as remains after deducting the smaller sum." It would follow from this provision that the appellant, who under the decree is entitled only to the smaller sum, has no right to apply for execution of the decree. But it is answered the appellant has that right, because the respondents' claim to their costs is barred by limitation. It is admitted that if the respondents' claim to their costs is to be considered as a separate claim apart from the other provisions of the decree, then it is barred under Article 182 of the Indian Limitation Act. But it is not the fact that the respondents here are seeking to execute the decree in respect of their claim for costs. They are merely using those provisions of the decree to resist the application made by the other side, and I am of opinion that they are entitled to rely upon the decree for that purpose. For, as I read the rule, it contemplates that the decree should be regarded

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as a single indivisible order of the Court enforceable only for the balance, that is, the difference between the two sums awarded, and that balance becomes awardable by the Court without the intervention of the parties as soon as the amount of the balance is determined. Though the respondents would be barred by limitation from recovering the large sum awarded to them under the decree, that circumstance cannot, I think, avail to enable the appellant to take out execution in a manner expressly forbidden by the rule. On this ground, I think that the appellant's attempt to execute his decree for the smaller sum, without reference to the larger sum which the decree awards to his adversary, must fail.

This is the only point involved in the appeal, though it was suggested by the appellant that there should be a direction to the Court to take further evidence as to the profits of the higher level *badiaverg* land. In my opinion, however, no case has been made out which would justify us in allowing the appellant, who was the original applicant, to re-inforce the evidence which he elected to give before the lower Court.

The appeal should, therefore, in my judgment, be dismissed with costs.

HAYWARD, J.—I concur. The appellants were entitled to mesne profits, which were found upon calculation to be the smaller sum recoverable by either of the parties. That sum must, therefore, be taken to have been entered as satisfied under the provision "satisfaction for the smaller sum shall be entered upon the decree" contained in Order XXI, rule 19 (b). The respondents were entitled, on the other hand, to the larger sum, consisting of their costs, but were only entitled to recover "so much only as remains after deducting the smaller sum" as prescribed in the said Order. The respondents, therefore, were the only parties entitled to take out execution at all and that execution could only be for the balance "after deducting the smaller sum." It cannot, therefore, be said that recovery of the part of their costs set off against that smaller sum was time-barred, because no application could have been made in respect of that part at all. But it can be said that recovery of the balance would be time-

barred under the ordinary rule of limitation applicable to the execution of decrees. In fact it has been admitted that recovery of the balance would be time-barred under Article 182 of the Schedule to the Indian Limitation Act.

Appeal dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM ORDER No. 132 OF 1914.

May 7, 1915.

Present:—Justice Sir Asutosh Mookerjee, Kt., and Mr. Justice Roe.

HARADEB DAS AGARWALLA AND OTHERS
—PLAINTIFFS—APPELLANTS

versus

ANANDA SHEIK AND ANOTHER—DEFENDANTS
—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 102, O. XLI, r. 23, O. XLIII, r. 1. (u)—Remand, appeal from order of.

An appeal does not lie against an order of remand in a suit of the nature cognisable by a Court of Small Causes and valued at less than Rs. 500, because a second appeal is not allowed against the decree of the lower Appellate Court in such a suit. [p. 895, col. 1.]

Appeal against an order of the Subordinate Judge, Faridpur, dated the 12th January 1914, reversing that of the Munsif, Goalundo, dated the 8th July 1913.

Babu Phanindra Lal Maitra, for the Appellants.

JUDGMENT.—This appeal is clearly incompetent. It is directed against an order of remand, made under rule 23 of Order XLI of the Code, in a suit of a nature cognisable by a Court of Small Causes and valued at less than Rs. 500. If a decree had been made in the suit by the lower Appellate Court, that decree would have been non-appealable under section 102. Consequently, no appeal lies against the order of remand, for clause (u) of rule 1 of Order XLIII allows an appeal against an order under rule 23 of Order XLI remanding a case, only where an appeal would lie from the decree of the Appellate Court. It may be observed that the pre-existing law in this respect has been changed by the Code of 1908. Under the Code of 1832, an appeal was allowed against an order of remand by clause 28 of

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section 588, and it was ruled in a long series of decisions that this right of appeal was not restricted by section 586: *Kirte v. Ramjan* (1); *Mathura Nath Ghose v. Nobin Chandra Kundu* (2); *Agandh Mahto v. Khajah Aliullah* (3); *Collector of Bijnor v. Jafar Ali Khan* (4); *Jhanday Lal v. Sarman Lal* (5); *Mahadev Narsingh v. Ragho Keshav* (6); *Chinnatambi v. Chinnana* (7). Now an appeal does not lie against order of remand in a suit of a nature cognizable by a Court of Small Causes and valued at less than Rs. 500, because a second appeal is not allowed against the decree of the lower Appellate Court in such a suit.

The result is that this appeal is dismissed.

Appeal dismissed.

(1) 10 C. 523; 5 Shome L. R. 159.

(2) 24 C. 774; 1 C. W. N. 674.

(3) 11 C. W. N. 862.

(4) 3 A. 18.

(5) 21 A. 291; A. W. N. (1899) 68.

(6) 7 B. 292.

(7) 19 M. 391.

MADRAS HIGH COURT.

CIVIL MISCELLANEOUS PETITIONS NOS. 249 TO 252 OF 1915.

July 26, 1915.

Present:—Sir John Wallis, Kt., Chief Justice, and Mr. Justice Seshagiri Aiyar.

Sri Rajah KAKARLAPUDI RAMACHANDRA RAJU BAHADUR GARU
AND OTHERS—PLAINTIFFS—PETITIONERS

versus

CHEEPURAPALLI APPAYYA AND OTHERS
—RESPONDENTS.

Civil Procedure Code (Act V of 1908), ss. 109, 110—Leave to appeal to Privy Council—Judgment, one in several suits—Aggregate value above Rs. 10,000—Each suit valued separately below Rs. 10,000—Appeal to Privy Council, if permitted.

Where a number of suits are tried together and one common judgment is pronounced in all of them, the fact that the aggregate value of all the suits is above Rs. 10,000 while the value of the subject-matter of each suit is below Rs. 10,000, does not give right of appeal to the Privy Council. [p. 895, col. 2.]

Royal Insurance Co. v. Akhoy Coomar Dutt, 6 C. W. N. 41, followed.

Deonarain Singh v. Guni Singh, 34 C. 400; *Raja Jagareesera Rama Venkateswara v. Suppanasarri*, 22 Ind. Cas. 390; (1914) M. W. N. 162, distinguished.

Petitions praying that in the circumstances stated therein the High Court will be pleased to grant the petitioners a certificate

under rules 2 and 3 of Order XLV of the Code of Civil Procedure, 1908, to enable them to appeal to His Majesty in Council from the decrees of the High Court, in Appeal No. 277 of 1911 and Second Appeal Nos. 1508 to 1510 of 1912, preferred against those of the Temporary Subordinate Judge of Vizagapatam in Original Suit No. 69 of 1910, and of the District Court of Vizagapatam in Appeal Suits Nos. 162, 161 and 160 of 1911, respectively.

FACTS.—The proprietor of a portion of the Uratla Estate instituted a number of suits to eject his tenants and obtained decrees in the Courts below. On appeal the High Court reversed the decrees of the Courts below and held that the lands which formed the subject-matter of the suit were "ryot" lands in the Uratla Estate, and that the suit should, therefore, have been brought in the Revenue Courts and directed the plaintiffs to be presented to the proper Court. The plaintiff filed the present applications for leave to appeal to the Privy Council against the decision of the High Court.

Mr. B. Narasimha Row, for the Petitioners.

Mr. V. Ramadoss, for the Respondents.

ORDER.—In none of these cases admittedly is the amount or value of the subject-matter of the suit in the Court of first instance ten thousand rupees or upwards, nor does the decree in any of these suits directly or indirectly involve some claim of like amount or value. The fact that a common judgment was pronounced in all the suits and that the aggregate value of all the suits exceeds Rs. 10,000, in our opinion, makes no difference. This appears to us to be the plain meaning of the section and is in accordance with the ruling of a Full Bench of the Calcutta High Court in *Royal Insurance Co. v. Akhoy Coomar Dutt* (1). It is not clear that in *Deonarain Singh v. Guni Singh* (2) the leave granted was under section 596 corresponding to section 110, and not under section 595 (c) corresponding to section 109 (c). As to *Raja Jagareesera Rama Venkateswara v. Suppanasarri* (3), the

(1) 6 C. W. N. 41.

(2) 34 C. 400.

(3) 22 Ind. Cas. 390; (1914) M. W. N. 162.

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case referred to by the learned Judges does not support their conclusion. We hold, therefore, that the applicants are not entitled to a certificate under section 110.

As regards section 109 (c) we are not satisfied that there is a fit case for appeal to His Majesty in Council.

The decision seems to be in accordance with the plain language of the Act and with numerous decisions of this Court.

These petitions are dismissed with costs.

Certificate refused.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEALS NOS. 390 AND 929
OF 1911.

December 22, 1913.

Present:—Justice Sir Asutosh Mookerjee,
Kt., and Mr. Justice Beachcroft.

**Maharaja BIRENDRA KISORE MANIKYA
BAHADUR—PLAINTIFF—APPELLANT**

versus

LAKSMI—DEFENDANT—RESPONDENT.

Landlord and tenant—Encroachment by tenant for his own benefit—Adverse possession—Limitation Act (XV of 1877), Sch. II, Art. 144.

A suit for declaration of title to land and for assessment and recovery of rent thereof is in its essence a suit for recovery of a limited interest in land. [p. 896, col. 2.]

Where the defendant has for more than 12 years repudiated the plaintiff's right to receive rent, under Article 144 of the second Schedule of the Limitation Act, the plaintiff has no enforceable title. [p. 897, col. 1.]

Encroachments made from the waste by a tenant, whether the land taken belongs to the landlord or to a stranger, are presumed to have been made for the benefit of his landlord unless it appears clearly from some act done at the time that the tenant intended to make the encroachments for his own benefit and not to hold them as he held the farm to which the encroachments were adjacent. [p. 897, col. 1.]

As a general rule the intention of the tenant to make an encroachment for his own benefit must be shown at the time when the encroachment is made, but a subsequent severance of the encroachment from the demised premises may have the same effect, if brought to the knowledge of the landlord, although if the landlord is allowed to remain under the belief that the encroachment was held as part of the holding, the tenant might be estopped from denying it. [p. 897, cols. 1 & 2.]

Appeals against the decision of the Subordinate Judge of Noakhali, dated the 22nd November 1910, affirming that of the Munsif of Feni, dated the 16th May 1910.

Babuj Dwarka Nath Chuckerbarti and

Gobind Chunder Dey Roy, for the Appellant.

JUDGMENT.—This is an appeal by the plaintiff in a suit for declaration of title to land and for assessment and recovery of rent in respect thereof. The case for the plaintiff is that the defendants are his tenants in respect of some lands within his estate, that they have encroached upon the disputed lands which were contiguous to the lands of their tenancy and that they are consequently liable to pay a fair rent for the encroached portion. The defendants plead that their ancestors excavated the disputed tank and that the rent was redeemed. They further contend that they have never paid rent and that the title of the plaintiff to realise rent has been barred by the Statute of Limitation. The Courts below have dismissed the suit.

It is not disputed that more than 12 years before the commencement of the suit, in the course of Settlement proceedings, the defendants asserted to the knowledge of the plaintiff a title to hold the land without payment of rent to him. Their case at the time was that they held the land under a rent-free grant and were under no legal obligation to pay rent therefor to the plaintiff. The question in controversy is, whether the title of the plaintiff to realise rent from the defendants is barred by the Statute of Limitation. In our opinion, the question must be answered against the plaintiff.

The plaintiff seeks to assert his right to a limited interest in the land. This is plain from the frame of the suit, which he describes as a suit for declaration of title to land and for assessment and recovery of rent thereof. The valuation of the suit is stated, for purposes of jurisdiction and for payment of Court-fees, to be based on the estimated value of the disputed land together with the amount of rent claimed. There can be no room for reasonable controversy that the suit is in its essence a suit for recovery of a limited interest in land. In so far as that interest is concerned, the defendants to the knowledge of the plaintiff asserted a hostile title more than 12 years before the commencement of the suit. When they first encroached upon these lands, it was open to the plaintiff to assume that they had taken possession of the land

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in their character as his tenants. When, however, more than 12 years before the commencement of this litigation, the defendants repudiated that position, to the knowledge of the plaintiff, it was his duty to enforce his right to receive rent from the defendants by an appropriate proceeding. He has failed to do this within the period allowed by the Statute of Limitation. He has never received rent for this land, and his right to receive rent has always been repudiated by the defendant; such repudiation has lasted, to his knowledge, for more than 12 years. It is consequently clear that under Article 144 of the second Schedule of the Limitation Act, the plaintiff has no enforceable title. The view we take is in accordance with that taken in the cases of *Ishan Chandra Mitter v. Raja Ramranjan* (1), *Raktoo Singh v. Sudhram Ahir* (2) and *Protap Chunder v. Shukhee Soonduree Dassee* (3). In these circumstances the plaintiff can derive no benefit from the principle recognised in the cases of *Kingsmill v. Millard* (4), *Doe d Lloyd v. Jones* (5), *Whitmore v. Humphris* (6) and *Attorney General v. Tomline* (7), namely, that encroachments made from the waste by a tenant, whether the land taken belongs to the landlord or to a stranger, are presumed to have been made for the benefit of his landlord, unless it appears clearly from some act done at the time that the tenant intended to make the encroachment for his own benefit and not to hold it as he held the farm to which the encroachments were adjacent: *Doe d Lewis v. Rees* (8), *Andrews v. Hailes* (9). No doubt as a general rule, the intention of the tenant to make an encroachment for his own benefit must be shown at the time when the encroachment is made, but a subsequent severance of the encroachment from the demised premises may have the same

effect if brought to the knowledge of the landlord, although if the landlord is allowed to remain under the belief that the encroachment was held as part of the holding, the tenant might be estopped from denying it: *Kingsmill v. Millard* (4), *Doe d Lloyd v. Jones* (5); *Nuddyarchand Shaha v. Meajan* (10), *Laws of England*, edited by Halsbury, Volume IV, paragraph 1144.

The result is that the decree of the Court below is affirmed and this appeal dismissed.

It is conceded that this judgment will govern Second Appeal No. 929 of 1911, which also is dismissed.

Appeals dismissed.

(10) 10 C. 820.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL NO. 834 OF 1914.

April 21, 1915.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Bakewell.

UTHARANKAT PURAKKAL EAZUVAN
RAMAN *alias* KUTTAN'S WIFE,
KALLIANI, AND ANOTHER—PLAINTIFFS—
APPELLANTS

versus

UTHARANKAT PARAKKAL EAZUVAN
RAMAN AND OTHERS—DEFENDANTS—
RESPONDENTS.

Hindu Law—Widow—Maintenance—Plea that she has other means of support, whether to be allowed.

A plea that a Hindu widow has other means of support and is, therefore, not entitled to maintenance ought not to be allowed to be raised in a suit by her for maintenance out of her husband's joint family property. [p. 898, col. 1.]

Darbha Lingayya v. Darbha Kanakamma, 28 Ind. Cas. 200; 38 M. 153; 28 M. L. J. 260, followed.

Second appeal against the decree of the Court of the Temporary Subordinate Judge of Palghat, in Appeal Suit No. 230 of 1913, preferred against that of the District Munsif of Alattur in Original Suit No. 391 of 1911.

Mr. T. R. Ramachandra Aiyar, for the Appellants.

Messrs. C. V. Ananthakrishna Aiyar and P. S. Vaidyanatha Aiyar, for the Respondents.

- (1) 2 C. L. J. 125.
- (2) 8 C. L. J. 557.
- (3) 2 C. L. R. 569.
- (4) (1855) 11 Exch. 313; 3 Com. L. R. 1022; 105 R. 538.
- (5) (1846) 15 M. & W. 580; 16 L. J. Ex. 58; 71 R. 772.
- (6) (1871) 7 C. P. 1; 41 L. J. C. P. 43; 25 L. T. 496; 20 W. R. 79.
- (7) (1880) 15 Ch. D. 150 at p. 160; 43 L. T. 486; 49 L. J. Ch. 377.
- (8) (1834) 6 Car. & P. 610.
- (9) (1853) 2 El. & Bl. 349 at p. 353; 23 L. J. Q. B. 404; 17 Jur. 621; 21 L. T. (o. s.) 151; 95 R. R. 593; 1 W. R. 366; 118 E. R. 797.

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JUDGMENT.—The lower Appellate Court ought not to have allowed the defendants to raise the contention that the 1st plaintiff has got other means of support and is, therefore, not entitled to claim maintenance at all out of her husband's joint family property. [See also 'on this point *Darbha Lingayya v. Darbha Kanakamma* (1).]

We modify the decree of the lower Appellate Court by allowing Rs. 270 to the 1st plaintiff in her own right besides the Rs. 250 allowed to the minor 2nd plaintiff represented by the 1st plaintiff. The defendants will pay 3/4ths of the plaintiff's costs here and in the lower Appellate Court and bear their own costs. The decree of the first Court as to costs in that Court will stand.

Appeal allowed: Decree modified.

(1) 28 Ind. Cas. 200; 28 M. L. J. 260; 38 M. 153.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 2491 OF 1913.

May 18, 1915.

Present:—Justice Sir Asutosh Mookerjee, K.T., and Mr. Justice Roe.

JANAKI NATH HORE AND ANOTHER—
DEFENDANTS—APPELLANTS

versus

PRABHASINI DASI—PLAINTIFF

—RESPONDENT.

Civil Procedure Code (Act V of 1908) O. XLI, rr. 11, 12, O. XLVII, r. 4—Review—Notice to opposite party, necessity of—“Opposite party”, meaning of—Bench of High Court reviewing order of dismissal—Power of another Bench to consider propriety of order of review—Review, whether re-opens the whole case—Lessor—Sub-lessee—Sub-lease—Bengal Tenancy Act (VIII of 1885), Ch. XIV, ss. 161, 167—Stranger purchasing holding in execution of decree for arrears of rent—Annulment of sub-lease.

As a general rule, no order of review can be made without previous notice to the person in possession of the decree which is to be reviewed. [p. 899, col. 1.]

But an application for review of an order of dismissal under rule 11, Order XLI, of the Code of Civil Procedure, 1908, can be granted without the issue of any notice to the respondent. [p. 899, col. 2.]

The expression “opposite party” in the proviso to rule 4, of Order XLVII may be taken to mean the party interested to support the order sought to be vacated or modified upon the application for review. [p. 899, col. 1.]

The propriety of an order granting a review of the order of dismissal of an appeal under rule 11 of Order XLI of the Code of Civil

Procedure, 1908, can be considered only by the Bench granting the review, and it is that Bench alone which can either maintain or vacate the original order of dismissal. [p. 899, col. 2; p. 900, col. 1.]

Whether the entire case is or is not re-opened when a review has been granted, must depend upon the circumstances of each individual case. [p. 900, col. 1.]

When an appeal is admitted under rule 12, Order XLI, of the Civil Procedure Code, 1908, the appeal cannot be restricted to one or more grounds specified in the memorandum of appeal, the whole appeal is before the Court when the case is taken up for final disposal. [p. 900, col. 2.]

The principle that, when a person has granted a lease on the allegation that he had such interest as entitled him to create a valid lease in favour of the grantee, the doctrine of estoppel operates between the grantor and the grantee, does not apply to the case of a purchaser of a holding at a sale in execution of a decree for arrears of rent suing to eject the defendant as a trespasser. [p. 900, col. 2; p. 901, col. 1.]

The rights of a stranger who has purchased at a sale held in execution of a decree under Chapter XIV of the Bengal Tenancy Act are regulated by the provisions of that Chapter, which authorise the purchaser to annul all encumbrances—including sub-tenancies—mentioned in section 161 of the Act. He can take the requisite steps under section 167 to annul a sub-tenancy. [p. 901, col. 2; p. 902, col. 1.]

Appeal against the decree of the District Judge of Faridpur, dated the 14th June 1913, modifying that of the Munsif of Goalundo, dated the 26th May, 1912.

Babus *Kishori Lal Sarkar*, *Bepin Behari Ghose* and *Haris Chunder Roy*, for the Appellants.

Babus *Hira Lal Sanjal*, *Purenda Sunder Banerjee* and *Amarendra Nath Bose*, for the Respondent.

JUDGMENT—This is an appeal by the defendants in a suit for possession of land upon declaration of title by purchase at an execution sale and for mesne profits. The Court of first instance dismissed the suit; upon appeal the District Judge has reversed that decision and has made a decree for ejectment in respect of the first seven parcels of land. On the present appeal the propriety of the decision of the District Judge has been assailed as erroneous in law. But before we deal with the questions which arise in the appeal, we have to examine two preliminary objections taken on behalf of the plaintiff-respondent.

The appeal was lodged in this Court on the 31st July 1913. On the 1st December 1913 the appeal was summarily dismissed under rule 11, Order XLI, of the Code by Carnduff and Richardson, JJ. On the 28th February

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1914, an application was made by the appellants for a review of this order. The application was heard *ex parte* on the 8th April 1914. The result was that the previous order of dismissal was recalled and an order was made to the following effect: "The appeal will be heard; let the record be sent for and issue the usual notices".

On behalf of the respondent, two objections have been urged against the validity of this order, namely, *first*, that it is inoperative because made in contravention of rule 4 of Order XLVII of the Code, which requires that no application for review shall be granted without previous notice to the opposite party to enable him to appear and be heard in support of the decree or order a review of which is applied for; and, *secondly*, that if the order be assumed to have been properly made without notice, the appellants are restricted to the single ground upon which the application for review was based. In our opinion, there is no substance in either of these contentions. As regards the *first* objection, it need not be disputed, to use the language of Lord Macnaghten in the case of *Mahomed Zohuruddin v. Nuruddin* (1), that, as a general rule, no order of review can be made without previous notice to the person in possession of the decree which is to be reviewed. But the substantial question is, who is the "opposite party" upon whom notice of the application should have been served in this case. The expression "opposite party" is not defined in the Code, but it may be taken to mean the party interested to support the order sought to be vacated or modified upon the application for review. Now, what was the order in the present case which was sought to be recalled by the appellants and what was the order which they endeavoured to get substituted in lieu thereof. The order which they prayed might be recalled was to the effect that the appeal be summarily dismissed; and the order which they wished to have substituted in its place was that notice of the appeal be served upon the respondent and that the appeal be heard on the merits after the record had been received. Can it be contended reasonably that the respondent was the "opposite party" within the meaning of the expression in the proviso to rule 4 of Order XLVII, that he was

in fact interested to appear and support the order of summary dismissal, when the only order sought to be substituted therefor was that the appeal be heard in his presence? In our opinion, the question must be answered in the negative. If we acceded to the contention of the respondent, the result would be that he would be subjected to needless harassment from which the Legislature intended to protect him by the introduction of rule 11, Order XLI of the Code. If it is obligatory upon the Court to issue notice upon the respondent when an application is made to review an order of dismissal under rule 11 of Order XLI, the respondent must appear in answer to the Rule to support the order of dismissal without the record before the Court; and if the Rule is made absolute and the appeal directed to be heard in the presence of the respondent, he would have to appear a second time to support the decree under appeal. This result could never have been intended by the Legislature. The view we take is in accord with that adopted in *Joy Coomur Dutta Jha v. Eshuree Nund Dutta Jha* (2), where it was ruled that an application for review of an order of dismissal under section 25 of Act XXIII of 1861, which corresponds to rule 11 of Order XLI of the present Code could be granted without the issue of any notice to the respondent. That procedure has been followed in numerous cases in this Court during the last 40 years, though we are informed that latterly in one or two solitary instances, amongst which may be mentioned *Abdul Hakim v. Hem Chandra Das* (3), the view has been taken that notice of the application for review should be issued upon the respondent. We are clearly of opinion that what has been the practice of the Court for a long series of years is in conformity with the law and that we should not depart from it. We may further point out that if the objection urged by the respondent were well founded, we could not give effect to it; for as was pointed out in the case of *Haldhar Jha v. Syed Shah Mahammad Ashraf Alam* (4) where a similar objection was unsuccessfully taken, the point must be urged before the Division Bench which granted the review; it is that Bench alone which can consider the propriety of the order previously

(2) 10 B. L. R. 155; 18 W. R. 475.

(3) 30 Ind. Cas. 165; 42 C. 433.

(4) 25 Ind. Cas. 880; 22 C. L. J. 95.

(1) 14 M. L. J. 7.

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made and either maintain or vacate the original order of dismissal. The respondent has made a faint attempt to develop an analogy between an *ex parte* order granting a review and an *ex parte* order directing that an appeal be registered though filed beyond the period of limitation or on a memorandum insufficiently stamped: on this basis, it has been argued that in the former, precisely as in the latter, class of cases the respondent is not bound by the order made in his absence and is competent to question its validity when the appeal is called on for final disposal in his presence. But, plainly, there is no real analogy between the two classes of cases. It cannot be maintained for a moment that the order in the present case was made without jurisdiction and we are not prepared to adopt the view indicated in *Abdul Hakim v. Hem Chandra Das* (3) that the order made without notice is a nullity. Even if the contention of the respondents that notice is essential is well founded, it shows at best that the order has been made irregularly or with material irregularity in the exercise of the jurisdiction possessed by the Judges who granted the review. That order, consequently, can neither be ignored nor vacated by us. But it is not necessary to deal with this aspect of the case in fuller detail, because in our opinion the order was properly made, though notice of the application for review was not served on the respondent.

As regards the *second* objection that the appeal should be restricted to the single ground which was made the basis of the application for review, we are of opinion that it is entirely unfounded. No doubt, it was ruled by this Court in *Bhubaneshwari Koer v. Ajodhya Singh* (5) that an application for review may be granted in part; and, as pointed out in *Sheikh Sadaruddin v. Sheikh Ekramuddin* (6), whether the entire case is or is not re-opened when a review has been granted, must depend upon the circumstances of each individual case. But it is plain that in this case the entire appeal is open, because, as was pointed out in *Lakhi Narain Sarongi v. Sri Ram Chandra Bhunya* (7), when an

appeal is admitted under rule 12 of Order XLI of the Code, the appeal cannot be restricted to one or more grounds specified in the memorandum of appeal: the whole appeal is before the Court when the case is taken up for final disposal. We hold accordingly that all the grounds taken in the memorandum of appeal may be considered by us.

We now turn to the merits of the appeal. The case was argued in the Courts below on the assumption that the land in dispute constituted an occupancy holding of one Arun Kanta Chandra, who granted a permanent sub-lease on the 3rd December 1899 to the first defendant. The case for the defendant is that at the time when this sub-lease was granted, he was already in occupation as a tenant and that the sub-lease did not create any new tenancy. This sub-lease contravened the provisions of section 85 of the Bengal Tenancy Act, as it created a term exceeding nine years and would not have been admitted to registration if it had been stated in the document that the grantor was an occupancy *raiyat*. But the title of the defendant does not depend upon the sub-lease. He has been in possession from a period antecedent to the lease upon payment of rent to his grantor, and has thus acquired the status of at least an under-*raiyat*. The question is, whether the plaintiff is entitled to eject him.

The plaintiff purchased the holding at a sale held in execution of a decree for arrears of rent on the 21st January 1901 and instituted this suit on the 4th December 1911 to eject the defendant as a trespasser. It is plain that there is no room here for the application of the principle recognised in *Manik Borai v. Bani Charan Mandal* (8) and *Ara' Ali v. Rachimaddi* (9), namely, that when a person has granted a lease on the allegation that he had such interest as entitled him to create a valid lease in favour of the grantee, the doctrine of estoppel operates between the grantor and grantee; in other words, that it is not competent to the grantor to show that the recitals in the document as to his status are incorrect and that on the true state of facts, he had no authority to create the lease. Here the question does not arise between the grantor and the grantee, and the

(5) 11 Ind. Cas. 102; 15 C. L. J. 339.

(6) 20 Ind. Cas. 670; 19 C. L. J. 225; 18 C. W. N. 22.

(7) 11 Ind. Cas. 212; 15 C. W. N. 921; 14 C. L. J. 146.

(8) 10 Ind. Cas. 463; 13 C. L. J. 619.

(9) 10 Ind. Cas. 552; 13 C. L. J. 656.

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sub-lease is consequently liable to be attacked as void, on the principle explained in *Jarip Khan v. Dorfa Bewa* (10) and *Telam Pramanik v. Adu Shaikh* (11). The plaintiff is a purchaser at a sale held in execution of a decree for arrears of rent and we have to investigate his rights and privileges. In this connection, our attention has been invited to two classes of cases, where two distinct principles have been recognised. In the first class of cases, namely, in *Amirullah Mahomed v. Nazir Mahomed* (12), *Amirullah Mahomed v. Nazir Mahomed* (13) and *Ial Ma'omed Sarkar v. Jogir Sheikh Mallik* (14) the doctrine was recognised that the landlord of an occupancy *raiyat*, who has purchased the interest of the *raiyat* and is thus brought into direct contact with the under-*raiyat* inducted on the land by the occupancy *raiyat*, cannot, in view of the provisions of section 22 of the Pungal Tenancy Act, seek the benefit of sub-section (1) of section 85, which provides that if a *raiyat* sub-lets otherwise than by a registered lease the sub-lease shall not be valid against the landlord, unless made with the landlord's consent. In the second class of cases, namely, *Peary Mohun Mookerjee v. Badul Chandra Bagdi* (15), *Gangadhar Mandal v. Rajendra Nath Ghosh* (16) and *Fakir Chandra Singha Roy v. Banamali Sain* (17), the principle is enunciated that when a landlord purchases the occupancy holding at a sale in execution of a decree for arrears of rent, it is not necessary for him to annul the interest of the under-*raiyat* as an encumbrance, because it is an interest which is not valid against him by virtue of sub-section (1) of section 85. The case before us is not covered by either of these two principles. We have not here to deal with the case of a landlord who has purchased by private alienation or at a sale held in execution of a decree for arrears of rent. We have to investigate the case of a stranger who has

purchased at a sale held in execution of a decree under Chapter XIV of the Bengal Tenancy Act. His rights are clearly regulated by the provisions of that Chapter. Section 159 provides that where a holding is sold in execution of a decree for arrears due in respect thereof, the purchaser shall take subject to the interests defined as "protected interests", but with power to annul the interests defined as "encumbrances". Section 160 defines "protected interests". Section 161 defines the term "encumbrance" to mean a lien, sub-tenancy, easement or other right or interest created by the tenant on his tenure or holding in limitation of his own interest therein and not being a protected interest therein as defined in section 160. The sale in this case was held under Chapter XIV, and, consequently, must be deemed to authorise the purchaser to annul all encumbrances mentioned in section 161. But the plaintiff contends that as he is a purchaser at the instance of the landlord, he is the landlord within the meaning of section 85 and that as against him the sub-tenancy of the defendants is not valid. To give effect to this contention of the respondent, it would be necessary to read into section 85 words which do not find a place there. We should have to read and construe section 85 as if it provided that sub-leases by the occupancy-*raiyat* shall not be valid against his landlord nor as against a person who has purchased at a sale in execution of a decree for arrears of rent held at the instance of the landlord. The obvious answer to the contention of the respondent accordingly is that these or similar words are not in section 85. The substance of the argument is a choice between two conflicting positions. One possible view is that as the sub-tenancy is not valid against the landlord when he takes proceedings to enforce the decree for arrears of rent and brings the holding to sale, he does so on the assumption that the sub-tenancy does not exist; that is, he acts in a manner contrary to the express language of section 159. The other possible view is that the landlord acts in conformity with section 159 and that the property is sold with liberty reserved to the purchaser to annul the sub-tenancy. If the landlord himself happens to purchase, it becomes superfluous for him to proceed in the manner provided in section 167 by service of notice upon the encumbrancer, because as

(10) 15 Ind. Cas. 476; 17 C. W. N. 59; 16 C. L. J. 144.

(11) 18 Ind. Cas. 791; 17 C. W. N. 468.

(12) 31 C. 932.

(13) 34 C. 104; 3 C. L. J. 155.

(14) 2 Ind. Cas. 654; 13 C. W. N. 913.

(15) 28 C. 205; 5 C. W. N. 30.

(16) 19 Ind. Cas. 652; 17 C. W. N. 860.

(17) 21 Ind. Cas. 104; 18 C. L. J. 252; 19 C. W. N. 412.

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soon as he is brought into direct contract with the sub-tenant, he is entitled to take up the position that the sub-tenancy as against him is not valid. On the other hand, if the property passes into the hands of a stranger, he takes the requisite steps under section 167 to annul the sub-tenancy. This view does not involve any hardship upon the purchaser, nor does it tend to depreciate the value of the holding as was apprehended by the respondent. We may add that the question which now requires decision was left open for consideration in the case of *Fakir Chandra Singha Roy v. Banumali Sain* (17) and after full consideration of the arguments addressed to us, we are of opinion that it should be answered against the respondent.

The result is that this appeal is allowed, the decree of the District Judge set aside and that of the Court of first instance restored with costs both here and in the Court of Appeal below. The effect of our decision will be that the defendants will be tenants under the plaintiff in respect of the first seven parcels of land.

Appeal allowed.

CALCUTTA HIGH COURT.

* SECOND CIVIL APPEAL NO. 1909 OF 1911.

December 22, 1913.

Present:—Justice Sir Asutosh Mookerjee, K.T.,
and Mr. Justice Beachcroft.

Maharaja BIRENDRA KISORE MANIKYA

BAHADUR—PLAINTIFF—APPELLANT

versus

GAGAN CHANDRA CHAKRABARTI—

DEFENDANT—RESPONDENT.

*Limitation Act (XV of 1877), Sch. II, Art. 144—
Adverse possession—Pleadings—Landlord and tenant.*

The plaintiff's case was that the defendant without any title unlawfully took possession of the disputed land situated within the estate of the plaintiff. The defendant alleged that more than 12 years before the commencement of the suit, in the course of Settlement proceedings, he had set up a rent-free grant and disclaimed all liability to pay rent to the plaintiff in respect of the land in dispute.

Held, that the right of the plaintiff to have rent assessed on the land had been extinguished under Article 144 of the second Schedule to the Limitation Act, 1877. [p. 903, col. 1.]

Nityanund Ghose v. Kissen Kishore, W. R. 1864, Act X, Ruling, 82, distinguished.

Appeal against the decree of that Subordinate Judge of Tippera, dated the 11th April 1911, affirming that of the Munsif of Comilla, dated the 23rd August 1910.

Babus Dwarka Nath Chukervarti and Romes Chunder Sen, for the Appellant.

JUDGMENT.—This is an appeal by the plaintiff in a suit for declaration of title to land and for assessment of fair rent. The case for the plaintiff is that the defendant has without any title taken possession of the disputed land which is situated within his estate, that although rent has been demanded repeatedly the defendant has not paid rent and has refused to take a settlement. The case for the defendant is that she has a rent-free title to the disputed tank and that in any event she and her predecessors have for generations held the property in adverse title, so that the claim of the plaintiff for assessment of rent is barred by limitation. The Courts below have concurrently dismissed the claim for assessment of rent.

The plaintiff has now appealed to this Court and has contended on the authority of the decision in *Nityanund Ghose v. Kissen Kishore* (1) that the relationship of landlord and tenant exists between the parties and that consequently the mere assertion of a hostile title by the defendant cannot possibly be taken to have extinguished his claim for assessment of rent in respect of the disputed land. In our opinion, there is no foundation for this contention. In the case upon which reliance is placed, it was observed that "it is a very usual thing for a man to squat on a piece of land, or to take into cultivation an unoccupied or waste piece of land. Tenancy, in a great many districts in Bengal, commences in this way and where it does so commence, it is presumed that the cultivator cultivates by the permission of the landlord, and is under obligation to his landlord to pay him a fair rent when the latter may choose to demand it. Thus the established usage of the country regards these parties as landlord and tenant, and unless the landlord chooses thus to treat him, the cultivator is not regarded, as he would be by the law as administered in England, as a trespasser, but as a tenant, and

(1) W. R. 1864, Act X, Ruling 82.

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he would be so although he may never have expressly acknowledged the landlord's right or entered into an express contract with him for the payment of rent. If he chooses to cultivate the *zemindar's* lands and the *zemindar* lets him, there is an implied contract between them, creating a relationship of landlord and tenant." The principle thus laid down has no application to the circumstances of this litigation. The case for the plaintiff is that the defendant unlawfully took possession of this tank. The defendant avers that more than 12 years before the commencement of this suit, in the course of Settlement proceedings, she set up a rent-free grant and disclaimed all liability to pay rent to the plaintiff in respect of the disputed land. Notwithstanding this disclaimer of liability the plaintiff has waited for more than 12 years and now seeks a declaration that he is entitled to have rent assessed on this land. In our opinion, the right of the plaintiff to have rent assessed on the land has been extinguished under Article 144 of the second Schedule of the Limitation Act. It is not alleged by the plaintiff that there was, at any time, a relationship of landlord and tenant between the parties. On the other hand, his case is that the defendant without any title unlawfully took possession of the disputed land. The Subordinate Judge has incidentally observed that on the authority of the decision mentioned, the inference may possibly be drawn that there was an agreement of tenancy between the parties. This, however, is not the case either of the plaintiff or of the defendant.

The result is that the decree of the Court below is affirmed and this appeal dismissed.

Appeal dismissed.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 260 OF 1914.

June 2, 1915.

Present:—Sir Henry Richards, Kt., Chief Justice, and Justice Sir P. C. Banerji, Kt.
SHIB SAHAI AND OTHERS—PLAINTIFFS—

APPELLANTS

versus

SARASWATI AND ANOTHER—DEFENDANTS—
RESPONDENTS.

Hindu Law—Mitakshara—"Bandhu," meaning of—Grandfather's great-grandson's daughter's son, whether a bandhu

The word "*bandhu*" under the Hindu Law means a "*sapinda*" who belongs to a different *gotra*, that is to say, a "*bhinna gotra sapinda*," [p. 904, col. 1.]

Therefore, for the *bandhu*-relationship to exist it is essential that the person claiming to be the *bandhu* and the last owner must have been *sapindas* of each other. The *sapinda*-relationship extends to seven degrees on the father's side and five degrees on the mother's side including the last owner. [p. 904, col. 1.]

A grandfather's great-grandson's daughter's son is not a '*bandhu*' under the *Mitakshara* Law. [p. 903, col. 1.]

Ramchandra Martand v. Vinayak Venkatesh Kothekar, 25 Ind. Cas. 290; 41 I. A. 290; 12 A. L. J. 1281; 18 C. W. N. 1154; 27 M. L. J. 333; 1 L. W. 831; 10 N. L. R. 112; 16 M. L. T. 447; (1914) M. W. N. 8 5; 16 Bom. L. R. 863; 20 C. L. J. 573; 42 C. 384, followed.

Second appeal from a decree of the Additional Judge of Moradabad.

The Hon'ble Dr. Tej Bahadur Sapru, (with him the Hon'ble Dr. Sunder Lal), for the Appellants.

Mr. K. N. Jughale (with him Messrs. S. C. Banerji and B. E. O'Connor), for the Respondents.

JUDGMENT.—This appeal arises out of a suit for possession of the property of one Khairati Rai. The plaintiff claims as transferee from Bulaki, who is alleged to be the *bandhu* of Khairati Rai and thus to have inherited his property. According to the pedigree put forward by the plaintiff in the plaint the relationship between Bulaki and Khairati Rai is this, that Bulaki is the son of the daughter of a grandson of the paternal uncle of Khairati's father. The question, therefore, is whether the grandfather's great-grandson's daughter's son is a *bandhu* under the *Mitakshara* Law. The Court of first instance was of opinion that the plaintiff's vendor Bulaki was Khairati's *bandhu* "*ex parte materna*." The learned Subordinate Judge clearly misunderstood what was meant

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by a "*bandhu ex parte materna*." According to the *Mitakshara bandhus* are of three descriptions, namely, the owner's own *bandhus*, his father's *bandhus*, that is "*bandhus ex parte paterna*" and his mother's *bandhus* that is "*bandhus ex parte materna*." There is no question of Bulaki being a *bandhu ex parte materna* in this case. The question what constitutes a *bandhu* was fully considered by their Lordships of the Privy Council in the recent case of *Ram Chandra Martand v. Vinayak Venkatesh Kothekar* (1) and the present case is practically concluded by the ruling of their Lordships. The word "*bandhu*" under the Hindu Law (as has been held in that case also) means a "*sapinda*" who belongs to a different *gotra*, that is to say, a "*bhinna gotra sapinda*." Therefore, for the *bandhu* relationship to exist it is essential that the person claiming to be the *bandhu* and the last owner must have been *sapindas* of each other. The rule of *sapinda*-relationship has been laid down in the *Mitakshara* and it extends to seven degrees on the father's side and five degrees on the mother's side, including the last owner. Taking the pedigree put forward by the plaintiff which will be found at page 9 of the paper-book, it is clear that Bulaki was one degree beyond the seventh degree counting from the last owner, Khairati Rai. We are asked to count the seven degrees from the great-grandfather of Khairati, who was the common ancestor and it is said that computing from the common ancestor Khairati is within the seventh degree, but this computation would leave out of consideration altogether Khairati himself and his father. The mode in which relationship should be computed is stated in Sarvadhikari's Tagore Law Lectures (1880), page 707, and that is a mode which the lower Appellate Court has adopted. We think that the decision of that Court is right. We dismiss the appeal with costs.

Appeal dismissed.

(1) 25 Ind. Cas. 290; 12 A. L. J. 1281; 41 I. A. 290; 18 C. W. N. 1154; 27 M. L. J. 333; 1 L. W. 831; 16 M. L. T. 447; (1914) M. W. N. 835; 16 Bom. L. R. 863; 20 C. L. J. 573; 10 N. L. R. 112; 42 C. 384.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 494 OF 1912.

July 7, 1915.

Present:—Mr. Justice Batchelor and
Mr. Justice Hayward.

USMANMIYA ABDULLAMIYA—
DEFENDANTS NOS. 1 & 2—APPELLANTS

versus

VALIMAHOMED HUSAINBHAI—

DEFENDANT No. 3—RESPONDENT.

Muhammadian Law—Acknowledgment of son—Son of another, if can be acknowledged—Acknowledgment of sonship, when amounts to acknowledgment of legitimacy.

A Muhammadan cannot legally acknowledge as his son a person who is shown to be the son of another man. [p. 904, col. 2.]

An actual declaration of acknowledgment includes only an admission of sonship yet that admission can be regarded as tantamount to an acknowledgment of legitimate sonship if there are circumstances to justify it. [p. 905, col. 2.]

Second appeal from the decision of the District Judge, Ahmedabad, in Appeal No. 233 of 1909, confirming the decree passed by the Subordinate Judge, Ahmedabad, in Civil Suit No. 135 of 1906.

Mr. G. S. Rao, for the Appellants.

Mr. K. N. Koyajee, for the Respondent.

JUDGMENT.—The suit out of which this appeal arises was brought by one Sardarbibi as the widow of Husseinbhai Abdullabhai to recover possession of her one-fourth share of the deceased's property. Husseinbhai died in June 1904. He left no issue, but he left a widow, the present plaintiff, and two brothers, the 1st and 2nd defendants. The 1st and 2nd defendants did not dispute the claim of the plaintiff, but the 3rd defendant resisted the plaintiff's suit and claimed to be the acknowledged son of the deceased Husseinbhai. Both the lower Courts have acceded to the 3rd defendant's contention, and the present appeal is brought, not by the plaintiff, but by the 1st and 2nd defendants who are represented before us by Mr. Rao.

The learned Pleader for the appellants has taken two points in his clients' interests. The first of those points is that a Muhammadan cannot legally acknowledge as his son a person who is shown to be the son of another man. It appears to me that this legal proposition is well grounded, and among the numerous authorities which

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may be cited in its favour we may mention Hamilton's Hedaya at page 439, Sir Barnes Peacock's judgment in *Musammatt Jaibun v. Musammatt Bilee Nujeeboonissa* (1) and the elaborate judgments in *Muhammad Allahdad Khan v. Muhammad Ismail Khan* (2).

But the question is, whether in the present case the 3rd defendant is shown not to have been the son of Husseinbhai. That is a question of fact and the decision of it rests with the lower Courts. Mr. Rao, however, urges that one of the necessary facts is the recital to be found in the deed of gift by Husseinbhai to the 3rd defendant, Exhibit 142, in which occurs this passage: "the reason why these fields are given to you in gift is that your parents died leaving you only about twenty days old". It is, therefore, urged that we have no option but to infer that whosoever may have been the father of the 3rd defendant, that father could not have been the donor, Husseinbhai. We think the answer to this contention is that the admission which we have set out is only one fact among many other facts upon which the lower Courts had to determine the question whether the 3rd defendant was shown not to be the son of Husseinbhai. It cannot be said that the learned Judges below have omitted to consider the admission in the deed of gift, nor can it, we think, be said that by reason of that admission they were bound to come to the conclusion in the appellants' favour. What they have done is, we think, what they were bound to do. They have considered this admission as one piece of evidence, but on a general examination of all the evidence bearing upon this point, they have found that the 3rd defendant is not shown to have been the son of any person other than Husseinbhai. That conclusion of fact being perfectly open to the Judges below on the evidence is not, in our opinion, subject now to review in second appeal. And since that is the conclusion of fact, the position in law seems to us to be precisely that which, according to Mr. Justice Mahmood in *Muhammad Allahdad Khan v. Muhammad Ismail Khan* (2), invites the application of the Mohammadan

doctrine of *ikrar* or acknowledgment; for, the learned Judge says at page 335 of the report: "The doctrine relates only to cases where either the fact of the marriage itself or the exact time of its occurrence with reference to the legitimacy of the acknowledged child is *not proved* in the sense of the law as distinguished from disproved". So here, as we understand the judgments, both Courts hold that the probability is that defendant No. 3 is the son of Husseinbhai by a union of doubtful validity.

The only other argument submitted on behalf of the appellants was based upon the Privy Council decision in *Abdul Razak v. Aga Mahomed Jaffer Bindanim* (3), which followed their Lordships' decision in *Ashrufood Dowlah Ahmed Hossein Khan Bahadoor v. Hyder Hossein Khan* (4). The argument was that for an acknowledgment of sonship to be valid according to Muhammadan Law, it must be an acknowledgment not merely of sonship but of legitimate sonship. It is clear, however, that the decisions in the two cases which we have noticed must be read in the light of the facts which were then before the Privy Council, and in both of these cases the Court was concerned with a Muhammadan son born out of wedlock, so that it was imperative to see that the acknowledgment relied upon was not a mere acknowledgment of sonship as opposed to an acknowledgment of legitimacy. In our present case there is not any such special reason for insisting upon a clear expression of the acknowledgment of legitimacy, and though the actual declaration of acknowledgment includes only an admission of sonship, yet that admission, when read according to the circumstances of this case, must, we think, be regarded as tantamount to an acknowledgment of legitimate sonship. That is the view which both the Courts have taken upon the evidence as to the treatment which Husseinbhai gave to the third defendant, as to the conduct which each of them pursued towards each other, and as to the terms upon which they stood as disclosed

(1) 12 W. R. 497.

(2) 10 A. 289.

(3) 21 C. 666 (P. C.); 21 I. A. 56.

(4) 11 M. I. A. 94; 7 W. R. 1 (P. C.); 1 Suth. P. C. J. 659; 2 Sar. P. C. J. 223; 20 E. R. 37.

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in the deeds of gift. We are satisfied upon the same evidence that the acknowledgment, though in express terms only acknowledging sonship, must, in the circumstances now appearing, be taken to have amounted to an acknowledgment of legitimate sonship.

These being the only two points urged on the appellants' behalf and both of them, in our opinion, failing for the reasons stated, we confirm the lower Court's decree and dismiss the appeal with costs.

Appeal dismissed.

CALCUTTA HIGH COURT.

LETTERS PATENT APPEAL No. 2 OF 1912.

July 2, 1915

Present:—Sir Lawrence Jenkins, Kt., Chief Justice, Justice Sir Asutosh Mookerjee,

Kt., and Mr. Justice Richardson.

BAIJNATH MISTRI AND OTHERS—

PLAINTIFFS—APPELLANTS

versus

Raja JUNG BAHADUR—DEFENDANT—

RESPONDENT.

Appeal—Letters Patent, cl. 15—Rule discharged under s. 115 of Civil Procedure Code, if appealable

Where a rule issued under section 115 of the Code of Civil Procedure, 1908, was discharged by a Bench of the High Court in accordance with the opinion of the senior Judge, the Court being divided in its opinion on the question of its jurisdiction to interfere in revision:

Held, that the order was not appealable under clause 15 of the Letters Patent. [p. 907, col. 2.]

Letters Patent Appeal from the decision of Stephen and D. Chatterjee, JJ., dated the 29th January 1912, in Civil Rule No. 4742 of 1911, against the decision of the Judicial Commissioner of Ranchi, dated the 20th May 1911, modifying that of the Munsif of Giridih, dated the 10th December 1910.

FACTS of the case appear from the following

JUDGMENT.

STEPHEN J.—This suit is brought on a promissory note executed in favour of the plaintiff by the second defendant, who was then the *Dewan* of the father of the first defendant. The consideration for the note was an advance of money to the second defendant to enable him to pay road-cess on behalf of the father of the first defendant. In the Munsif's Court it was held

that the second defendant had an implied authority from the father of the first defendant to raise the money and that his action had been ratified by the first defendant. The suit was accordingly decreed against the first defendant. On appeal to the Judicial Commissioner, this decree was set aside, on the finding that the second defendant had no authority to borrow money on behalf of the first defendant, and that the acts necessary to constitute a ratification of the second defendant's action by the first did not occur. A Rule has been issued calling on defendant No. 1 to show cause why this order should not be set aside. The question whether defendant No. 2 had authority to bind defendant No. 1 is one which the Court had jurisdiction to decide and we cannot interfere with its decision on revision. It is argued before us, however, that the question of ratification was an issue in the case, and that the Judicial Commissioner failed to exercise his jurisdiction to decide it. The question of ratification was not expressly set out as an issue, but as it is independent of the question of the authority of the second defendant, it must be regarded as an issue by itself. The finding of the trying Court is that on demand being made of the first defendant he told the second defendant to pay the amount claimed out of his rent collections. The Appellate Court found that the question whether this occurred was immaterial, that there would have been ratification if certain circumstances had occurred which did not, in fact, occur, and that the facts found by the first Court constituted no admission that the money ordered to be paid was to come out of the pocket of the first defendant. The law laid down by the Judicial Commissioner cannot be accepted as correct, but looking at the facts of the case I cannot doubt that he had the question of ratification before his mind, and that he in fact decided it adversely to the petitioner. I am of opinion, therefore, that he has not declined jurisdiction in this matter, and that he has not acted with material irregularity within the meaning of section 115 of the Code, and consequently that this Rule should be discharged.

The Court being divided in its opinion, the opinion of the senior Judge prevails.

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The Rule is discharged. No order as to costs.

D. CHATTERJEE, J.—I regret very much that I am unable to agree with my learned colleague in the view he has taken of this case.

The plaintiff expressly alleged in his plaint that the defendant No. 1 had admitted the debt after the death of his father. This was denied by the defendant No. 1. The case of the plaintiff was that even if the defendant No. 2 had no initial authority to bind the Raja, the latter had, when a demand was made of him for the debt, directed his servant, defendant No. 2, to re-pay the debt, from the collections of his estate. The learned Munsif found that this was so and that there had been a clear ratification or admission of the debt. The learned Judge thinks that this issue of ratification was immaterial and does not come to any finding upon it. The reason given is that it would have been ratification if the Raja had directed payment from his procket, but would not be ratification as the money was directed to be paid from the collections of his estate. This view of law is decidedly erroneous, but that alone would not perhaps by itself give us jurisdiction to interfere in revision. Here, however, the learned Judge has not come to a decision on the facts alleged to have occurred, and has thereby left undecided the most important issue in the case. He has, I think, by so doing, not only acted with material irregularity, but virtually refused to exercise a jurisdiction vested in him by law. The decision of the Privy Council in the case of *Amir Hassan Khan v. Sheo Buksh Singh* (1) has been relied on as negating our jurisdiction to interfere in this case. Their Lordships held in that case that a Court deciding a question of law wrongly does not exercise jurisdiction illegally or with material irregularity. The judgment of the Judicial Committee does not furnish any test, however, for determining under what circumstances a Court may be said to have acted illegally or with material irregularity. See *Dwarka Nath Sen v. Kisori Lal Gosain* (2). In the case of

Silharathrai Soojanrai v. Anantram Baldeodas (3), the Bombay High Court (Jenkins, C. J., and Aston, J.) held that where a Court refuses to set aside an *ex parte* decree on an erroneous view of the law of limitation, it fails to exercise a jurisdiction vested in it by law. In the case of *Rudrappa v. Narasingrao* (4) the same Court (Jenkins, C. J., and Batchelor, J.) held that where the only issue tried by the lower Court is not an issue upon which the dispute could be adjudicated upon, it is an exercise of jurisdiction with material irregularity. So the returning of a plaint without warrant of law has been held to be an acting illegally in the exercise of jurisdiction: *Zamiran v. Fateh Ali* (5).

I think these are sufficient authorities on which we can hold that the action of the Court below is within the mischief of section 115 of the Civil Procedure Code.

I would, therefore, make the Rule absolute and send the case back to the lower Court for a proper decision of the issue of ratification.

Against the above decision an appeal was preferred under clause 15 of the Letters Patent.

Mr. H. N. Sen and Babu Rajendra Chandra Guha, for the Appellant.

Babu Nares Chandra Sinha, for the Respondent.

JUDGMENT.—Though we have heard Mr. Sen and listened to an interesting and careful argument, we certainly do not mean to hold that he was entitled to be heard and that an appeal lies. But it is enough for us to say that notwithstanding what he urged, it is clear that there was no case for revision under section 115 of the Code.

We must, therefore, dismiss the appeal with costs.

We assess the hearing fee at one gold mohur.

Appeal dismissed.

(3) 8 Bom. L. R. 567.

(4) 29 B. 213; 7 Bom. L. R. 12.

(5) 32 C. 146.

(1) 11 C. 6 (P. C.); 11 L. A. 237; 4 Sar. P. C. J. 559; Rafique & Jackson's P. C. No. 83.

(2) 6 Ind. Cas. 549; 14 C. W. N. 703; 11 C. L. J. 426.

SHEO NANDAN v. RAM LAGAN SINGH.

ALLAHABAD HIGH COURT.
SECOND CIVIL APPEAL NO. 1310 OF 1914.
July 13, 1915.

Present:—Mr. Justice Tudball.

SHEO NANDAN AHIR—DEFENDANT—

APPELLANT

versus

RAM LAGAN SINGH AND ANOTHER—

PLAINTIFFS—RESPONDENTS.

Evidence Act (I of 1872), s. 90—Mortgage-bond more than 30 years old signed by scribe—Presumption of execution—Proof.

A mortgage-deed more than 30 years old was signed not by the executant but by the scribe on behalf of the executant:

Held, that under section 90 of the Evidence Act, there was no presumption that the scribe had any authority from the mortgagor to sign his name on the document. [p. 909, col. 1.]

Second appeal from a decree of the District Judge of Azamgarh.

Mr. Shamnath Mushran, for the Appellant.

Mr. Narmadeshwar Prasad Upadhyaya (with him Mr. Surendra Nath Sen), for the Respondents.

JUDGMENT.—This is a defendant's appeal and arises out of the following circumstances. The property in dispute is an occupancy holding. The appellant Sheonandan and one other brought a suit against the plaintiff in the Revenue Court for arrears of rent. Sheonandan's case was that the holding had been mortgaged to certain mortgagees who had sub-let the land to Ram Lagan Singh, that the mortgage had been redeemed, that Ram Lagan Singh remained on as a sub-tenant and that he was liable for arrears of rent. Ram Lagan's case was that he was not a sub-tenant but that he held the land as a mortgagee in possession on an old mortgage of 1920 *Sambat*. The Revenue Court went into the matter, held that Ram Lagan had failed to establish any mortgage and gave Sheonandan a decree for arrears of rent. Then Sheonandan and his companion brought another suit in the Revenue Court to eject Ram Lagan Singh (and one other) as being a sub-tenant. The latter again put forward his plea that he held as a mortgagee under this old mortgage. The Revenue Court referred Ram Lagan to the Civil Court to obtain a declaration as to whether or not he held this land as a mortgagee. Thereupon Ram Lagan Singh and another plaintiff brought the present suit against Sheonandan Ahir, and claimed a declaration that the plaintiffs

held the land as a mortgagee. The Court of first instance dismissed the suit. The lower Appellate Court decreed the suit. The defendant Sheonandan comes here on second appeal. Two points were pressed. The first is that the very point in dispute between the parties is *res judicata* by reason of the decision by the Revenue Court in the rent suit. The second point is that the plaintiffs have failed to prove the mortgage which they put forward. I do not propose to touch the question of *res judicata* because in my opinion it is quite clear that the plaintiffs in the present suit have failed to establish any mortgage whatsoever in their favour. The mortgage-deed set up by them is dated 1920 *Sambat* corresponding to February 1864. The document is unregistered. It is in the handwriting completely from beginning to end of one person. It purports to be in the handwriting of Gajadhar Das. The names of the executants and the names of the witnesses purport to have been written upon the document by the hand of Gajadhar Das. No portion of the document purports to have been written by the mortgagors. The alleged executants and the alleged attesting witnesses and the scribe are all said to have died. The plaintiffs produced the son of the scribe to testify to the fact that the whole of the document is in the handwriting of his father. There is not a scrap of evidence to prove that Gajadhar Das had any authority from the alleged mortgagors or the alleged attesting witnesses to sign their names upon the document. The lower Appellate Court in the course of its judgment remarks as follows: "The scribe has signed for all the executants. It, therefore, appears that he was authorized by them to do so and the plaintiffs have proved the handwriting of the man who signed for the executants." It is a mere assumption on the part of the lower Appellate Court that the scribe appears to have been authorized by the alleged mortgagors to sign their names. The lower Appellate Court also purported to apply section 90 of the Indian Evidence Act and to presume the document to be genuine. Under section 90 a Court may presume that the signature and every other part of a document which purports to be in the handwriting of any particular person is in that person's handwriting and in the case of a

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document executed or attested, that it was duly executed and attested by the persons by whom it purports to be executed and attested. The present document does not purport to be executed by the mortgagors at all. It purports to have been executed by Gajadhar Das for the mortgagors. Section 90 does not allow a Court to presume that Gajadhar Das had any authority from the mortgagors to sign their names upon this document. The respondents' case is somewhat peculiar. If this mortgage-deed be a true one, then they and their predecessor-in-title must have held possession for at least fifty-two years and one would have thought that it would be easy to prove their possession by means of the Government record. But apparently they have been unable to prove possession for anything more than fourteen or fifteen years, and that only by the admission of the opposite party. The lower Appellate Court in its judgment says:—"It has been produced from proper custody and as I shall show later on, the plaintiffs-mortgagees have been in possession in accordance with this deed." Later on what the lower Appellate Court says about the plaintiffs' possession is as follows: "The possession of the plaintiffs for at least fourteen or fifteen years has been admitted by the defendants. The oral evidence coupled with the mortgage-deed shows that the plaintiffs have been in possession as mortgagees." It is impossible to hold that the plaintiffs-respondents held possession as mortgagees, unless and until it could be established that a mortgage was ever created. The document under which the plaintiffs claim as mortgagees no doubt exists and purports to have been written and the names of the executants to have been signed thereon by one Gajadhar. No authority from the mortgagors in favour of Gajadhar has been proved. Therefore it is impossible to say that this mortgage-deed was executed by or with the consent of the alleged mortgagors. The mortgage not having been established it is impossible to give to the plaintiffs a decree declaring that they hold the land as mortgagees. In my opinion the decision of the Court of first instance was quite correct. I allow this appeal, set aside the decree of the lower Appellate Court and restore that of the Court of first

instance. The appellant will have his costs in all Courts.

Appeal allowed.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL NO. 283 OF 1914.

July 16, 1915.

Present:—Mr. Justice Batchelor and

Mr. Justice Hayward.

MANCHHARAM PRANJIVANDAS

AND ANOTHER—DEFENDANTS NOS. 1 AND 2—

APPELLANTS

versus

PANUBHAI LALLUBHAI AND OTHERS—

PLAINTIFFS—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Art. 91, object of—Deed invalid—Suit for possession—Deed, if first to be set aside.

Where the deed or instrument which seems to stand between a plaintiff and the realization of his claim in the suit is an actual nullity, the plaintiff is entitled to bring his suit for possession within twelve years and is not hindered by the narrower period laid down in Article 91 of the Limitation Act, 1908. [p. 910, col. 1.]

The only object of Article 91 of the Limitation Act, 1908, is to compel a plaintiff to remove out of his way some real existing obstacle, but where there is no real obstacle the Article has no scope for operation. [p. 910, col. 1.]

Second appeal from the decision of the District Judge of Surat in Appeal No. 95 of 1910, confirming the decree passed by the Subordinate Judge of Surat in Civil Suit No. 248 of 1908.

Mr. K. N. Koyajee, for the Appellant.

Mr. P. D. Bhide, for the Respondents
Nos. 1 to 3.

JUDGMENT.—The appellant here was the 1st defendant in the suit, and the suit was brought by the plaintiffs for possession of a house. The plaintiffs claimed as legatees or reversioners either of one Tribhowandas or of Tribhowandas' posthumous son, who survived Tribhowandas for a period of three years. Four years after Tribhowandas' death his widow, who was the 2nd defendant, mortgaged the house in suit to present appellant who was her own brother.

The only questions with which we are concerned in this appeal are, whether the mortgage by the widow was without necessity and whether the plaintiffs' suit is

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out of time. On the first point the finding of the lower Courts that the mortgage was without necessity is conclusive as being a finding of fact, and though we have allowed Mr. Koyajee, for the appellant, to point out to us some alleged slips in the judgment of the lower Court upon this question, we are clearly of opinion, without examining whether the alleged slips or mistakes are really mistakes, that there is ample and convincing evidence for the lower Courts' finding on this point.

As to the question of limitation, the argument for the appellant is that the suit is governed by Article 91 of the Indian Limitation Act, which prescribes for the institution of the suit a period of three years from the date when the facts entitling the plaintiff to have an instrument cancelled or set aside become known to him. The contention is that though in form the present suit is a suit for possession, yet it must be regarded as essentially a suit to set aside the widow's mortgage, because until that mortgage is set aside, the plaintiffs cannot obtain possession of the property. As to this point the authorities, we think, are in accord, and are to the effect that where the deed or instrument which seems to stand between a plaintiff and the realization of his claim in the suit is an actual nullity, the plaintiff is entitled to bring his suit for possession within twelve years, and is not hindered by the narrower period laid down by Article 91, and that, if one may say so, seems to be good sense. For the only object of Article 91 is to compel a plaintiff to remove out of his way some real existing obstacles; but where there is no real obstacle, the Article has no scope for operation. Now here it is found, in the words of the learned District Judge, that "the story of the equitable mortgage is absolutely false", or in the still plainer language of the trial Judge, "the deed passed by the widow to her brother was never intended to operate as a real mortgage transaction." What we have, therefore, is not a mortgage or any real thing whatsoever, but a mere sham or nothing, which the plaintiff was under no obligation to sue to remove.

There are many decisions which seem

to us to bear out this construction of Article 91, but it will be sufficient for our present purpose to refer to what was said by the Privy Council in *T. F. Petherpermal Chetty v. R. Muniandy Servai* (1), where Lord Atkinson observed:—

"As to the point raised on the Indian Limitation Act, 1877, their Lordships are of opinion that the conveyance of the 11th June 1895, being an inoperative instrument, as in effect it has been found to be, does not bar the plaintiff's right to recover possession of his land, and that it is unnecessary for him to have it set aside as a preliminary to his obtaining the relief he claims."

So here, the apparent obstacle created by the mortgage is now ascertained to be no obstacle or real thing at all. Therefore, there was never anything which it could have been the plaintiff's duty to remove from his path before he could claim possession.

The appeal is dismissed with costs.

Appeal dismissed.

(1) 10 Bom. L. R. 590 at p. 599; 35 C. 551 (P. C.); 4 N. L. R. 65; 7 C. L. J. 528; 4 M. L. T. 12; 18 M. L. J. 277; 14 Bur. L. R. 108 35 I. A. 98; 12 C. W. N. 562; 5 A. L. J. 290; 4 L. B. R. 266.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 1794 of 1910.

April 2, 1913.

Present:—Sir Lawrence Jenkins, Kt., Chief Justice, Justice Sir Asutosh Mookerjee, Kt., and Mr. Justice Beachcroft.

Maharaja BIRENDRA KISORE
MANIKYA BAHADUR—PLAINTIFF—

APPELLANT

versus

BHARAT CHANDRA SINHA AND
OTHERS—DEFENDANTS—RESPONDENTS.

Bengal Land Revenue Assessment (Resumed Lands) Regulation (II of 1919)—Bengal Land Revenue Resumption Act (VII of 1862)—Decree ordering liability to rent, effect of.

The plaintiff sued the defendants for ejectment as mere trespassers. The suit was dismissed as barred by time. In appeal it was contended that a previous decree in what was called a resumption suit established the relationship of landlord and tenant between the parties and hence the suit was within time.

Held, that the decree could not be accepted as establishing the relationship of landlord and tenant, inasmuch as the resumption suit was one instituted under Regulation II of 1919, and

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subsequently transferred to the Civil Court under Bengal Act VII of 1862, and it was at least as reasonable to regard it as a suit dealing with revenue as a suit dealing with rent and, moreover, it was the predecessor of the defendant that was a party to that suit. [p. 911, cols. 1 & 2.]

Appeal against the decree of the Subordinate Judge of Tipperah, dated the 16th February 1910, affirming that of the Munsif of Comilla, dated the 24th August 1909.

Babu Dwarka Nath Chakrabarti, Gobind Chandra Dey Roy and Romes Chandra Sen, for the Appellant.

Dr. Sarat Chandra Basak, for the Respondents.

JUDGMENT.

JENKINS, C. J.—This second appeal arises out of a suit whereby the plaintiff seeks against two defendants *khas* possession, with an alternative prayer that if the Court should think that defendant No. 1 could not be ejected from the land, then the plaintiff might be declared entitled to rent from him. These prayers are based upon allegations in the plaint, which set up a title in the plaintiff and proceed to state that defendant No. 1 has legally no right to hold and retain possession of the land and that both the defendants are mere trespassers. Both the lower Courts have decided against the plaintiff, holding that the suit is barred by limitation. In my opinion, that decision is correct. It, in effect, is in accordance with our determination in the previous appeals. But it is contended that there is a distinction in this case, which arises out of a decree in what has been termed a resumption suit. The argument is that this decree established the relationship of landlord and tenant between the plaintiff and both the defendants. The decree is translated and we have also had the advantage of having the original vernacular decree brought to our notice. I agree with the lower Court that the decree cannot be accepted as establishing the relationship of landlord and tenant. The suit was one instituted under Regulation II of 1819 and subsequently transferred to the Civil Court under Bengal Act VII of 1862; and it is at least as reasonable to regard it as a suit dealing with revenue as a suit dealing with rent. Moreover, it was the predecessor of defendant No. 2 that was a

party to that suit, and defendant No. 2 is now treated as a trespasser. I, therefore, hold that the suit must fail and would confirm the decree of the lower Appellate Court with costs.

MOOKERJEE, J.—I agree.

BRACHCROFT, J.—I agree.

Appeal dismissed.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1342 OF 1914.

July 16, 1915.

Present:—Justice Sir George Knox, Kt.

BHAGWANA AND ANOTHER—DEFENDANTS—

APPELLANTS

versus

BHAGWAN DAS AND OTHERS—PLAINTIFFS—

RESPONDENTS.

Mortgage of sir before Tenancy Act II of 1901—Ex. proprietary right—Subsequent sale of sir—Right of mortgage, if affected—Agra Tenancy Act (II of 1901), s. 10, cl. (12)—N. W. P. Rent Act (XII of 1881), s. 7.

In 1896 a zemindar executed a usufructuary mortgage of a portion of his *zemindari* including *sir*. In 1907 the *zemindari* was sold at auction. The auction purchaser got the *zemindar* ejected from his ex-proprietary right and then brought another suit to eject the mortgagee:

Held, that the mortgagee could not be ejected, inasmuch as the mortgage having been made prior to the passing of Act II of 1901, the *zemindar* had not become an ex-proprietary tenant by virtue of his mortgage. [p. 912, col. 1.]

Second appeal from a decree of the District Judge of Meerut.

Dr. Surendra Nath Sen, for the Appellants.

Mr. Gokul Prasad, for the Respondents.

JUDGMENT.—In the year 1896 one Kure was the proprietor of a certain share in *Mauza Lohari*, Pargana Kutana. Out of that share he mortgaged a portion consisting of a little over a *bigha* to the appellants. The mortgage was a usufructuary mortgage and Kure put the appellants in possession of the plots now in dispute. In the year 1907 a portion of Kure's property covering an area of eight *bighas* eleven *biswas* was put up to auction in execution of a Civil Court decree and sold. The purchasers at auction were the respondents in the present case. The purchasers went to the Revenue Court and got mutation of

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names in their favour. They further had a rent of Rs. 44-14-2 fixed on the ex-proprietary holding of Kure. In the year 1912 the auction-purchasers proceeded further and obtained the ejectment of Kure from his entire ex-proprietary holding. Having done this, they next proceeded to sue for the ejectment of the present appellants, Bhagwana and Dewana, from the two plots Nos. 2570 and 2571. These two plots are included in the area of eight *bighas* eleven *biswas* from which Kure had been ejected.

The appellants in their written statement raised the point that they were mortgagees co-sharers and were in possession as such and that the plots in dispute were their *khudkasht*. The Court of first instance accepted this plea and dismissed the suit. Thereupon the respondents, Bhagwan Das and others, appealed. The lower Appellate Court held that the question for determination in the appeal was whether the respondents to this appeal were entitled to have the appellants ejected. The lower Appellate Court, holding that when Kure was ejected from the plots the appellants were merely trespassers, went on to hold that the plaintiffs were clearly entitled to have the defendants ejected. It accordingly allowed the appeal and decreed the plaintiffs' suit with full costs throughout. Two pleas were taken in the memorandum of appeal which the defendants have filed in this Court. Great stress is laid upon the first plea, *viz.*, that the plaintiffs, here respondents, were not competent to eject the defendants, here appellants, in enforcement of the decree against Kure. I think no doubt can exist upon this point. Indeed it is admitted by the other side that when the mortgage in 1896 was first entered into between the parties, Kure was then *zemindar* and he did execute a usufructuary mortgage over the two numbers in suit and put the mortgagees in possession. In 1896 and the year following this Court held that a *zemindar* who makes a usufructuary mortgage of his *zemindari* including his *sir* land does not so lose or part with his proprietary rights "within the meaning of section 7 of Act XII of 1881 as to become an ex-proprietary tenant of his *sir* land." This was held in the case of *Madho Bharthi v. Barti Singh* (1) by all the Judges of this Court sitting in Full Bench. From 1896 onward then Kure continued to be the proprietor over the land in dispute and was not an ex-proprietary

tenant only. In the year 1901, the N.-W. P. Tenancy Act was passed and that Act (section 10, clause 12) has enacted that a usufructuary mortgage shall be deemed to be a transfer within the meaning of that section. Whatever effect that may have had upon the position of Kure it is not necessary to determine, but the passing of that Act could not affect the right which had been created in favour of the appellants prior to the passing of that Act. Section 6 of the Local General Clauses Act, clause (c), expressly lays down that where an Act of the United Provinces Legislature repeals any enactment hitherto made or hereafter to be made, then, unless a different intention appears, the repeal shall not affect any right, privilege, obligation or liability acquired, accrued or incurred under any enactment so repealed. No such intention has been pointed out to me nor do I know of any. On behalf, however, of the respondents my attention has been called to the case of *Sham Das v. Batul Bibi* (2). In that case it was undoubtedly held that a *zemindar* having mortgaged by way of usufructuary mortgage his *zemindari* together with his *sir* land lost his *zemindari* rights and became an ex-proprietary tenant of his *sir*. There is one difference between that case and the present. In *Sham Das v. Batul Bibi* (2) the mortgagor parted with the whole of his rights in the property held by him and it was in pursuance of the mortgage, the mortgagee obtained a decree for sale, sold that property in execution of the decree and purchased it and obtained possession. I do not think that that case is a safe precedent to follow in the present case and even if it applies, then the only difference is that the mortgagee rights of the appellants must be held to attach to the ex-proprietary rights which Kure held when the sale took place. The learned Judge of the Court below and the Vakil of the respondents lay some stress upon the fact that the sale of the ex-proprietary rights was not subject to any incumbrance in favour of one Sumrat, but the present appellants were no parties to that decree and it does not appear that they were ever sent for and asked as to how the property should be sold.

I allow the appeal, set aside the decree of the lower Appellate Court and restore that of the Court of first instance.

Appeal allowed.

(2) 24 A. 538; A. W. N. (1902) 155.

(1) 16 A. 337; A. W. N. (1894) 110.

NAZARALLI SAYAD IMAM v. BABAMIYA DUREYATIMSHA.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 836 OF 1914.

July 21, 1915.

Present:—Sir Basil Scott, Kt., Chief Justice,
and Mr. Justice Shah

NAZARALLI SAYAD IMAM—

PLAINTIFF—APPELLANT

versus

BABAMIYA DUREYATIMSHA—

DEFENDANT—RESPONDENT.

Contract Act (IX of 1872), s. 23—Agreement with licensee to share profits—Agreement not allowed by terms of license—Agreement, if void.

As there is nothing in the Forest Act which makes it obligatory upon a licensee from a Forest Officer to observe the conditions of his license, an agreement to share profits with the licensee is not void.

Second appeal from the decision of the District Judge of Khandesh, in Appeal No. 315 of 1913, reversing the decree passed by the Subordinate Judge at Shirpur, in Civil Suit No. 640 of 1912.

Mr. Pendse (with him Mr. H. G. Kulkarni), for the Appellant.

Mr. P. B. Shingne, for the Respondent.

JUDGMENT.—The plaintiff sues the defendant to have it declared that he is entitled to recover half the share in the profit and loss made by the defendant in the grass contract for nine forest coups, and to recover the sum falling to his share as damages and costs. The defendant denied the alleged partnership in the terms set up in the plaint, and contended that the suit was bad as being based on an agreement, if there was such an agreement, which was void under section 23 of the Indian Contract Act.

The learned Subordinate Judge found that the agreement was not unlawful under section 23 of the Indian Contract Act. Therefore, he directed that a preliminary decree should be drawn up on that issue.

The learned District Judge reversed the preliminary decree and remanded the case to the lower Court. The appellant has appealed to this Court on the ground that the lower Court erred in holding that the agreement of partnership was unlawful. But notwithstanding the pendency of the appeal, it appears that the suit has been tried in the first Court on the basis of the judgment of the District Court being correct. That, however, need not prevent us from disposing of this appeal. We are of opinion that the judgment of the

District Court is not correct. The section of the Indian Contract Act which is relied upon is section 23, which says: "The consideration or object of an agreement is lawful, unless it is forbidden by law; or is of such a nature that, if permitted, it would defeat the provisions of any law;" and it is contended, because the license given by the Forest Officer prohibits the assignment of a share or interest in the license, therefore, this agreement to pay half the profits to the plaintiff falls within the words of section 23 above referred to. We have examined the Forest Act, and we have heard all that can be said by the Pleader for the respondent in support of the judgment of the Court below. We are unable to find any provision of Statute Law which makes it obligatory upon the parties to observe the conditions of the license. Of course, the license can be revoked by the Forest Officer if the licensee disregards the terms of it. It does not follow from that, that an agreement to share profits which would contravene the terms of the license as between the Forest Officer and the licensee, is forbidden by law, or would defeat the provisions of any law. The learned District Judge has relied upon the case of *Raghunath Lalman v. Nathu Hirji Bhate* (1), which, however, is distinguishable. That was a case under the Opium Act under which the sale of opium was only permitted subject to such conditions as the Commissioner might, from time to time, prescribe. Therefore, the sale of opium by partners who could not enter into partnership without contravening the conditions prescribed would violate the provisions of the Opium Act.

We set aside the decree of the District Judge upon the preliminary issue, and direct the Judge of the lower Court to dispose of the case on the merits. The respondent must pay the costs in this Court and the lower Appellate Court upon the preliminary issue.

Decree set aside.

(1) 13 B. 626.

KADIR BUX v. BIRENDRA KISORE MANIKYA.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEALS NOS. 1783 AND 1784
OF 1910.

April 3, 1913.

Present:—Sir Lawrence Jenkins, Kt., Chief
Justice, Justice Sir Asutosh Mookerjee,
Kt., and Mr. Justice Beachcroft.

KADIR BUX AND OTHERS—DEFENDANTS—
APPELLANTS

versus

Maharaja BIRENDRA KISORE
MANIKYA BAHADUR—PLAINTIFF

—RESPONDENT.

*Adverse possession—Long possession—Non-payment
of rent.*

Where the defendant has been in possession on his own behalf far beyond the statutory period and during all this time there has been no payment of rent by him and no receipt of rent by the plaintiff in respect of the land in suit, there are the elements that are required for a plea in bar by reason of adverse possession. [p. 914, col. 2.]

Appeal against the decision of the Officiating Subordinate Judge, Tipperah, dated the 23rd February, 1910, modifying that of the first Munsif, Comilla, dated the 2nd March 1909.

Babu Sasadhar Roy, for the Appellants.

Mr. S. P. Sinha and Babus Dwarka Nath Chakravarti, Gobinda Chunder Dey Roy, Romes Chunder Sen and Birendra Chunder Das, for the Respondent.

JUDGMENT.—In these two appeals, the right of the Maharaja has been affirmed by the lower Appellate Court, and it has been held that he is entitled to have the lands in suit assessed with the rental of Rs. 2 per *kani* and also to get mesne profits. From the decrees of the lower Appellate Court, the defendants have come to this Court by way of second appeal. Here, as in other cases, much of the difficulty experienced has been created by the disregard of the essential allegations in the pleadings. The plaint here alleged wrongful dispossession and claimed by reason thereof *khas* possession or, in the alternative, rent as is permitted by the provisions of the Bengal Tenancy Act.

The defence was *nishkar* right, limitation and in one case work done of a substantial character. The lower Appellate Court has come to findings which it is difficult to follow, because it declares the existence of a tenancy and at the same time directs that mesne profits be paid. Mr. Sinha has admitted that this is erroneous, and I feel that

perhaps, the real points at issue were not clearly placed before the Court and hence there has been some confusion of ideas. Now, there can be no doubt that there was long possession by each defendant on his own behalf far beyond the statutory period and that, during this period, there has been no payment of rent by the defendants and no receipt of rent by the plaintiff in respect of the lands in suit, and thus there are the elements that are required for a plea in bar by reason of adverse possession. To escape from this predicament the plaintiff, contrary to the allegations in his own plaint, suggests that the defendants were his tenants and in support of that, relies on what is called an admission contained in paragraph 6 of the written statement. That paragraph has been read to us more than once and it is clear that it is not an admission, but is merely a suggested explanation of how the present position of affairs might have come about.

It was an essential part of that suggestion that there was a custom of the character there described, but that custom has not been found to be established. And though at one time the learned Counsel for the plaintiff did state before us that the Maharaja had not denied the custom, when it was put to him whether he admitted the custom, he declined to do so, and for very good reason. In the circumstances, it cannot be fairly suggested that what is stated in paragraph 6 of the written statement, amounts to an admission. Then again, there is the further finding of the lower Appellate Court that there has been an encroachment on adjoining lands and thus those adjoining lands which are the subject-matter of this suit have become the subject of the original tenancy. Mr. Sinha has very frankly admitted that if they thus became part of the tenancy, the suit as at present framed must fail as being one inappropriate for the purpose of raising and procuring a decision of the question, whether or not there should be an enhancement in respect of this particular holding which has been enlarged by the encroachment. The result then is this:—The facts apart from this theory of encroach-

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ment do not show there ever was the relationship of landlord and tenant between the plaintiff and the defendants, and so there is nothing in the way of the application of the plea of limitation. If the plea of limitation be applied then the suit fails. If, on the other hand, it be said that this finding of encroachment is conclusive then the suit is misconceived. Whichever view then is taken the suit fails. We, therefore, must reverse the decree of the lower Appellate Court and dismiss the suit with costs in all the Courts in each case.

Appeals allowed.

BOMBAY HIGH COURT.

FIRST CIVIL APPEAL NO. 231 OF 1912.

March 22, 1915.

Present:—Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Batchelor.

MAFATLAL MOTILAL—PLAINTIFF

—APPELLANT

versus

KANIALAL TRIKAMLAL—DEFENDANTS

—RESPONDENTS.

Will—Life-estate to son's wife—Gift over to daughters—Death of one daughter—Another daughter born—Construction of Will—Surviving daughter, rights of, to vested remainder.

A testator bequeathed his property in the following words: "If I die, then my son's wife Bai Ganga is the owner of the above-mentioned immoveable and moveable properties.....The said Ganga shall during her life-time spend and use and enjoy out of my property and as to whatever property may have remained over after her decease, her two daughters are the owners thereof." He also stated that his son's conduct not being good he gave him no authority in that Will and made no provision for him. At the date of the Will the testator had two grand-daughters by Ganga one of whom predeceased him but before his death another was born and survived him:

Held (1) that the testator excluded his son from participation in the property dealt with by the Will; [p. 915, col. 2.]

(2) that the son's wife took for life with a power of disposition in her life-time but not by Will; [p. 916, col. 1.]

(3) that the survivor of the son's daughters named in the Will took a vested interest in the whole residue which was both heritable and transferable. [p. 916, col. 2.]

First appeal from the decision of the first Class Subordinate Judge at Ahmedabad, in Civil Suit No. 609 of 1909.

Messrs. G. S. Rao, N. K. Mehta and H. V. Divatia, for the Appellant.

Mr. N. M. Samarth, for the Respondents.

JUDGMENT.—The only questions with which we have to deal in this judgment arise upon the construction of the Will of Mathuradas made in the year 1873, for the later Will upon which the respondent also relied as showing that Gangabai had an absolute interest in the property in suit, has been held in litigation between the plaintiff and Ganga not to be proved.

By the first clause of the Will of 1873 the testator stated that his son Girdhar's conduct not being good he gave him no authority in that Will and made no provision for him. We entertain no doubt that the testator excluded Girdharlal by these words from participation in the property dealt with by the Will, which, upon the contentions of the parties, must be taken to be the self-acquisition of Mathuradas.

The property is then described. It consisted of one house and the middle and third story of another house in Ahmedabad sufficiently capable of identification by the descriptions given. The other immoveable property was one field in Shahawadi, Taluka Daskroi, in Ahmedabad District bearing Survey No. 123.

The moveable property is not capable of identification at the present time.

It is contended for the plaintiff that as the Will speaks, from the testator's death it must be taken to dispose of all the property in his ownership at that date. We think we should apply the rule of construction approved by Lord Justice Davey in *In re Seal, Seal v. Taylor* (1), that "where there is property in respect of which all the facts of the description are found to be true, so that the property exactly fits the description, the whole of that property, and nothing more passes." Under that rule no immoveable

(1) (1894) 1 Ch. 316 at p. 323; 63 L. J. Ch. 275; 70 L. T. 323.

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property would pass but such as answered to the description and was of the testator's ownership at his death. That this was the testator's intention is confirmed by the passage referring to the "above-mentioned" moveable and immoveable properties.

The property is disposed of after the testator's death in the following words: "If I die then my son's wife Bai Ganga is the owner of the above-mentioned immoveable and moveable properties...The said Ganga shall during her life-time spend and use and enjoy out of my property and as to whatever property may have remained over after her decease her two daughters are the owners thereof." At the date of the Will the testator had two granddaughters by Ganga one of whom predeceased him but before his death another was born and survived him. He, therefore, left two granddaughters by Ganga.

The first question arising in this part of the Will is whether Ganga took an absolute or some less interest and the second, if she did not take absolutely, whether of her two surviving daughters one or both took vested remainders.

On the first point we think the widow took for life with a power of disposal in her life-time as in *In re Punder, Williams v. Pounder* (2). In that case a testator by his Will gave his residue to his wife absolutely. By a codicil he revoked this gift and after making a specific gift gave his residue to his wife "for her own absolute use and benefit and disposal", but without prejudice to the absolute power of disposal by his wife of all the said residue in case after her decease any part thereof should "remain undisposed of" by her, he gave the same to two other persons equally as tenants-in-common. It was held that the wife took a life-interest with a power of disposition by act *inter vivos* but not by Will.

The same conclusion follows where the gift over in remainder follows a gift for the widow's sole and separate use and benefit in the same testamentary document, as in *Constable v. Bull* (3).

The second question is whether Chanchal, the only one of the two daughters of Ganga

living in 1873, the date of the Will, who survived the testator, took a vested remainder in the whole residue on the death of Ganga. Of the English authorities cited, viz., *In re Emery, Jones v. Emery* (4), *Garvey v. Hibbert* (5), *Daniell v. Daniell* (6) and *Spencer v. Ward* (7), *In re Emery, Jones v. Emery* (4) alone is in point, for here there was no mistake as to the number of grandchildren at the date of the Will and the testator must be taken to have intended to benefit only those known to him: see also *Sherer v. Bishop* (8). Chanchal, therefore, the survivor of those named in the Will, took a vested interest in the whole residue which was both heritable and transferable. In this case the plaintiff as her transferee takes the whole.

The plaintiff, therefore, is entitled to the immoveable property of the testator specified in the Will of 1873 which was of his ownership at the time of his death.

This does not dispose of the whole property left by Mathuradas. There was other property which descended to Girdharlal by inheritance sufficient to feed the defendant's claim under the adoption by Ganga.

As the plaintiff succeeds upon the amended plaint and the new point set out therein, by virtue of an interest of Chanchal having come to him by assignment subsequent to the plaint, it is clear that he could not have succeeded if he had not taken an assignment. We, therefore, think that he ought to bear all the costs of the respondents throughout.

Decree varied.

- (4) (1876) 3 Ch. D. 300; 34 L. T. 446; 24 W. R. 97.
- (5) (1812) 19 Ves. 125; 12 R. R. 155; 34 E. R. 465.
- (6) (1849) 3 De G. & Sm. 37; 18 L. J. Ch. 157; 13 Jur. 164; 64 E. R. 505; 84 R. R. 337.
- (7) (1870) 9 Eq. 507; 22 L. T. 702; 18 W. R. 858.
- (8) (1742) 4 Brown, C. C. 55; 29 E. R. 776.

(2) (1886) 56 L. J. Ch. 113; 56 L. T. 104.

(3) (1852) 22 L. J. Ch. 182.

BIRENDRA KISORE BAHADUR V. NAZIR MAHOMMAD.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 1820 OF 1911.

December 19, 1913.

Present:—Justice Sir Asutosh Mookerjee, Kt.,
and Mr. Justice Beachcroft.

Maharaja BIRENDRA KISORE
MANIKYA BAHADUR—PLAINTIFF—

APPELLANT

versus

NAZIR MAHOMMAD—DEFENDANT—

RESPONDENT.

Decree, interpretation of—Pleadings—Landlord and tenant—Adverse possession.

The plaintiff alleged that he was the owner of a large estate, that the defendant, a tenant of some land within the estate, had taken possession of the land in suit without any right. The plaintiff prayed for a decree for rent. The defendant asserted that he and his predecessors had held the land adversely to the knowledge of the plaintiff for more than 50 years. The Court found that the suit land was situated within the ambit of the *mal* land of the estate of the plaintiff, but that the defendant had been in adverse possession of it for more than 12 years. The decree directed that the suit be decreed in part and that the plaintiff's alleged title to the property in dispute be hereby declared and that his claim for assessment of rent and for *wasilat* do stand dismissed.

Held, that the decree was self-contradictory, that the Court did not and never intended to find anything to the effect that the relationship of landlord and tenant existed between the parties, that in face of the pleadings of the parties there was no room for any possible finding to that effect. [p. 917, col. 2; p. 918, col. 1.]

Appeal against the decree of the Subordinate Judge of Noakhali, dated the 31st March 1911, affirming that of the Munsif, Feni, dated the 2nd August 1910.

Babus *Dwarka Nath Chakravarti* and *Birendra Chunder Das*, for the Appellant.

Babu *Dhirendra Lal Kastgir* (*amicus curiæ*), for the Respondent.

JUDGMENT.—This is an appeal by the plaintiff in a suit which has been described as one for rent. The plaintiff alleges that he is the owner of a large estate, that the defendant is a tenant of some land within his estate, that he has taken advantage of his position as such tenant to take possession of the land in suit without any right and without settlement of rent and that the plaintiff was first apprised of this circumstance in 1898 when, in the course of Settlement proceedings, the defendant asserted that he was entitled to occupy this land

without payment of rent to the proprietor. The plaintiff, therefore, prays for a decree for rent for three years at a rate described by him as fair and reasonable rate. The defendant resists the claim on the ground that he and his predecessors have held the land adversely to the knowledge of the plaintiff for 50 or 60 years and that the land is rent free. The Court of first instance found that the land was situated within the ambit of the *mal* land of the estate of the plaintiff. But the Court also found that the defendant had failed to prove the alleged rent-free grant in his favour by the plaintiff or his predecessors. As regards the assertion of hostile title by the defendant, the Court came to the conclusion that for more than 12 years prior to the commencement of the suit, the defendant had asserted to the knowledge of the plaintiff that he was entitled to occupy this land without payment of rent. The Court then proceeded to make a decree in these terms: "that the suit be decreed in part and that the plaintiff's alleged title to the properties in dispute be hereby declared and that his claim for assessment of rent and for *wasilat* do stand dismissed."

This decree, it will be observed, is self-contradictory. If the title of the plaintiff as landlord is declared, it cannot very well be held that what is described as the claim for assessment of rent and for mesne profits fails on the ground of adverse possession. The defendant, however, was satisfied with this decree; it did not hurt him in any way, as the plaintiff had according to the Court failed to establish his claim to make the defendant liable for payment of rent. The plaintiff thereupon appealed to the Subordinate Judge, who held that the claim for assessment of rent was barred by limitation because the defendant had, more than 12 years prior to the commencement of the suit denied the title of the plaintiff to his knowledge to have rent assessed on this land.

The plaintiff has now appealed to this Court and has argued that as the Court of first instance decreed the suit in part and declared his alleged title to the

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properties in dispute, the inference follows that the relationship of landlord and tenant must be deemed to have existed between him and the defendant and that consequently the defendant could not, during the continuance of the tenancy, set up any hostile title. In our opinion this contention is fallacious. The judgment of the Court of first instance shows that all that the Court intended to declare was that the land in dispute was situated within the ambit of the *mal* land of the *zeminlari*. If that had been explicitly stated in the decree there could have been no room for misapprehension. The ambiguous language used in the decree has been made the foundation for the argument that the Court intended to find, and did as a matter of fact find, that the relationship of landlord and tenant existed between the parties. The Court did not and never intended to find anything to that effect. The plaintiff, indeed, came into Court on the allegation of trespass; his case was that the defendant had taken possession of the disputed land without any right. The plaintiff has never treated the defendant as his tenant and has never realised rent from him. The defendant did not plead that he held the land as a tenant under the plaintiff. His case throughout has been that he and his predecessors held the land in adverse right to the knowledge of the plaintiff for much longer than the statutory period. Under these circumstances there was no room for any possible finding that the relationship of landlord and tenant existed between the parties. We, therefore, do not feel embarrassed by the declaration given by the Court of first instance to the plaintiff.

The result is that the decree of the Subordinate Judge is affirmed and this appeal dismissed.

Appeal dismissed.

BOMBAY HIGH COURT.

FIRST CIVIL APPEAL No. 184 OF 1914.

June 30, 1915.

Present:—Mr. Justice Batchelor and
Mr. Justice Hayward.

PRANJIVANDAS SHIVLAL AND OTHERS—

DEFENDANTS—APPELLANTS

versus

ICHHARAM VIJBHUKHANDAS

AND OTHERS—PLAINTIFFS—RESPONDENTS.

Hindu Law—Partition—Property; what, to be partitioned—Share of member already separated, if to be accounted.

A joint Hindu family consisted of three branches. A member of one branch separated having taken his share, which was $\frac{1}{12}$ th of the property, the others remaining joint. Later on the family separated. The question arose whether the branch from which a member had already separated was entitled to a full $\frac{1}{3}$ rd share or $\frac{1}{3}$ rd minus $\frac{1}{12}$ th.

Held, that under the Hindu Law the partition should be made *rebus sic stantibus* as on the date of suit and consequently the branch was entitled to a full $\frac{1}{3}$ rd share. [p. 920, col. 2; p. 924, col. 1.]

Manjanatha v. Narayana, 5 M. 362; 6 Ind. Jur. 518 not followed.

Appovier v. Rama Subba Aiyar, 11 M. I. A. 75 at p. 89; 8 W. R. 1 (P. C.); 1 Suth. P. C. J. 657; 2 Sar. P. C. J. 218; 20 E. R. 30, referred to.

First appeal from the decision of the first Class Subordinate Judge at Surat in Suit No. 130 of 1911.

Mr. G. S. Rao, for the Appellant.

Messrs. H. C. Coyaji and Rangnekar (with them Mr. H. V. Divatia), for Respondent No. 1.

Mr. N. K. Mehta, for Respondent No. 2.

Messrs. Mulji and Thakurdas, for Respondents Nos. 3, 5 and 6.

Mr. T. R. Desai, for Respondent No. 4.

JUDGMENT.

BATCHELOR, J.—This is an appeal brought from a preliminary decree made by the learned Subordinate Judge of Surat in a suit for partition. The appeal is brought by the defendants Nos. 6 to 11 and 13 who are represented before us by Diwan Bahadur G. S. Rao.

The genealogical tree of the parties, which is requisite to an understanding of the points involved, is set out at the beginning of the judgment of the lower Court and need not now be repeated. The main argument on behalf of the appellants has been that the plaintiff's share in the family property should be only $\frac{1}{4}$ th and not $\frac{1}{3}$ rd as the learned Judge below has decided. As there are now existing only three branches descended from the original ancestor,

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Sambhulal, it is clear, and is admitted, that if partition is to be made having regard only to the present state of the family, the plaintiff is entitled to $\frac{1}{3}$ rd. But, says Mr. Rao, his claim is reduced to $\frac{1}{4}$ th owing to the circumstance that in 1892 his brother Magan separated from the family and took away with him a $\frac{1}{12}$ th share of the family property. The whole question really involved in this argument is, whether partition is now to be enforced in accordance with the existing condition of the family or whether, in enforcing partition now, regard is to be had to an allowance made for a share withdrawn by one member of the plaintiffs' branch of the family, Magan, when he seceded from the co-parcenary in 1892. Mr. Rao contends that allowance must be made for Magan's withdrawal of the $\frac{1}{12}$ th share, and the argument is that partition is primarily *per stirpes* and is *per capita* only among the members of any particular branch, and, therefore, that in allotting now its appropriate share to any one branch the Court should reckon with any portion of the joint property which has already fallen to the share of that branch. In the particular case before us the argument works out in this way, that since the plaintiffs' branch in the person of Magan has already received $\frac{1}{12}$ th of the property, the present 12 shares must be distributed among the three branches with due regard to the $\frac{1}{12}$ th already acquired by the plaintiffs' branch, that is to say, since $\frac{1}{12}$ th has already gone to the plaintiff's branch plaintiff is now entitled not to the $\frac{1}{3}$ rd which he would ordinarily receive, but to the $\frac{1}{3}$ rd minus the $\frac{1}{12}$ th, in other words, $\frac{1}{4}$ th. In support of this argument reliance is placed upon the decision in *Manjanatha v. Narayana* (1). That case was quoted before the learned Judge below, but he avoided its authority, *first*, because he regarded it as distinguishable on its facts from our present case, and, *secondly*, because he was of opinion that in *Wasantrao v. Anand-rao* (2) a Bench of this Court had adopted the contrary opinion. It seems to me, however, clear that *Wasantrao's* case (2) has no bearing upon the present question. For, *first*, the point now before us was never suggested in

Wasantrao's case (2), nor was it considered by the Court, and, *secondly*, the decision of this Court rested on the *ratio* that Madhav who had released his share must be regarded as having died, so that his share lapsed to the family. *Wasantrao's* case (2), therefore, being laid out of consideration as of no relevance to our present facts, we are left with *Manjanatha v. Narayana* (1) as the only direct authority. I am unable to agree with the learned Subordinate Judge that this case can be fairly distinguished from the case now before us. On the contrary, it seems to me that the facts in the Madras case were essentially the same as those with which we have to deal, and if the Madras decision is accepted as good Hindu Law applicable also to this Presidency, then I have no doubt that the appellants ought to succeed on this point.

The genealogy of the parties and their relative position in the Madras case are set out in the judgment of the lower Court and may also be gathered from the report in the Madras series. I will not, therefore, encumber this judgment by repeating them. It is enough to say that at a partition made in 1867, 7 $\frac{1}{12}$ th shares were allotted to various members of the family and there were left 5 $\frac{1}{12}$ th shares in the possession of Ramkrishna, Manjanatha and Narayan II. Ramkrishna having died, Manjanatha brought a suit for partition. It was held by the Madras High Court that he was entitled to three of the 5 $\frac{1}{12}$ th shares left and that Narayana II was entitled only to the remaining two shares. That decision was arrived at, as I understand the judgment, because the learned Judges held (1) that in 1867 there was no disruption of the joint family, but only a separation by certain members, the others continuing joint after as before this event; (2) that the rule directing division primarily *per stirpes* and secondly *per capita* inside each branch applies only where all the co-parceners desire partition at one and the same time; and (3) that since the two brothers of Manjanatha had in 1867 taken together 3 $\frac{1}{12}$ th shares, each taking $\frac{1}{2}$ such shares, therefore, the plaintiff, Manjanatha should get three shares, $1\frac{1}{2}$ in his own right and $1\frac{1}{2}$ as representing his deceased father, so that Narayan II could only get two of these $\frac{1}{12}$ th shares. Narayan II, it should be said, had contended

(1) 5 M. 262; 6 Ind. Jur. 518.

(2) 6 Bom. L. R. 925.

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that the distribution should be equal as things stood at the date of suit, so that the plaintiff, Manjanatha, should receive $2\frac{1}{2}$ shares out of the five. But this contention was disallowed, because, as I have explained, the learned Judges decided that regard must be had to the share which had already gone to the plaintiff Manjanatha's branch. Now if we apply this reasoning to the facts before us, we start with this: that in 1892 the present plaintiff's branch in the person of Magan received a $\frac{1}{12}$ th share. That must remain to the debit of the plaintiff's branch, and consequently the plaintiff's present claim cannot exceed the $\frac{1}{3}$ rd to which he would ordinarily be entitled *minus* the $\frac{1}{12}$ th which his branch had already taken. In other words, upon the reasoning adopted in the Madras judgment the appellants are right in saying that the plaintiff's present claim cannot exceed a $\frac{1}{4}$ th share. The learned Subordinate Judge, I think, was mistaken in supposing that the Madras judgment was based on the view that in 1867 there had been an actual or general division among Manjanatha's ancestors. On the contrary, the Court held that the members, who did not separate from the co-parceners in 1867, continued throughout to form a joint family. That is identically the case here where both parties agree, and where the learned Judge below has found, as a fact, that when Magan separated in 1892, the other members did not divide but continued as a joint family both before and after 1892. In view of the Privy Council's judgment in *Balabux v. Rukhmabai* (3) it is clear that this is the position which must be accepted for the determination of our present case. I must not be taken as suggesting that the decision of this appeal would be different even if the other members had to be regarded as reunited co-parceners after 1892. I mention that their status continued joint only in order to show that in this respect also the facts in the Madras case were the same as those now before us.

The simple question, therefore, is, whether we should follow the decision in *Manjanatha's* case (1). It is not binding on us, but it is deserving of all respect both on account

of the learned Judges who delivered that judgment and on account of one's natural anxiety to avoid, if possible, any difference of judicial opinion on a question of law affecting rights of property. But with every wish to follow the view which commended itself to the learned Judges in Madras I find myself compelled to prefer the other opinion.

In explaining the grounds upon which my view is based, I desire to say, *first*, that so far as concerns this Presidency the Madras rule is to be supported only on the grounds of apparent arithmetical equality and depends on no text or specific principle of Hindu Law. For the Hindu text which the learned Judges in Madras called in aid of their decision was from the *Smriti Chandrika*, a work of no direct authority in this Presidency; whereas the work which is of authority in this case from Gujarat, *viz.*, the *Vyavahara Mayukha*, lays down exactly the contrary rule to that which has been prescribed in the *Smriti Chandrika*. For the rule of the *Mayukha* is that in a partition between reunited co-parceners the shares are equal, notwithstanding that the portions brought in on reunion are unequal: see West and Buhler, pages 783 and 784. As I have already said, the parties here are not to be regarded as reunited co-parceners, but in so far as any analogy is to be drawn from the position which reunited co-parceners would occupy in a similar state of facts, that analogy is clearly adverse to the appellants.

Next, I venture to doubt whether the apparent arithmetical equality secured by the Madras rule is a sufficient ground for the promulgation of such a general principle. For though in one view the rule would work equitably, and did work equitably, in the particular facts of the Madras case, it is not difficult to imagine circumstances in which its working would be inequitable, as for instance, where after the first separation the members of the family who remained joint largely increased the wealth of the family by their own industry. I think, therefore, that such a rule as I am considering is hardly an adequate reason to depart from the ordinary rule that partition should be made *rebus sic stantibus* as on the date of suit. There is no direct authority for this opinion in the Bombay reports, but in a somewhat similar case expression was given

(3) 5 Bom. L. R. 469; 30 C. 725 (P. C.); 7 C. W. N. 642; 30 I. A. 130.

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to a similar principle in *Konerrav v. Gurrav* (4). Further, in my opinion, the peculiar legal system of the joint Hindu family should not be invaded or disturbed by unauthorized rules in pursuit of a doubtful equality. It must be remembered that in all such cases where one member separates and the others continue joint, those who continue joint do so at their own risk. Their position may improve or may suffer owing to any one of many chances, and the check on fortune introduced by the adoption of the Madras rule seems to me insignificant when compared with the risks and chances which must inevitably be accepted by those who elect to remain joint. And in this context I would observe that it seems to me a mistake to suppose that financial considerations are anything but a subsidiary point in the preservation of the Hindu system of the joint family. If all the members of a Hindu joint family were bent solely or principally each on his own financial betterment, the system could not, I suppose, survive very long. For these reasons I think that there is no general principle or consideration which can be appealed to in support of the rule adopted in Madras; and with unaffected respect I cannot but think that that rule cannot be reconciled with the legal principle which underlies the joint family system. That principle was stated in language now become familiar by the Privy Council in the judgment in *Appovier v. Rama Subba Aiyar* (5) in the following words:—"According to the true notion of an undivided family in Hindu Law, no individual member of that family, whilst it remains undivided, can predicate of the joint and undivided property that he, that particular member, has a certain definite share." But the reasoning in the Madras case seems to me to proceed, and necessarily to proceed, upon the footing that the shares mentally ascertained at the first separation have ever since remained fixed and definite so that throughout the intervening years before the institution of the suit for partition it can be predicated of each member of the joint family that he owned such and such a definite, share of the joint family property. That, I respectfully think, is not in accordance with the

(4) 5 B. 589.

(5) 11 M. I. A. 75 at p. 89; 8 W. R. 1 (P. C.); 1 Suth. P. C. J. 657; 2 Sar. P. C. J. 218; 20 F. R. 30.

principle which rather invites the inference that when once the separating member retires with his share, the retirement becomes an accomplished fact whose influence is spent at the time so that the joint members and their fortunes are no longer to be influenced by the incident. As I have indicated, that would be the case under the law prevailing in this Presidency if the family had separated and reunited in 1892, and the case in favour of equal shares at the time of suit appears to me to be still stronger where there has never been any general partition of the family but all except the seceding member have continued joint. On this ground I am of opinion with very great respect that we ought not to give effect to the decision in *Manjanat-a's* case (1), and that the appellants, who upon this point rely wholly upon that decision, ought not to succeed.

[Note.—The rest of the judgment is not material for the purpose of this report.—Ed.]

HAYWARD, J.—The plaintiff representing one branch, viz., Tribhovan's branch, saed defendants representing two other branches, viz., Lalbhai's and Shivilal's branches, to obt in 1/3rd share in the family estate by partition. The defendants pleaded as to the share claimed (1) an ancestor's Will limiting the share to Rs. 25,000 alleged to have already been paid, (2) a previous partition limiting the share to what it would have been at the withdrawal of Lalbhai, the sole representative of another branch, and (3) a previous partition limiting the share to what it would have been at the withdrawal of Maganlal, another member of Tribhovan's branch. The defendants pleaded as to the property to be divided (1) that the plaintiff's residential house and certain ornaments should be brought into hotch-potch as belonging to the joint family, and (2) that the moveable and immoveable property of the deceased Kasandas, the sole representative of yet another branch, should not be brought into hotch-potch as it was the separate property of Kasandas and did not belong to the joint family.

The Subordinate Judge held as to the share claimed that the plaintiff was entitled to 1/3rd, and as to the property to be divided that the plaintiff's house and ornaments should not, but that Kasandas' moveable and immoveable property should, be brought into

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hotch-potch as part of the joint family estate.

This appeal is brought by the representatives of Shivalal's branch, contending that the share claimed should be not $\frac{1}{3}$ rd but $\frac{1}{4}$ th only and that the plaintiff's house should, but the moveables of Kasandas should not, be included in the division as joint family property.

Now as to the share claimed, the first plea based on the ancestor's Will and the second plea based on the previous partition and withdrawal of Lalbhai have been dropped and as regards the third plea based on the partition and withdrawal of Maganlal, it has been admitted by both parties that after that withdrawal the remaining members of the family continued to be joint and were not in the position of separated parceners who had reunited. It was argued at the trial on this third plea that the plaintiff's branch was entitled to a $\frac{3}{11}$ ths share, *viz.*, two shares left out of the three shares due to it at the withdrawal of Maganlal *plus* one share subsequently due to it as one of the surviving branches out of the share of the deceased Kasandas' branch and that defendants' two branches were each entitled to $\frac{4}{11}$ ths, that is to say, the three shares each due to them at the withdrawal of Magan *plus* one share each subsequently due to them as surviving branches out of the share of the deceased Kasandas' branch. Plaintiff's branch was thus argued to be entitled to three shares and each of the defendants' branches to four shares out of the total of eleven shares for division. But in this appeal Mr. Rao, who has the support of Lalbhai's branch and represents directly Shivalal's branch, has urged that the share should not be $\frac{3}{11}$ ths but should be $\frac{1}{4}$ th or $\frac{3}{12}$ ths. He has put it in this way, that the share should be $\frac{1}{3}$ rd as *prima facie* due at the division of the three remaining branches less $\frac{1}{12}$ th withdrawn by Maganlal, one of the members of the branch now seeking partition, that is to say, $\frac{1}{3}$ rd *minus* $\frac{1}{12}$ th which is $\frac{1}{4}$ th or $\frac{3}{12}$ ths. It is argued that the defendants' branches, that is to say, Lalbhai's and Shivalal's branches should be allowed to divide between them the remaining $\frac{3}{4}$ ths or $\frac{9}{12}$ ths. This contention is based on the alleged necessity of preserving equal shares to each of the three branches as explained thus by Muttusami Ayyar, J.—

"The rule that, as between different branches, division should be by the stock..... is designed to ensure equality of partition in cases of vested interests held in co-parcenery, and to carry out in those cases the principle that those who have capacity to confer equal spiritual benefits on the common ancestor ought to take equal shares..."

and again in another passage:—

"At the first partial division, allotments due to the other co-parceners were determined by an act of the mind for the purpose of computing the shares which were allotted to those who desired to separate, and in the same manner the allotments made at the first partition should be taken into account in calculating the shares to be awarded at the second in order that unequal partition, which is forbidden by law, may be avoided. This view is confirmed by the Smriti Chandrika, in which it is said with reference to a second partition among reunited parceners, that the shares may be unequal where the common wealth was at the time of reunion made up of disproportionate contributions, and that the inequality must be proportionate to the extent of the contribution made by each parcenar at the time of re-union."

These passages occur at pages 364 and 365 of the judgment in the case of *Manjanatha v. Narayana* (1).

It seems to me necessary to examine the rule here laid down with special care, as though it was laid down a number of years ago, it does not appear to have been since referred to in any subsequent case in Madras, and no similar case has been reported from this Presidency or from any of the other Courts in India. My *first* observation on this case is this: that the rule as laid down for Madras would not ordinarily be necessary in this Presidency. It was apparently framed to prevent inequality where sons enforce partition from their father and joint uncles. Such partition might apparently be enforced in Madras, but here it could only occur by common agreement with full knowledge of the consequences. For it is a well-established rule that sons cannot enforce partition against their fathers and joint uncles in this Presidency. My *second* observation is this: that with due deference to the opinion of the learned Judges who decided

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the case in Madras it would not appear that the rule they have laid down would necessarily maintain the desired equality. If, for instance, the 3/11ths share argued for in this case, at the trial were given, then it is true that the branch would receive its full share as one of the surviving branches to the deceased Kasandas' branch. But if, as now argued here, only 1/4th or 3/12ths were given, then not only would the share taken by one member Magan be deducted, but the branch would also be deprived of its full 1/3rd or 4/12ths share as one of the three surviving branches to the share of the deceased Kasandas' branch. It is also not difficult to imagine other cases in which the rule would result in serious inequality. For instance, if one member of a branch withdrew part of the share of the branch and the other member left were subsequently to die, the remainder of the share of the branch would survive to the other branches. The result would be that the branch would not have got its full share. The remainder of that share would have gone to swell the shares of the other branches. Again, if one member of a branch were to withdraw while the family was poor, then that branch would never under the rule be allowed its full share of the subsequently accumulated wealth of the family obtained by the united efforts of all the branches. My *third* observation is that the learned Judges who decided the Madras case appear to have based their rule in part, at all events, on the equality of spiritual benefits to be conferred by the various branches, whereas little weight can be given to the doctrine of religious efficacy in this Presidency as pointed out by Mayne in his work on Hindu Law in paragraph 3 at page 2 and paragraph 509 at page 711 of the 8th Edition. My *fourth* observation on the Madras judgment is this: that it sought confirmation from the analogy of a partition between reunited brothers, as prescribed by the passage already quoted from the Smṛiti Chandrika occurring in Chapter XII paragraph 4 of that work. But that authority is only an authority in Southern India (see paragraphs 27 and 28 of Mayne's Hindu Law, at pages 28 and 29 of the 8th Edition) and has been expressly dissented from by the Mayu-

kha, the authority recognised in Gujarat. This is the passage from the Mayukha: "Here some say that the unequal distribution being negatived by the phrase 'the shares must in that case be equal,' the prohibition of the 'eldest son's right' is repeated for the sake of making it clearly understood that although there is to be no inequality in making up the shares of the eldest, yet in the distribution, the shares may be even unequal, when made up of greater and lesser shares at the time of reuniting the property. But since the term 'eldest son's right' and the like is merely a declaration of the general meaning, therefore, if the contributions to the wealth were greater and less, still the share of each must be equal. And the same is the popular practice. Hence as the foundation of the practice is derived from this text, any supposition of a declaration contrary thereto is at variance with reason. For, another author says, 'The body of the law, like grammar, for the most part, is based on usage', in Chapter IV, section 9, paragraphs 2 and 3 of that work. This has also been pointed out by West and Buhler, Volume II, Book 2, paragraph 7A(1.c). It seems to me, therefore, that whatever force the rule might have as laid down by the learned Judges for Madras, it could not properly be applied to this case which comes from Gujarat. And it is significant that the rule was not applied by the parties in the year 1898, when they made a division into three shares of part of the moveable property and again in 1906, when they divided into three shares the sale profits of part of the immoveable property between the three branches of the family. The third share has, in my opinion, therefore, been rightly held to be the share to be given on the division of the remainder of the family property.

It seems to me indeed impracticable to frame any rule which would ensure absolute equality for all circumstances and for all branches and no *a priori* reason has been shown for applying the Madras rule to this Presidency. Nor have any texts been found in support of framing any such rule or departing from the general rule laid down by Lord Westbury: "According to the true notion of an undivided family in Hindu Law, no individual member of that family,

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whilst it remains undivided, can predicate of the joint and undivided property that he, that particular member, has a certain definite share" in *Appovier's case* 5, and further stated thus: "The position of any particular person...will be very important when the time for partition arrives, because it will determine the share to which he is then entitled. But until that time arrives he can never say, I am entitled to such a definite portion of the property; because next year the...division might be much smaller and the year after, much larger, as births or deaths supervene", in Mayne's Hindu Law, paragraph 273, at page 340 of the 8th Edition.

[Note.—The rest of the judgment is not material for the purpose of this report.—*Ed.*]

Appeal dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL NO. 230 OF 1913.

September 22, 1915.

Present:—Justice Sir William Ayling, Kt.,
and Mr. Justice Seshagiri Aiyar.

AMBALATH VEETIL THEKKETHIL

MOSSA—PLAINTIFF—APPELLANT

versus

VALIYAKATH PATHUMMA AND ANOTHER

—DEFENDANTS—RESPONDENTS.

Restitution of conjugal rights, suit for—Motive or delay, if affects suit—Legal cruelty—Presumption—Keeping low caste woman, if sufficient.

In a suit for restitution of conjugal rights, the motive with which a man brings the suit or delay in instituting it has nothing to do with the enforcement of his right, and if there is no legal defence to the suit, it must be decreed. [p. 924, col. 2.]

Scott v. Scott, 4 Sw. & Tr. 113; 34 L. J. Mat 23; 12 L. T. 211; *Beauclerk v. Beauclerk*, 71 L. T. 376; 6 R. 657; 59 J. P. 8, followed.

It is no answer to a suit for restitution of conjugal rights to say that the husband keeps a low caste woman as his concubine, unless actual legal cruelty or reasonable apprehension of it is proved against him. [p. 925, col. 1.]

Husaini Begam v. Muhammad Rustom Ali Khan, A. W. N. (1907) 27; 4 A. L. J. 60; 2 A. 222, distinguished.

Moonshee Buzloor Ruheem v. Shumsoonnissa Begum, 8 W. R. 3 (P. C.); 11 M. L. A. 551; 2 Sath. P. C. J. 39; 2 Sar P. C. J. 259; 20 E. R. 208, followed.

Legal cruelty will be presumed to exist only when the husband has so conducted himself towards his wife as to render future cohabitation more or less dangerous to her life, or limb or mental or bodily health. [p. 925, col. 1.]

Russell v. Russell, (1895) P. 315; 64 L. J. P. 105; 73 L. T. 295; 41 W. R. 213, followed.

Second appeal against the decree of the District Court of South Malabar at Calicut in Appeal Suit No. 143 of 1912, preferred against that of the Court of the District Munsif of Chowghat in Original Suit No. 365 of 1910.

Mr. K. P. Govinda Menon, for the Appellant.

Mr. C. Madhavan Nair, for the Respondents.

JUDGMENT.—The parties are Muhamadans. The first defendant was married to the plaintiff in 1907. It is found that for some time after that the plaintiff kept a low caste woman as his concubine. It is not clear that at the time of the suit, she was still in his keeping. He married a second wife. He now sues for the restitution of conjugal rights against the first defendant. The District Munsif decreed the suit. The lower Appellate Court has reversed that decision. Hence this second appeal.

We are unable to agree with the District Judge. The grounds mentioned by him are not sufficient to nonsuit the plaintiff. It is suggested that this is not a *bona fide* suit, as it was instituted after the father-in-law sued the plaintiff for moneys due to him. This is not a ground for refusing relief. It was held in *Scott v. Scott* (1) that the Courts are not concerned with the sincerity of the plaintiff's motive, and that if there is no legal defence, the suit should be decreed. Another objection relates to the delay in bringing the suit. That again is no defence to the action. See *Beauclerk v. Beauclerk* (2). The main ground relied

(1) 4 Sw. & Tr. 113; 34 L. J. Mat 23; 12 L. T. 211.

(2) 71 L. T. 376; 6 R. 657; 59 J. P. 8.

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upon by Mr. Madhavan Nair is that the plaintiff consorted with a low caste woman and that the defendant has consequently a reasonable apprehension of cruelty. This defence was not put forward in the written statement. The decision in *Husaini Begam v. Muhammad Rustam Ali Khan* (3), on which the District Judge relied, proceeds on the ground that the husband charged the wife with adultery and made other serious unfounded charges. The learned Judges held that such a husband may reasonably be expected to ill-treat his wife. The Judicial Committee in *Moonshee Buzloor Ruheem v. Shumsoonnissa Begum* (4) have laid down that there must be either actual violence or a reasonable apprehension of it. That decision is also authority for the position that on the question of legal cruelty, there is no difference between the English Law and the Muhammadan Law. The question of what amounts to cruelty was considered elaborately in *Russell v. Russell* (5). Lord Justice Lopes says: 'As we read that case, no husband could be found guilty of legal cruelty towards his wife unless he had either inflicted bodily injury upon her, or had so conducted himself towards her as to cause actual injury to her mental or bodily health, or so as to raise a reasonable apprehension that he would either inflict actual bodily injury upon her, or cause actual injury to her mental or bodily health. In a word, he must so have conducted himself towards her as to render future cohabitation more or less dangerous to her life, or limb, or mental or bodily health.' Lord Justice Lindley concurred in this opinion. Lord Justice Rigby who differed from the opinion of the majority of the Court is in substantial agreement with them on this point.

Applying the above tests, we are unable to hold that the defendant has proved that there has been any legal cruelty or any reasonable apprehension of it from the plaintiff. We must, therefore, reverse the decree of the District Judge

and restore that of the District Munsif. We make no order as to costs in this and in the Courts below having regard to the relationship of the parties. Three months' time from this day for obeying the decree.

Appeal allowed; Suit decreed.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 229 OF 1914.

July 16, 1915.

Present:—Sir Basil Scott, Kt., Chief Justice,
and Mr. Justice Shah.

SHANKAR BABAJI KULKARNI—
PLAINTIFF—APPELLANT

versus

DATTATRAYA BHIWAJI—DEFENDANT

No. 1—RESPONDENT.

Jurisdiction—Suit for declaration as to being nearest heir of Vatandar, maintainability of—Bombay Hereditary Offices Act (III of 1874), s. 36—Bombay Hereditary Offices Act (III of 1910), s. 36.

A suit for a declaration that the plaintiff is the nearest heir of a deceased representative vatandar is maintainable in the Civil Court. [p. 926, col. 2.]

Second appeal from the decision of the first Class Subordinate Judge, at Sholapur, in Appeal No. 323 of 1912, confirming the decree passed by the Subordinate Judge at Pandharpur, in Civil Suit No. 169 of 1912.

Mr. G. K. Parekh, for the Appellant.

Mr. A. G. Sathaye, for the Respondent.

JUDGMENT.—In this case the plaintiff stating the death of a vatandar named Ramchandra alleged "that the Kulkarni Vatan is to be continued in the eldest family; that the defendant No. 1 whose name was entered in the register was not of the eldest family, and that the plaintiff was, and that in consequence of the defendant's objection, the plaintiff's name was not entered in the Vatan register. Therefore, the plaintiff brings this suit praying for a declaration (a) that he, the plaintiff, being of the eldest family, is the

(3) A. W. N. (1907) 27; 29 A. 222; 4 A. L. J. 60.

(4) 11 M. L. A. 551; 8 W. R. 3 (P. C.); 2 Suth. P. C. J. 59; 2 Sar. P. C. J. 259; 20 E. R. 208

(5) (1895) P. 315 at p. 322; 64 L. J. P. 105; 73 L. T. 205; 44 W. R. 213.

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nearer heir of Ramchandra than the defendant; and (b) that the plaintiff has a right to have his name entered in the place of Ramchandra with respect to the Kulkarni Vatan at Bhalvani, he being of the eldest branch."

The lower Courts have held on the authority of *Raoji v. Genu* (1) that they have no jurisdiction to entertain the suit, and it has, therefore, been dismissed. In our opinion their decision is not correct. *Raoji v. Genu* (1) related to section 25 of the Bombay Hereditary Offices Act (Bombay Act III of 1874). On the other hand, *Rahimkhan Hyderkhan v. Dadamiya Hyderkhan* (2), which was distinguished in the lower Appellate Court, related to section 36 of the Bombay Hereditary Offices Act. In that case it was said :

"The conclusive determination of the question whether the statutory condition of eldership or heirship is satisfied becomes, therefore, a matter of importance to a person claiming to be the eldest son or nearest heir, and it is a question which is not by the words of the Act reserved for the exclusive determination of the Collector. This view of section 36 was taken by this Court in *Dalpat Jogidas v. Punja Zipa* (3), where, upon review, it was held that a suit for a declaration that the plaintiff was the nearest heir of a deceased representative *vatan*dar was maintainable, notwithstanding that it was manifest that the declaration was sought for the purpose of establishing a fact which would enable the plaintiff to have his name entered in the Vatan Register."

Those decisions were passed upon section 36 of the Act before it was amended in 1910. Section 36 then provided that: "A certificate of heirship or a decree of a competent Court shall, until revoked or set aside, be conclusive proof of the facts stated or determined in such certificate or decree." Reference to "a certificate of heirship, or a decree or order of a competent Court" is no longer in the same language. Whether or not the new reference has a different effect is a matter which we do

not purpose to determine. The amended Act provides that:

"If at any time any person shall, by production of a certificate of heirship, or of a decree or order of a competent Court, satisfy the Collector that he is entitled to have his name registered as the nearest heir of such deceased *vatan*dar in preference to the person whose name the Collector has ordered to be registered, the Collector may subject to the foregoing provisos, cause the entry in the register to be amended accordingly."

Therefore, in connection with this question of heirship under the deceased *vatan*dar, the Act, as it stood before the amendment and as it now stands since the amendment, recognises the possibility of the production of a decree of a competent Court upon the question of heirship affecting the entries in the Vatan Register.

It has been argued that the second part of the declaration prayed in the plaint, namely, a declaration that the plaintiff is entitled to have his name entered in the place of Ramchandra in the register is clearly a matter which would be beyond the jurisdiction of the Court. Let that be granted, it does not prevent the plaintiff from getting relief under the first head to which upon the authorities he is entitled. We are not prepared to agree with the learned Judge of the Appellate Court that a declaration under the first head, "as it would not be binding upon the Collector, would not serve any purpose whatever." As above stated, we do not propose to express any opinion as to the effect of the words of clause 3 of the proviso to the amended section. Being of opinion that the Court has jurisdiction to give the relief asked for in the first paragraph of the prayer we set aside the decree of the lower Appellate Court and remand the case for trial. Costs costs in the cause.

Decree set aside; Case remanded.

(1) 22 B. 344.

(2) 4 Ind. Cas. 833; 11 Bom. L. R. 1330; 34 B. 101.

(3) 11 Bom. L. R. 1342 *note*.

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BANGARAYUDU v. PERAYYA SASTRY.

MADRAS HIGH COURT.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 616 of 1913.

SECOND CIVIL APPEAL No. 551 of 1913.

August 27, 1915.

August 17, 1915.

Present:—Mr. Justice Seshagiri Aiyar.*Present:*—Mr. Justice Spencer andMADAPATY VENKATESWARA ROW
PANTULUGARU—PLAINTIFF—PETITIONER

Mr. Justice Seshagiri Aiyar.

ELAMARTY BANGARAYUDU AND OTHERS

versus

—DEFENDANTS NOS. 5 TO 7, 9 AND 14—

NANDUM RAJAGOPALAM—DEFENDANT

APPELLANTS

—RESPONDENT.

versus

MANGIPOODY PERAYYA SASTRY—

PLAINTIFF—RESPONDENT.

*Jurisdiction of Civil or Revenue Court—Kattubadi, suit to recover—Inamdar not cultivator.**Hindu Law—Widow—Compromise of suit, validity of—Alienation of husband's estate—Reversioner's consent.*

A suit to recover kattubadi from an inamdar who is not a cultivator, lies in the Civil and not in the Revenue Court.

Where a compromise of a suit entered into by a Hindu widow has the effect of alienating her husband's estate, and where she effects such compromise with the consent of her husband's reversioners entitled to succeed on her death, they are bound by it [p. 929, col. 1.]

Gopiseti Narainsawmi Naidu v. Tallanraju Venkatasubrayudu, 9 Ind. Cas. 642; (1911) 1 M. W. N. 233; 9 M. L. T. 315, followed.*Musammat Hiran Bibi v. Musammat Sohan Bibi*, 24 Ind. Cas. 309; 27 M. L. J. 149; 18 C. W. N. 929; 1 L. W. 648 (P. C.); *Khanmi Lal v. Kanwar Govind Krishna Narain*, 10 Ind. Cas. 477; 15 C. W. N. 545 (P. C.); 8 A. L. J. 552; 13 Bom. L. R. 427; 13 C. L. J. 575; 10 M. L. T. 25; 21 M. L. J. 645; 33 A. 356; (1911) 1 M. W. N. 432; 38 I. A. 87; *Musammat Indro Kooer v. Shaikh Abool Burkat*, 14 W. R. 146; *Kambinayani Javvaji Timmaji v. Kambinayani Javvaji Subbaraju*, 5 Ind. Cas. 640; (1910) M. W. N. 60; 7 M. L. T. 340; 20 M. L. J. 204; 33 M. 473; *Imrit Konwar v. Roop Narain Singh*, 6 C. L. R. 76; *Rajlakshmi Dasee v. Katayani Dasee*, 12 Ind. Cas. 464; 38 C. 639; *Bhogaraju Venkatarama Jogiraju v. Adapalli Seshayya*, 12 Ind. Cas. 123; 10 M. L. T. 179; 35 M. 560, followed.

Petition, under section 25 of Act IX of 1887, praying the High Court to revise the order of the Court of the Principal District Munsif of Bezvada, in Small Cause Suit No. 649 of 1913.

Mr. K. G. Sarangaraja Aiyangar, for Mr. V. Ramadoss, for the Petitioner.

JUDGMENT.—The respondent is unrepresented. The suit was by the proprietor to recover kattubadi from a minor inamdar. The District Munsif held that, having regard to section 77 of the Madras Estates Land Act, the plaint ought to have been presented to the Revenue Court. On the authorities which have been cited before me this conclusion is wrong. In *Gopiseti Narainsawmi Naidu v. Tallanraju Venkatasubrayudu* (1), under similar circumstances it was decided that a suit for kattubadi is not beyond the jurisdiction of the ordinary Civil Courts. In Second Appeal No. 716 of 1913 a similar conclusion was come to with reference to quit rent. There is no allegation in this case that the inamdar is also a cultivator. Under these circumstances the decision of the District Munsif is wrong. It must be set aside and the District Munsif must be asked to restore the case to his file and dispose of it according to law.

Petition allowed; Suit remanded.

(1) 9 Ind. Cas. 642; (1911) 1 M. W. N. 233; 9 M. L. T. 315.

Second appeal against the decree of the District Court of Godavary at Rajahmundry; in Appeal Suit No. 56 of 1911, preferred against that of the District Munsif of Rajahmundry, in Original Suit No. 489 of 1909.

Mr. G. Venkataramiah, for the Appellants.

Mr. B. Somayya, for the Respondent.

This second appeal coming on for hearing on the 16th December 1914, the Court delivered the following

JUDGMENT.—We agree with the lower Courts in their conclusion that the appellants have not shown any title by virtue of the alleged gift by Antanna in favour of his grandsons Subbarayudu and Venkayya, on the strength of which plaintiff's claim can be resisted. We also think that no question arises of a partial alienation, because the grandsons had no power to alienate the property during the life-time of their mother. The only question that remains relates to the effect of the compromise in Original Suit No. 348 of 1886.

Before we can decide this second appeal we must call for a finding from the District

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Judge upon the questions raised in paragraph 10 of the written statement of defendants Nos. 5 to 9 and paragraph 11 of the 4th defendant's written statement which we think are covered by the 3rd issue but have not been considered by the lower Courts.

In Original Suit No. 348 of 1886 there was a compromise of the suit brought by the purchasers under Exhibit I, who are the predecessors-in-title of defendants Nos. 5 and 7, by which Garakamma and her son Venkatachalapati consented to the plaintiffs in that suit retaining the enjoyment of 5 acres 7 cents of the suit lands; but the lower Courts have not decided whether that compromise was a *bona fide* settlement of a doubtful claim and whether any other nearer reversioner than Venkatachalapati who might have been consulted was alive at the time.

We must, therefore, remand the appeal for a decision upon the following issues:—

1. Whether the compromise evidenced by Exhibits V and VI was a *bona fide* compromise by the parties concerned?

2. Whether it amounted to a valid alienation by the widow Garakamma representing the estate with the consent of the nearest reversioner?

Both sides may adduce fresh evidence on these points. The findings should be returned within three months from this date and ten days will be allowed for filing objections.

In compliance with the above order the District Judge of Godavari submitted the following

FINDINGS.—One additional witness has been heard for each side. On the 1st issue there can be no doubt that the compromise was a *bona fide* one by the parties concerned. It was given effect to and was entered into on the advice of Vakils, three of whom have signed including Mr. N. Subbarao. Under it plaintiffs were given possession and enjoyment of 5 acres 7 cents at Lolla and defendants retained 3 acres 49 cents at Vadapalli paying Rs. 150 down in cash, which presumably represented mesne profits and costs foregone. On the evidence and probabilities I find this issue in the affirmative. An attempt is made to argue that the words "parties concerned" mean something else than the parties concerned in the compromise, and refer to the parties litigant in this appeal. I cannot follow the Pleader into such deep waters.

2. Issue No. 2.—It is unnecessary to re-

capitulate the history of the compromise, and what preceded it. These facts were already before their Lordships and are well understood by me. In my opinion the consent of the next reversioner makes the alienation valid and binding on the actual reversioner. Such consent raises a presumption of due inquiry and legal necessity if the presumption is not rebutted by more cogent proof. This is the language of the Calcutta High Court in *Debi Prosad Chowdhry v. Golap Bhagat* (1). No evidence is brought forward here to rebut that presumption. Respondent's 1st witness, speaking of an event which occurred 29 years ago, does attempt to say something about Garakamma being forced into the compromise by the fear that her son would go to Jail. But this is a palpable falsehood because there was no such fear and the compromise was made under the advice of eminent Pleaders, of whom one Mr. N. Subbarao is available and might have been called. Such an absurd statement ought not to have been made in a serious Court of Justice.

3. Here is a case of a mother and her only son. The mother alienates with the son's consent, the motive for the consent clearly being that the compromise was a settlement of doubtful claims. At the date of the compromise Chalapati was aged 20. After his mother's death he would be heir. No one contemplated the possibility of this young man predeceasing his mother and the succession passing at some problematic future date to the other reversioners of Antanna. The dictum of the Full Bench in the Calcutta case has been accepted by all Courts and on the facts of the present case, common sense seems to me to make it clear that the compromise was a *bona fide* settlement of a doubtful claim and that the consent of the nearest reversioner Chalapati was sufficient to render it valid and binding. He was a young man with every prospect of issue. The compromise was on the basis of half and half and each party gained something, the widow retaining the more valuable lands. I can only regard the transaction as a perfectly *bona fide* one and one rendered valid and binding by the consent of the next reversioner, there being no rebuttal by more cogent proof of the presumption of legal necessity or of reasonable inquiry and

(1) 19 Ind. Cas. 278; 40 C. 721; 17 O. W. N. 701; 17 C. L. J. 499.

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honest belief. Chalapati, the person most affected, was a consenting party to 5 acres of his mother's land going out of their possession. If there was any fraud he stood to lose, being the heir to his mother and he certainly did not see the contingency of his dying before her. The latest decision is *Nachiappa Gounden v. Rangasami Gounden* (2). There the Chief Justice goes so far as to say that the consent of the next reversioner to an alienation, though partial, is conclusive of its propriety. Looking to the special circumstance of the present case, this is a sound principle and applies with greater force here where the facts are so clear. No evidence has been adduced whether any other nearer reversioner than Chalapati, who might have been consulted, was alive at the time. Chalapati was the next reversioner with the possibility of heirs of his body and surely it cannot have been expected that the reversioners next after him, whoever and wherever they might be, should be called in and consulted before this alienation can be treated as valid. I answer the 2nd issue in the affirmative.

This second appeal coming on for final hearing after the return of the finding of the lower Appellate Court on the issues referred by this Court for trial, the Court delivered the following

JUDGMENT.—We accept the findings. It is now contended as a point of law that a widow being a limited owner can in no circumstances make a valid compromise or be a party to a consent decree so as to bind the inheritance of the reversionary heirs. There is no doubt that while in some instances compromises by a limited owner may amount to family settlements, as in *Musammam Hiran Bibi v. Musammam Sohan Bibi* (3) and in *Khunni Lal v. Kunwar Gobind Krishna Narain* (4), in other cases they cannot be placed on a higher footing than they would have as contracts or alienations. Vide *Musammam Indro Koor v. Shaikh Aboul Burkat* (5), *Kambinayani Javvaji Timmaji v.*

Kambinayani Javvaji Subbaraju (6), *Imrit Komur v. Roop Narain Singh* (7), *Rajlakshmi Dasee v. Katayani Dasee* (8) and *Bhogaraju Venkatarama Jogiraju v. Adapalli Seshayya* (9). In the present case, assuming that the compromise of Original Suit No. 348 of 1886 by Garakamma could not be treated as more binding on the reversioners than an alienation, we asked the District Judge to find whether it amounted to a valid alienation. This question he has answered in the affirmative and he gives as a reason for his opinion that the nearest reversioner consented to it and that it was made under the advice of the legal advisers engaged in the suit. Then he says there is "no rebuttal by more cogent proof of the presumption of legal necessity or of reasonable enquiry and honest belief." Under these circumstances we consider that it is not open to the respondent's Pleader now to raise the contention that the District Judge should have discussed whether the alienation was not for justifiable necessity on account of the purpose for which Exhibits III and IV were executed, as it was open to the respondent to have urged at the hearing in the lower Appellate Court that the effect of these documents was to rebut the presumption arising from the circumstances under which the suit was compromised. In the memorandum of objections to the finding the ground has not been taken that the Judge improperly excluded these documents from his consideration.

We think that the learned District Judge was in error in relying on the expression of opinion of a single Judge in *Nachiappa Gounden v. Rangasami Gounden* (2) as to the conclusive effect of the consent of the nearest reversioner upon an alienation by a widow, as the decision of the Court in that case did not go so far and the opinion of the majority of the Full Bench has since found support in the recent Privy Council decision in *Hari Kishen Bhagat v. Kashi Parshad Singh* (10).

(2) 26 Ind. Cas. 757; 28 M. L. J. 1; (1915) M. W. N. 53; 2 L. W. 69; 17 M. L. T. 87.

(3) 24 Ind. Cas. 309; 27 M. L. J. 149; 18 C. W. N. 929; 1 L. W. 643 (P. C.)

(4) 10 Ind. Cas. 477; 38 I. A. 87; 15 C. W. N. 545 (P. C.); 8 A. L. J. 552; 13 Bom. L. R. 427; 13 C. L. J. 575; 10 M. L. T. 25; 21 M. L. J. 645; 33 A. 356; (1911) 1 M. W. N. 432.

(5) 14 W. R. 146.

(6) 5 Ind. Cas. 640; (1910) M. W. N. 60; 33 M. 473; 7 M. L. T. 340; 20 M. L. J. 204.

(7) 6 C. L. R. 76.

(8) 12 Ind. Cas. 464; 38 C. 639.

(9) 12 Ind. Cas. 123; 10 M. L. T. 179; 35 M. 560.

(10) 27 Ind. Cas. 674; 17 M. L. T. 115; 19 C. W. N. 370; 13 A. L. J. 223; 2 C. W. 219; 17 Bom. L. R. 426; 21 C. L. J. 225; 28 M. L. J. 565; (1915) M. W. N. 511,

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But in other parts of his finding the District Judge bases his conclusion on a sound footing and, therefore, as a whole we can accept it.

In allowing the appeal we reverse the decrees of the Courts below and dismiss the suit as regards items Nos. 1 and 2 of the plaint schedule. Defendants Nos. 5 to 9 and 14 will get their costs throughout from the plaintiff.

Appeal allowed; Suit partly dismissed.

LOWER BURMA CHIEF COURT.

FIRST CIVIL APPEAL NO. 192 OF 1914.

September 9, 1915.

Present:—Mr. Justice Ormond and

Mr. Justice Twomey.

A. J. ROBERTSON—DEFENDANT—APPELLANT
versus

MRS. H. V. MURRAY—PLAINTIFF—
RESPONDENT.

Damages—Slander—Malice—Burden of proof—Privileged occasion.

The law applicable to a suit for damages for slander in India is the same as the English Law. If the occasion is privileged, the onus is on the plaintiff to show actual malice in the defendant and if the defendant make a statement honestly he is not liable for the slander even though there is no reasonable ground for his belief. [p. 931, col. 1.]

Clark v. Molyneux, 47 L. J. Q. B. 230; 37 L. T. 694; 26 W. R. 104; 14 Cox. C. C. 10; 3 Q. B. D. 237; *Stuart v. Bell*, 60 L. J. Q. B. 577; 2 Q. B. 341; 64 L. T. 633; 39 W. R. 612; *Collins v. Cooper*, (1903) 19 T. L. R. 118, referred to.

Refusal to apologise before suit may be evidence of malice, but it may equally be consistent with the defendant honestly adhering to his opinion. [p. 931, col. 1.]

Mr. J. R. Das, for the Appellant.

Mr. Higinbotham, for the Respondent.

JUDGMENT.

ORMOND, J.—On the original side of this Court the plaintiff-respondent has been awarded a decree for Rs. 500 damages for slander uttered by the appellant Robertson, an Advocate of this Court, who now appeals. Robertson occupied a house belonging to the plaintiff at Pauktaw, Insein, free of rent. The house had been unoccupied for some time and was in need of repair and Robertson stated that he was to be allowed, if he did it up, to occupy it free of rent until it could be sold. The house was burnt down on the 4th of June 1913. The plaintiff had taken out a fire insurance policy for Rs. 13,000 on this house through the defendant and Finlay,

Fleming & Company were the agents for the Insurance Company. Robertson reported to the agents that the fire was an act of incendiarism and in his opinion was at the instigation of Mrs. Murray, the plaintiff: that is the slander complained of. The defence was that it was a privileged communication and made without malice. If the facts are as stated by the defendant as to what he saw at the time, it was clearly an act of incendiarism and there is no reason to disbelieve his evidence as to these facts. Most of Robertson's furniture was burnt in the fire and was uninsured, but he with the Insurance Company had the common interest. I think it was a moral duty cast on Robertson to report the facts within his knowledge to the agents of the Insurance Company. The learned Judge on the original side has held that the occasion was privileged, and in my opinion it was clearly so. But the learned Judge has thought there was no basis for the defendant's opinion that the fire was at the instance of plaintiff. It is not clear from the judgment whether the learned Judge found that there was actual malice on the part of the defendant in expressing that opinion or whether the learned Judge held that he had acted without due care and attention in holding that opinion. I think the effect of the judgment is that the defendant could not have honestly thought that the fire was at the instance of the plaintiff and, therefore, was actuated by malice. The plaintiff had served a notice upon the defendant to quit the house and he had refused to do so. A Mrs. Hood was living in the house and her husband objected to her doing so. Defendant was told by Mrs. Hood that a few days before the fire Mrs. Murray, the plaintiff, had told her mother, Mrs. Paulini, and Miss Pinto who was with her that she should not let her daughter remain in the house as the house might be burnt down, that Pauktaw was a disreputable place and insinuated that Hood might burn this house down. Koreishi, the broker, also told the defendant that Mrs. Murray, the plaintiff, had told him that Hood was troubling her and complaining that Mrs. Hood was staying with Robertson and that she was afraid of Hood doing something to it and that she was afraid her house might be burnt down. Koreishi says that she told him to tell Robertson that Hood was arranging to burn down

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the house, or that he, Robertson, was to be beaten and that he had better leave the house, and that he had informed Robertson of what Mrs. Murray had told him. The fact that those statements were made by Mrs. Murray to the witness and reported to the defendant is not disbelieved by the learned Judge, but he holds that the proper inference to draw from them is that she was afraid that Hood might either burn down the house or get *budmashes* to do so.

The law applicable to a suit for damages for slander is the same as the English Law. Under that law if the occasion is privileged, the onus is on the plaintiff to show actual malice in the defendant and if the defendant made his statement honestly, he would not be liable for slander even though there was no reasonable ground for his belief. The following cases are sufficient authority for this proposition:—*Clark v. Molyneux* (1), *Stuart v. Bell* (2) and *Collins v. Cooper* (3). The defendant refused to apologise before suit and that is relied upon as evidence of malice. But it is equally consistent with the defendant honestly adhering to his opinion. The absence of any reasonable ground for the opinion would be evidence of malice but in this case, apart altogether from the statements made by Mrs. Murray, the fact that the house was insured for Rs. 13,000 and apparently was worth Rs. 10,000, for that was the sum paid by the Insurance Company, and the fact that it was clearly an act of incendiarism might be sufficient to warrant an honest belief in the mind of the defendant that the plaintiff must have been connected with the fire and Hood would have hardly acquainted Mrs. Murray with his intention of burning down her house unless Mrs. Murray acquiesced in his doing so. In my opinion the plaintiff has not made out that the defendant did not honestly believe that the house was burnt down at the instance of the plaintiff. I would allow this appeal and dismiss the suit with costs in both Courts.

TWOMEY, J.—I concur.

Appeal allowed.

(1) 47 L. J. Q. B. 280; 37 L. T. 694; 26 W. R. 104; 14 Cox. C. C. 10; 3 Q. B. D. 237.

(2) 60 L. J. Q. B. 577; 2 Q. B. 341; 64 L. T. 633; 39 W. R. 612.

(3) (1903) 19 T. L. R. 118.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEALS NOS. 1504 AND 1626
OF 1911.

June 1, 1914.

Present:—Justice Sir Asutosh Mookerjee, Kt.,
and Mr. Justice Beachcroft.

GAGAN CHANDRA CHUCKERBUTTY
APPELLANT—DEFENDANT—

versus

Maharaja BIRENDRA KISORE MANIKYA

BAHADUR—PLAINTIFF—RESPONDENT.

Limitation Act (IX of 1908), Sch. I, Art. 144, —Suit for declaration of title and assessment of rent—Suit for possession—Tenancy—Presumption

The plaintiff sued for declaration of title to land and for assessment of rent, praying also that for the years antecedent to the suit damages for use and occupation may be decreed. The defendant pleaded adverse possession for more than 12 years:

Held, that the suit was essentially for recovery of possession and was, therefore, barred by time under Article 144 of the Limitation Act. [p 933, col. 2.]

If a person squats upon the land of another and if the latter accepts him as his tenant; either by express declaration or by implication, the squatter acquires the status of a tenant. But it is open to the proprietor to repudiate the tenancy and to evict the person who has come upon the land without his consent. It is impossible to support on principle the proposition that if a person occupies the land of another, it is open to the proprietor, any length of time afterwards, to treat the occupier as his tenant, although the latter has not given any indication that he intended to hold the land as tenant. [p. 933, col. 1.]

Nityamund Ghose v. Kissen Kishor, W. R. 1864, Act X, Ruling 82, distinguished.

Appeals against the decision of the Subordinate Judge of Tippera, dated the 11th April 1911, reversing that of the Munsif, Comilla, dated the 23rd August 1910.

Babu Tarak Chunder Chuckerbutty, for the Appellant.

Babus Gobind Chunder Dey Roy and Birendra Chunder Das, for the Respondent.

JUDGMENT.—This is an appeal by the defendant in a suit for declaration of title to land for assessment of rent. The case for the plaintiff is that he is the proprietor of an extensive *zemindari*, that there are numerous tracts of waste land within his estate and that various persons, without his knowledge and without settlement from him, have taken possession of these lands and have brought them under cultivation. According to the plaintiff, the defendant

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is one of such persons, and in 1898, in the course of Settlement proceedings under the Bengal Tenancy Act, it was discovered that the defendant was in occupation of some land without settlement from the plaintiff. The defendant was, however, described in the Settlement record as an intermediate tenure-holder who held without payment of rent. The plaintiff finally states that the defendant, though thereafter repeatedly asked to take a settlement of the disputed land, has, on various pretexts, never attored to him. The plaintiff consequently asks that rent may be assessed at the rate of Rs. 2 per *bigha* and prays that for the years antecedent to the suit damages for use and occupation may be decreed at the same rate. The defendant resists the claim on the ground that he has a *niskar* or rent-free title, that neither he nor his ancestors who were in occupation for many years ever paid rent to the plaintiff and that the claim for assessment of rent is barred by limitation. The Court of first instance found that the defendant held under a rent-free title. The Court also held that if the defendant had no such title, the claim for assessment of rent was barred by limitation. Upon appeal, the Subordinate Judge has held that the fact that the defendant and his predecessors had been in occupation of the land for many years without payment of rent does not show that the defendant has a rent-free title; he has also held that the claim for assessment of rent is not barred by limitation. In this view the claim of the plaintiff has been decreed. On the present appeal by the defendant, it has been argued that the claim is essentially one for recovery of possession of land and is barred by limitation, as neither the plaintiff nor his predecessor has been shown to have been ever in possession of the land either directly or through tenants. On behalf of the respondent it has been argued on the authority of the decision in *Nityanund Ghose v. Kissen Kishore* (1) that the defendant was presumably a tenant under the plaintiff, that it is not proved that the defendant at any time set up a hostile title, and that consequently the claim for assessment of rent is not barred by limitation.

In our opinion the Subordinate Judge has taken an erroneous view of the relative situation of the parties and that the claim for assessment of rent is clearly barred by limitation.

Reliance has been principally placed on behalf of the respondent upon the following passage from the judgment in *Nityanund Ghose v. Kissen Kishore* (1): "Here it is a very usual thing for a man to squat on a piece of land or to take into cultivation an unoccupied or waste piece of land. Tenancy, in a great many districts in Bengal, commences in this way, and where it does so commence, it is presumed that the cultivator cultivates by the permission of the landlord, and is under obligation to his landlord to pay him a fair rent, when the latter may choose to demand it. Thus, the established usage of the country regards these parties as landlord and tenant, and unless the landlord chooses thus to treat him, the cultivator is not regarded, as he would be by the law as administered in England, as a trespasser, but as a tenant, and he would be so although he may never have expressly acknowledged the landlord's right or entered into any express contract with him for the payment of rent. If he chooses to cultivate the *zemindar's* lands, and the *zemindar* lets him, there is an implied contract between them, creating a relationship of landlord and tenant." Reference has also been made to the *dictum* of Jackson, J., in *Ranee Lalun Monee v. Sona Monee Dabee* (2) to the effect that if the parties are in possession, they make themselves tenants by use and occupation of the land. Our attention has also been drawn to the decisions in *Lukee Kanto Dass Chowdhry v. Sumeeruddi Lusker* (3), *Surnomoyee v. Denonath Gir* (4), *Azim Sirdar v. Ram Lal Shaha* (5) and *Ishan Chandra Mitter v. Ramranjan Chakarbutty* (6). On the basis of these decisions, it has been broadly contended that if a person squats on the land of another and proceeds to cultivate it, he makes himself a tenant under such person,

(1) W. R. 1864; Act X, Ruling 82.

(2) 22 W. R. 334.

(3) 21 W. R. 208; 13 B. L. R. 243 (F. B.).

(4) 9 C. 908; 13 C. L. R. 69.

(5) 25 C. 324.

(6) 2 C. L. J. 125.

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that although the proprietor does not expressly give permission to the squatter to occupy the land and the latter does not expressly contract to pay rent to the proprietor yet a tenancy is established by presumption, and that it becomes open to the proprietor any length of time afterwards to demand rent from the occupier. In our opinion, this proposition is not deducible from the cases mentioned. It is perfectly plain that if a person squats upon the land of another and if the latter accepts him as his tenant, either by express declaration or by implication, the squatter acquires the status of a tenant. But it is clearly open to the proprietor to repudiate the tenancy and to evict the person who has come upon the land without his consent. It is further impossible to support on principle the proposition that if a person occupies the land of another, it is open to the proprietor, any length of time afterwards, to treat the occupier as tenant, although the latter has not given any indication that he intended to hold the land as tenant. This is in accord with the decision of *Maharaja Birendra Kisore Manikya Bahadur v. Gagan Chandra Chuckerbutty* (7) and *Mati Lal v. Darjeeling Municipality* (8). There is a further difficulty in the way of the plaintiff-respondent. The principle which he enunciates as deducible from the case of *Nityanand Ghose v. Kissen Kishore* (1) applies only to squatters. In the case before us, the defendant was recorded as an intermediate tenure-holder, and, the entries from the Record of Rights, which have been placed before us, show conclusively that there are settled *raiyats* under the defendant. The defendant, consequently, is not a squatter in any sense of the term, and even if the broad proposition formulated by the respondent were accepted, it would be of no assistance to his case. It is further plain that although the defendant was recorded as an intermediate tenure-holder in the Record of Rights, he has never been treated as tenant by the plaintiff or his predecessors. The plaintiff came into Court on the allegation that the defendant occu-

pied the land without his permission and has never attorned to him; not only was the entry upon the land unauthorised, the defendant when called upon to take a settlement has strenuously refused to accept a tenancy from him. The defendant also does not allege that he was ever a tenant under the plaintiff. Consequently, there is no room for the application of a presumption of tenancy between the parties. If it had been established that the defendant had at any time held as a tenant under the plaintiff or that the plaintiff had accepted the defendant as his tenant, the question might no doubt arise whether the defendant could at a subsequent period effectively set up the plea of adverse possession, when such adverse possession was not brought to the knowledge of the person whom he had acknowledged as his landlord. Here, it is not the case of either party that a tenancy ever existed, and this is emphasised by the fact that although the plaintiff seeks for assessment of rent for the future, in so far as the period antecedent to the suit is concerned, he claims damages for use and occupation on the assumption that up to the date of the institution of the suit at any rate the defendant was not his tenant. The suit is essentially for recovery of possession. It is nonetheless a suit for recovery of possession, though the plaintiff seeks only to have rent assessed. He does not, indeed, claim to evict the defendant and to have actual occupation of the land; but he does seek to have possession by realisation of rent from the defendant. As was pointed out by the Judicial Committee in *Chundrabullee Debia v. Luckhee Debia* (9) and by this Court in *Abhoy Churn Pal v. Kally Pershad Chatterjee* (10), a suit of this character must be treated as a suit for recovery of possession, and the rule of limitation applicable to suits for recovery of possession must be applied. If the contrary view were maintained, the result would be that a person dispossessed by a trespasser might, any length of time afterwards when a suit for recovery of actual possession would be effectively met by the plea of limitation,

(7) 30 Ind. Cas. 902; 22 C. L. J. 132.

(8) 18 Ind. Cas. 844; 17 C. L. J. 167.

(9) 10 M. L. A. 214; 1 Suth. P. C. J. 602; 2 Sar. P. C. J. 119; 19 E. R. 952.

(10) 5 C. 949; 6 C. L. R. 260.

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maintain a suit for assessment of rent on the allegation that the defendant was his tenant. The plaintiff has not suggested—and even if he had made a suggestion, there is nothing to show that it could have been supported—that he was ever in actual occupation of the land in suit; he has not shown that the possession of the defendant was at any time possession on his behalf; nor has he established that he was in possession of this land by receipt of rent from the defendant within twelve years antecedent to the suit. It is plain that there is no answer to the plea of limitation.

The result is that this appeal is allowed, the decree of the Subordinate Judge set aside and the suit dismissed with cost, in all the Courts.

This judgment, it is conceded, will govern the other appeal (No. 1626 of 1911).

Appeals allowed.

BOMBAY HIGH COURT.

FIRST CIVIL APPEAL No. 81 OF 1914.

August 23, 1915.

Present:—Mr. Justice Batchelor and
Mr. Justice Hayward.

YESUBAI BHRATAR SADASHIV
GANESH DESPANDE—PLAINTIFF—

APPELLANT

versus

SADASHIV GANESH DESPANDE—

DEFENDANT—RESPONDENT.

Hindu Law—Imputation of unchastity—Mere suspicion—Maintenance, separate, when allowed—Wife voluntarily deserting husband, if entitled to maintenance.

A judgment of a Court of Justice should not impute unchastity to a married woman on mere suspicion but only on strong and sure grounds. [p. 934, col. 2.]

Nawab Khicaji Muhammad Khan v. Nawab Husaini Begum, 7 Ind. Cas. 237; 14 C. W. N. 865 (P. C.); 7 A. L. J. 871; 8 M. L. T. 147; 12 C. L. J. 205; 20 M. L. J. 614; 32 A. 410; 12 Bom. L. R. 638; (1910) M. W. N. 313; 37 L. A. 152, followed.

Where a wife claims separate maintenance from her husband, she must show that he abandoned or deserted or expelled her without justifying cause. [p. 935, col. 1.]

A wife by voluntarily deserting her husband becomes disentitled to claim separate maintenance from him. [p. 936, col. 1.]

Appeal against the decision of the Acting first Class Subordinate Judge at Belgaum, in Suit No. 142 of 1912.

Mr. A. G. Desai, for the Appellant.

Dewan Bahadur G. S. Rao, for the Respondent.

JUDGMENT.—This is an appeal by a Hindu wife who sued her husband for separate maintenance. She was defeated in the trial Court, because the learned Judge there held, *first*, that the plaintiff voluntarily deserted her husband, the defendant, and *secondly*, that the unchastity pleaded in bar of the plaintiff's claim was proved.

The parties to the suit were married in 1872 or 1873. The rupture occurred either in 1885 or in 1896. According to the defendant it was in 1885 that he abandoned his wife, because he detected her in the very act of adultery. The wife, who denies all unchastity, says that the separation occurred in 1896 when she was abandoned and expelled by her husband. It is admitted that in 1887 the defendant married another woman. This suit was filed in April 1912. The main object of this appeal, as the learned Pleader Mr. Desai has candidly made known to us, is to remove the stigma of unchastity which the lower Court's judgment has attached to the plaintiff. And here, we think, the plaintiff is entitled to this Court's pronouncement in her favour. The judgment of the learned Judge below is upon this point unsatisfactory. For his conclusion is couched in these halting and hesitating words: "For all these reasons it looks to me that she has not been quite faithful to her husband." It is not, we think, upon such a doubtful expression of opinion that a woman is to be branded as unchaste by judgment of a Court, and the learned Judge's attention might with advantage be directed to the language of their Lordships of the Privy Council in *Nawab Khwaja Muhammad Khan v. Nawab Husaini Begum* (1) where their Lordships had occasion to comment upon a similarly objectionable finding which in that case was expressed in these words: "although unchastity is not duly proved, yet I have no hesitation in holding that the plaintiff's character is not free from suspicion." Upon that the Judicial Committee observed: "Their Lordships cannot help considering an opinion of this kind regarding a serious charge as unsatisfactory.

(1) 7 Ind. Cas. 237; 12 Bom. L. R. 638; 14 C. W. N. 865 (P. C.); 7 A. L. J. 871; 8 M. L. T. 147; 12 C. L. J. 205; 20 M. L. J. 614; 32 A. 410; (1910) M. W. N. 313; 37 L. A. 152.

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Either the allegation of unchastity was established or it was not; if the evidence was not sufficient or not reliable there was an end of the charge, so far as the particular matter in issue was concerned, and it was hardly proper to give expression to what the Judge calls 'suspicion.' In our present case the learned Judge's excursion into the regions of mere suspicion, is the more unfortunate, because direct ocular testimony was adduced to prove that this woman was an adulteress, and the testimony was expressly disbelieved, and in our opinion very rightly disbelieved by the learned Judge. No attempt has been made to rehabilitate either these witnesses or the witnesses who spoke to vague rumour as to the appellant's character, and, indeed, Mr. Rao has frankly admitted that he is not in a position to press this charge of unchastity. We must, therefore, in the appellant's interests dissociate ourselves from the learned trial Judge's finding upon this point and formally record our opinion that there is not upon this record any evidence sufficient to warrant any imputation against the plaintiff's moral character.

But the plaintiff in order to succeed in this suit must show that the defendant, her husband, abandoned, or deserted or expelled her without justifying cause. Her story in the plaint is that in 1890 the husband ill-treated her and finally beat her and, in her own words, kicked her out of the house, but notwithstanding that, she continued occasionally to visit him up till 1899. In that year she ceased to visit him, because he stopped her from entering his house. That account apparently includes a charge of cruelty as well as abandonment. But there is no evidence of cruelty and Mr. Desai for the appellant admits that the charge of cruelty is unsustainable. We have, therefore, only to consider the case of desertion or expulsion.

According to the plaintiff's deposition, the defendant expelled her from his house about three years after he had married the 2nd wife. The account, however, is not quite consistent and there are various indications in the lady's deposition that her testimony is such as ought not to be accepted without corroboration. Now, her story, if it be true, was capable of easy corroboration. For she tells us that there were four witnesses to the events upon which she relied, *viz.*, Gundoba,

Jaywant, Duyanoba and Bhan Desai. Not one of these four men was examined as a witness, and although the plaintiff did cite Bhan Desai, she subsequently refrained from calling him. So far, therefore, the plaintiff's story is weakened by the absence of the corroboration which should be forthcoming and has not been offered.

What remains of her case seems to us to be disposed of by reference to the notice which she served upon her husband on the 29th of July 1910. It is Exhibit 34 in the suit and the ground for it is stated in these terms: "Notice is given you that you are my husband. After the marriage you and I, living together for several years, managed wordly affairs. But as you married a second time some years after our marriage, I could not pull on in the house, and quarrels took place often-times. Therefore I had to maintain myself by residing at my mother's place". This notice, in our opinion, gives the true key to this suit and the real explanation of the division between this couple. The evidence shows that the plaintiff, an only daughter of well-to-do parents, was petted and beloved by them. Used to such an environment, it was natural that on the introduction of a rival into her house she should resent the consequences and should refuse to accept that position of submission which the Hindu Law ascribes to a wife so placed. We are satisfied on the evidence that it was her natural revolt from this position which led to the quarrel and induced her to leave her husband's house of her own accord. If she had been expelled or ill-treated by the husband, she had numerous and powerful friends, who, we must suppose, would have been ready to take her part and to vindicate her claims against the husband. This inference seems to us to be supported by the long delay, which occurred before the plaintiff was minded to seek relief. On her showing she was expelled in 1896; yet from that year down to 1910 she makes no move or claim or attempt to assert her rights. The only explanation which we can find of this, consistent with the evidence, is that she was conscious that she had voluntarily deserted her husband and had so forfeited whatever rights she might otherwise have had against him.

On these grounds we agree with the

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learned Judge below in thinking that the plaintiff is shown voluntarily to have deserted her husband, and on that ground she is disentitled to claim separate maintenance from him.

The appeal must, in our opinion, be dismissed, the decree of the Court below being confirmed.

No order as to costs.

Appeal dismissed.

SIND JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 27 OF 1913

April 15, 1915.

Present:—Mr. Pratt, J. C., and

Mr. Crouch, A. J. C.

KUNDANDAS NANUMAL—APPELLANT

versus

DEUMAL LILARAM—RESPONDENT.

Partition Act (IV of 1893), s. 4—'Undivided family', meaning of—Family member, right of, to compel outsider to accept money value for his share in family property.

The expression 'undivided family' in section 4 of the Partition Act must be taken to mean undivided *qua* the dwelling house in question and to be a family which owns the house but has not divided it. The condition is fulfilled if the parties are co-owners, whether as joint tenants or tenants-in-common; in either case a member of a family so owning is entitled to claim that the transferee of a share of such dwelling house, who is a stranger, shall accept a money valuation of his share therein. [p. 936, col. 2; p. 937, col. 1.]

Sultan Begam v. Debi Prasad, A. W. N. (1908) 126; 5 A. L. J. 352; 4 M. L. T. 38; 30 A. 324, referred to.

Second appeal against the decision of the District Judge, Sukkur.

Mr. Wadhupal Oodharam, for the Appellant.

Mr. Hirdaram Mewaram, for the Respondent.

JUDGMENT.

PRATT, J. C.—The dwelling house in suit belonged to Lilaram, father of the 1st defendant. Lilaram had four sons—the 1st defendant, a second son, who sold to the plaintiff, and two others. The 1st defendant and plaintiff's vendor effected partition with the two other sons, and in that partition the house in suit fell to the share of defendant No. 1 and plaintiff's vendor.

Plaintiff has now sued for partition and the only question for decision in this appeal is whether defendant No. 1 is entitled to claim under section 4 of the Partition Act, IV of 1893, that plaintiff should accept valuation of his share in the house. Mr. Wadhupal accepts the ruling referred to by the District Judge in the case of *Sultan Begam v. Debi Prasad* (1), where it was held that the expression 'undivided family' in section 4 of the Partition Act must be taken to mean undivided *qua* the dwelling house in question and to be a family which owns the house but has not divided it. But Mr. Wadhupal seeks to distinguish this case on two grounds. In the first place, he says that the family that owns the house is the family of four brothers and that as these brothers effected partition, it cannot be said to be an undivided family. But the house is not now owned by the four brothers. It is owned by two brothers, defendant No. 1 and plaintiff's vendor, who have not effected partition *inter se* and who are, therefore, undivided *qua* the dwelling house. Mr. Wadhupal's next point is that the other brothers having separated defendant No. 1 and plaintiff's vendor are no longer joint tenants in respect of the house in suit, and he cites in support of this proposition the case of *Balabux v. Rukhmabai* (2). But in that case the Privy Council decided that if one co-parcener is separated from the others there was no presumption of union in respect of others who had not so separated. The question as to whether the others hold their property in severalty or in joint tenancy or in common is a question of fact not governed by any presumption. But it makes no difference whether these two brothers, the defendant No. 1 and plaintiff's vendor, owned the property as joint tenants or as tenants-in-common. All that is necessary to fulfil the requirement of the Partition Act is that they should be undivided *qua* the dwelling house. That condition is fulfilled if they

(1) 30 A. 324; A. W. N. (1908) 126; 5 A. L. J. 352; 4 M. L. T. 38.

(2) 30 C. 725; 5 Bom. L. R. 469; 7 C. W. N. 642 30 I. A. 180.

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are co-owners, whether as joint tenants or as tenants-in-common.

We accordingly confirm the order of the lower Court and dismiss this appeal with costs.

Appeal dismissed.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL NO. 1339 OF 1911.

July 3, 1914.

Present:—Justice Sir Asutosh Mookerjee, Kt.,
and Mr. Justice Beachcroft.

Maharaja BIRENDRA KISORE MANIKYA
BAHADUR—PLAINTIFF—APPELLANT

versus

KAILAS CHANDRA SARKAR AND

ANOTHER—DEFENDANTS—RESPONDENTS.

Bengal Tenancy (Amendment) Act (I of 1907), s. 103B (3)—Nature of evidence required for rebuttal of presumption—Suit for declaration of title to land and assessment of rent—Decree dismissing suit but declaring plaintiff's zemindari right in land—Non-payment of rent—Long possession—Adverse possession—Limitation.

In a suit for declaration of title to land and assessment of rent, the Court of first instance dismissed the suit as barred by limitation, but gave the plaintiff a declaration that he had *zemindari* right in the disputed land:

Held, that the Court by the declaration merely intended to hold that the land was situated within the ambit of the plaintiff's estate, and not that the defendants or their predecessors held, at any time, as tenants under the plaintiff. [p. 937, col. 2; p. 938, col. 1.]

Under sub-section 3 of section 103B of the Bengal Tenancy Act as it stands under Act I of 1907 the evidence by which the entry may be proved to be incorrect, may be evidence of facts of a date prior to that of the publication of the Record of Rights, although evidence of facts subsequent to the publication may also throw an important light upon the solution of the problem. [p. 938, cols. 1 & 2.]

Where the defendants were treated by the plaintiff as trespassers in 1894 and notwithstanding the entry in the Record of Rights in 1898 to the effect that the defendants were settled *raiya*s, the defendants had since that date repudiated the theory of a possible tenancy:

Held, that the entry in the Record of Rights had been amply rebutted, in the absence of any suggestion and any evidence in support of a possible allegation that between 1894 and 1898 a tenancy was created by the plaintiff in favour of the defendant. [p. 938, col. 2.]

Where, according to the defendants, they and their ancestors have been in occupation of the

disputed land from generation to generation without payment of rents, and the plaintiff has failed to prove that he or his predecessor has ever been in possession of the land by actual occupation or receipt of rent:

Held, that under the circumstances, the claim for assessment of rent, which is really a claim for possession of the land, is barred by limitation. [p. 938, col. 2.]

Appeal against the decree of the Subordinate Judge of Noakhali, dated the 22nd February 1911, affirming that of the Munsif of Feni, dated the 16th July 1910.

Babu Romesh Chunder Sen, for the Appellant.

JUDGMENT.—This is an appeal by the plaintiff in a suit for assessment of rent. His allegations are that the defendants are tenants of some land within his estate, that they have unlawfully taken possession of the disputed land which is not comprised within their tenancy, that in 1894 in the course of Settlement proceedings they were found in occupation of this land, and that although they were then entered in the Record of Rights as settled *raiya*s, they have not attorned to him and have not taken settlement at a fair and reasonable rent. The defendants urged that they are rent-free holders, and that the claim is in any view barred by limitation. The Court of first instance dismissed the suit as barred by limitation, but gave the plaintiff a declaration that he had *zemindari* right in the disputed land. The defendants were satisfied with this decree as it did not hurt them in any way, but the plaintiff preferred an appeal. The Subordinate Judge has confirmed the decree of the primary Court on the ground that the claim for assessment of rent was barred by limitation. In the present appeal it has been argued for the plaintiff that as the decree of the Court of first instance was not challenged on behalf of the defendants, it must be taken that they were tenants under the plaintiff and consequently no question of limitation could arise. In our opinion, there is no foundation for this contention.

The Court of first instance, when it declared that the plaintiff had *zemindari* right in the disputed land, merely intended to hold, as is clear from an examination of the judgment, that the land was situated within the ambit of his estate. The Court

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found that as the land was surrounded by *mal* lands of the *zemindari* it might be deemed to be *mal* land; but the Court did not find that the defendants or their predecessors held, at any time, as tenants under the plaintiff. The defendants are consequently not embarrassed by the declaration in favour of the plaintiff, which they never questioned by way of an appeal: *Maharaja Birendra Kisore Manikya Bahadur v. Nazir Mahommad* (1).

We have next to determine, whether the claim for assessment of rent is or is not barred by limitation. The plaintiff contends that the claim is not barred in view of the entry in the Record of Rights, published on the 17th December 1898, to the effect that the defendants were settled *raiya*s. Under section 103B of the Bengal Tenancy Act this entry must be presumed to be correct until it is proved by evidence to be incorrect. We may here observe parenthetically that there is a slight difference in language between sub-section (3) of section 103B as it stands under Act I of 1907 and section 103B as it stood under Act III of 1898. Under the latter Act, every entry in a Record of Rights finally published was to be presumed to be correct until the contrary was proved. Under sub-section 3 of section 103B as it stands under Act I of 1907, every entry in a Record of Rights shall be presumed to be correct until it is proved by evidence to be incorrect. It is not necessary for our present purpose to determine whether the introduction of the words "by evidence" effects an alternation in the law. But it is plain that the evidence by which the entry may be proved to be incorrect, may be evidence of facts of a date prior to that of the publication of the Record of Rights: *Sheonandan Persad v. Bacha Raut* (2). In fact, as the question primarily is whether the entry in the Record of Rights was correct at the time when it was made, that is, correctly stated the facts as they stood at that time, evidence of facts of a date prior to the publication of the record must be admissible, although evidence of facts subsequent to the publication may also throw an important light upon the solution of the problem. In the

(1) 30 Ind. Cas. 917; 22 C.L.J. 122.

(2) 4 Ind. Cas. 54; 9 C. L. J. 284.

case before us, there was a dispute between the plaintiff and the defendants in the course of Settlement proceedings. The plaintiff contended that the defendants were not in occupation of the disputed land, while the defendants asserted that they were in occupation as rent-free holders. Evidence was taken and, on the 6th May 1894 it was decided that the possession of the defendants was proved. We start then with the position that in 1894 the plaintiff repudiated the defendants and declined to recognise them as tenants; his case at the time was that they were trespassers. On the other hand, the defendants asserted that they held as rent-free holders; they did not claim to hold as tenants under the plaintiff. To this must be added the statement made by the plaintiff in his plaint in this suit that, although since 1898, when the Record of Rights was finally published, the defendants have been repeatedly asked to take settlement at fair and equitable rates, they have not attorned to him and have fraudulently omitted to do so. We have thus the facts that the defendants were treated by the plaintiff as trespassers in 1894 and that notwithstanding the entry in the Record of Rights in 1898, the defendants have since that date repudiated the theory of a possible tenancy. We are of opinion, in these circumstances, that the entry in the Record of Rights has been amply rebutted, in the absence of any suggestion and any evidence in support of a possible allegation that between 1894 and 1898 a tenancy was created by the plaintiff in favour of the defendants. The position then is that while, according to the defendants, they and their ancestors have been in occupation of the disputed land from generation to generation without payment of rents, the plaintiff has failed to prove that he or his predecessor has ever been in possession of the land by actual occupation or receipt of rent. We are of opinion that, in these circumstances, the claim for assessment of rent, which is really a claim for possession of the land, is barred by limitation and the suit has been rightly dismissed: *Chundrabullee v. Luckhea* (3), *Abhay Churn Pal v. Kally Pershad Chatterjee* (4), *Dharani Kant Lalari v. Gabar Ali*

(3) 10 M. I. A. 214; 1 Subh. P. C. J. 602; 2 Sar. P. C. J. 119; 19 E. R. 952.

(4) 5 C. 949; 6 C. L. R. 260.

BRITISH INDIA STEAM NAVIGATION CO., LTD. v. JIAWOOLA.

SOBHAN BAKSH v. BIRENDRA KISORE.

Khan (5), *Gagan Chandra Chuckerbutty v. Maharaja Birendra Kisore Manikya Bahadur* (6).

The result is that the decree of the Subordinate Judge is affirmed and this appeal dismissed.

Appeal dismissed.

(5) 18 Ind. Cas. 17; 17 C. L. J. 277 (P. C.); 13 M. L. T. 185; (1913) M. W. N. 157; 17 C. W. N. 389; 15 Bom. L. R. 445; 25 M. L. J. 95.

(6) 80 Ind. Cas. 931; 22 C. L. J. 134.

LOWER BURMA CHIEF COURT.

CIVIL REVISION PETITION No. 91 OF 1915.

August 20, 1915.

Present:—Sir Charles Fox, Kt., Chief Judge.
BRITISH INDIA STEAM NAVIGATION
COMPANY, LIMITED—DEFENDANT
— APPELLANT

versus

JIAWOOLA—PLAINTIFF—RESPONDENT.

Shipper, liability of—“At shipper’s risk with option of carrying on deck” in the Bill of Lading, meaning of.

Apart from the general law which imposes on a carrier by sea the duty of carrying goods under decks, except in the case of express contract or custom to the contrary, the meaning of the clause “at shipper’s risk without option of carrying on deck” is clearly in favour of the ship-owner and he is exempted from liability for damages caused to the goods by want of ventilation, by the terms of the clause “at shipper’s risk” though he did not exercise the option of carrying the goods on deck.

Mr. MacDonell, for the Appellant.

Mr. Hancock, for the Respondent.

JUDGMENT.—The suit was for damages for negligence in carrying betel leaves in baskets on a voyage of one of the defendant Company’s steamers from Calcutta to Rangoon in October 1914. The baskets were stowed in between the decks, and owing to want of sufficient air or ventilation there for betel leaves they went bad. The question in the case was whether the defendant Company was exempted from liability from the terms of the Bill of Lading under which the goods were carried. The form of Bill of Lading as originally printed exempts the Company from almost every conceivable liability, but yet another clause was added to the Bill of Lading in question, being stamped across the printed matter. Its terms are “At shipper’s risk with option of carrying on deck.” Even without reference to the general law which

imposes on a carrier by sea the duty of carrying goods under decks except in the case of express contract or custom to the contrary, the meaning of the clause is perfectly plain and free from ambiguity. Not only the words “at shipper’s risk,” are necessarily in favour of the ship-owner, but the words “with option of carrying on deck” are in his favour, and I mean that the option is with the ship-owner. It would be indeed surprising to find any ship-owner inserting a clause in his Bill of Lading form favouring the shipper.

The Company was exempted from liability by the terms of the clause “at shipper’s risk” although it did not exercise the option of carrying the goods on deck. The decree of the Small Cause Court in favour of the shipper was contrary to law and is set aside. The suit is dismissed with costs. The plaintiff must pay the defendant Company’s costs of this application—one gold mohur as Advocate’s fee.

Suit dismissed.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 3436 OF 1910.

July 3, 1914.

Present:—Justice Sir Asutosh Mookerjee, Kt., and Mr. Justice Beachcroft.

SOBHAN BAKSH AND ANOTHER—
DEFENDANTS—APPELLANTS

versus

Maharaja BIRENDRA KISORE MANIKYA
BAHADUR—PLAINTIFF—
RESPONDENT.

Bengal Tenancy Act (VIII of 1885)—Entry in Record of Rights before amendment of 1898 disputed—Presumption—Repudiation by both parties—Burden of proof—Possession—Long possession without payment of rent and with assertion of title, effect of.

No presumption of correctness can apply to an entry made, after the decision of a dispute, in a Record of Rights before the amendment of the Bengal Tenancy Act by Act III of 1898. [p. 940, col. 2.]

It is open, however, to the parties to agree that the entry is not correct, and must be repudiated, though they are not at one as to what should be substituted in its place. [p. 940, col. 2.]

Hence, where the plaintiff repudiates the entry as fraudulently obtained, and the defendants repudiate it as erroneously made, the Court should not place upon the defendant the burden of rebutting the

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entry upon which the plaintiff does not place reliance. [p. 940, col. 2.]

When the plaintiff comes into Court on the allegation that the defendants have never attorned to him, there is no room for the suggestion that the possession of the defendants was possession on his behalf. [p. 941, col. 1.]

Long possession of the disputed lands by the defendants and their predecessors without payment of rent and under assertion of a rent-free title justifies the inference that the defendants had the title they set up. [p. 941, col. 1.]

Appeal against the decree of the District Judge of Tippera, dated the 24th May 1910, reversing that of the Munsif of Comilla, dated the 18th September 1909.

Babu Girija Prosonno Roy Chowdhury, for the Appellants.

Babus Dwarka Nath Chakravarti, Gobind Chunder Dey Roy and Romesh Chunder Sen, for the Respondent.

JUDGMENT.—This is an appeal by two of the defendants in a suit for recovery of possession of land with mesne profits or, in the alternative, for assessment of rent. The case for the plaintiff is that he is the owner of an extensive *zemindari*, that within his estate there are large tracts of land whereof possession has been taken by different persons without his knowledge and consent, that the defendants are persons of this description, that they are in occupation without title to the disputed lands in respect of which they wrongfully secured an entry in the Settlement Record on the 14th July 1898 to the effect that they were settled *raiyats*, and that thereafter they have neither attorned to him nor paid him rent. The plaintiff consequently seeks to eject the defendants as trespassers; he prays in the alternative that if, for any reason, ejectment is not decreed, rent may be assessed on the land in their occupation. The claim is valued at Rs. 79-3-3, namely, Rs. 50 as the market price of the land in suit and Rs. 29-3-3 as the amount of mesne profits. The defendants resist the claim on the two-fold ground that it is barred by limitation, and that they are rent-free holders. They assert that they themselves and their ancestors were in possession from generation to generation for upwards of a century; they also repudiate the entry in the Record of Rights as incorrect and state that they should have been recorded as rent-free holders. The Court of first instance found upon the evidence that the lands had not been proved to be

mal, that the plaintiff had never been in possession thereof by actual occupation or receipt of rent and that from the long possession of the defendants and their predecessors, the legitimate inference was that they were rent-free holders. Upon appeal, the District Judge has reversed this decision. He has held that the defendants had failed to rebut the entry in the Record of Rights and that the plaintiff was consequently entitled to rent at the rate claimed by him. On the present appeal, it has been argued, *first*, that no question arises as to the entry in the Record of Rights which had been repudiated by both the parties in the Court of first instance; *secondly*, that the claim is barred by limitation; and *thirdly*, that the defendants hold under a rent-free grant. In our opinion these contentions are well founded.

As regards the *first* ground, it may be observed that as the entry was made on the 14th July 1898 before the Bengal Tenancy Act was amended by Act III of 1898 which came into force on the 2nd November 1898, any question as to the correctness of the entry must be decided with reference to sub-section 2 of section 109 as it stood before the amendment. That sub-section provides that every undisputed entry in the record shall be presumed to be correct until the contrary is proved. In the case before us, the entry was made after the decision of a dispute, and consequently no presumption of correctness could apply to it. But under section 9 of Act III of 1898, the decision by the Revenue Officer had the force and effect of a decree of a Civil Court in a suit between the parties and was final. It was obviously open, however, to the parties to agree that the entry was not correct and must be repudiated, though they might not be at one as to what should be substituted in its place. The plaintiff repudiates the entry as fraudulently obtained by the defendants; the defendants repudiate it as erroneously made. In these circumstances, the District Judge should not have held that the burden lay upon the defendants to rebut an entry upon which the plaintiff did not place reliance. The first ground must, therefore, prevail.

As regards the *second* ground, the Court of first instance found that the plaintiff had

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failed to prove that the land was *mal* or that he had ever been in possession thereof by actual occupation or by receipt of rent. The District Judge has not reversed this finding, and, on the record as it stands, the finding cannot be successfully assailed. Besides, as the plaintiff comes into Court on the allegation that the defendants had not attorned to him, there is no room for the suggestion that the possession of the defendants was possession on his behalf. The claim is consequently barred by limitation: *Dharani Kanta Lahiri v. Gabar Ali Khan* (1).

As regards the *third* ground, the Court of first instance held that the long possession of the disputed lands by the defendants and their predecessors without payment of rent and under assertion of a rent-free title justified the inference that the defendants had the title they set up. This view is obviously right: *Dharmput Singh v. Russomoyee* (2); *Raddha Gobind Doss v. Prokash Chunder Doss* (3). The result is that this appeal is allowed, the decree of the District Judge set aside and the suit dismissed with costs in all the Courts.

Appeal allowed.

(1) 18 Ind. Cas. 17; 17 C. L. J. 277; 17 C. W. N. 389; 13 M. L. T. 185; (1913) M. W. N. 57; 15 Bom. L. R. 445; 35 M. L. J. 95.

(2) 10 W. R. 461.

(3) 14 W. R. 108.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1084 OF 1914.

June 14, 1915.

Present:—Mr. Justice Tudball.

DAMODAR DAS—DEFENDANT—APPELLANT

versus

TILAK CHAND—PLAINTIFF—RESPONDENT.

Easements Act (V of 1882), s. 23—Thatched roof house changed to pukka three-storeyed house—Discharge of water—Additional burden.

The defendant had a single-storeyed house with a thatched roof. One portion of the thatched roof discharged the rain water on the plaintiff's land between the houses of the two parties. He removed his thatched house and built a three-storeyed *pukka* house with five spouts on the roof to discharge water on to the land:

Held, that there was a considerable increase of burden within the meaning of section 23 of the *Easements Act*.

Second appeal from a decree of the Additional Judge of Saharanpur.

Mr. *Nihal Chand*, for the Appellant.

Mr. *S. A. Haidar*, for the Respondent.

JUDGMENT.—The sole question in this appeal is whether the defendant has increased the burden within the meaning of section 23 of the *Easements Act*. The facts are simple. The defendant had a single-storeyed house with a thatched roof. One portion of the thatched roof discharged the rain water on a small lane between the houses of the two parties. He has removed his thatched house and has now built a three-storeyed *pukka* house and he has put spouts on the roof of the house to discharge water on to the land between the plaintiff's wall and his wall. The Court of first instance held that there was really no increase in the burden except where the water from one spout fell on to the wall of the plaintiff's house. That spout, the Court ordered, should be altered in its direction. The lower Appellate Court has held that the spouts clearly threw an additional burden on the servient heritage. It seems to me that there can be no question that there is a considerable difference between the burden which the servient heritage formerly bore and that which it now bears. In the first place double the quantity of water now falls upon it. The roof of the defendant's house was a sloping roof. Half of the water fell in one direction and the other half in another direction. It is now a flat roof and the whole of the water is discharged through five apertures and falls from a greatly increased height on to the land below it. In my opinion there has been a considerable additional burden placed upon the plaintiff's land and the order of the Court below in regard to the spouts on the roof on the second floor of the defendant's house is fully justified. If the defendant wishes to discharge his water on this land, he must so arrange that there is no addition to the burden which the servient heritage bore. The burden he has now placed upon it is a considerably increased one and in my opinion there is no force in this appeal. It is, therefore, dismissed with costs.

Appeal dismissed.

PALANIAPPA CHETTY v. CHIDUMBARAM PILLAI.

MADRAS HIGH COURT.

LETTERS PATENT APPEAL No. 253 of 1914.

August 31, 1915.

Present:—Mr. Justice Sadasiva Aiyar and
Mr. Justice Napier.PALANIAPPA CHETTI AND ANOTHER—
RESPONDENTS—APPELLANTS

versus

CHIDUMBARAM PILLAI AND ANOTHER—

PETITIONERS—RESPONDENTS.

Letters Patent (Madras), s. 15—"Judgment", meaning of—Order staying further trial of suit by single Judge of High Court—Appeal, maintainability of.

An order staying the further trial of a suit is similar to an order adjourning the trial of a suit and is not a "judgment" and from such an order passed by a single Judge of the High Court no appeal lies under section 15 of the Letters Patent to a Division Bench.

Tuljaram Row v. Alagappa Chettiar, 8 Ind. Cas. 340; 35 M. 1; (1910) M. W. N. 696; 8 M. L. T. 453; 21 M. L. J. 1, followed.

Appeal, under clause 15 of the Letters Patent, against the order, dated the 9th April 1914, of the Hon'ble Mr. Justice Oldfield, in Civil Miscellaneous Petition No. 222 of 1914 on the file of this Court, for stay of further proceedings in Original Suit No. 144 of 1912, on the file of the Court of the Temporary Subordinate Court of Sivaganga pending disposal of Appeal No. 26 of 1914 on the file of this Court, preferred from the preliminary decree in the said Original Suit No. 144 of 1912.

Mr. T. Rangaramanujachari, for the Appellants.

Mr. B. Sitarama Rau, for the Respondents.

JUDGMENT.—An order for staying the further trial of a suit is similar to an order adjourning the trial of the suit and the observations in the judgments pronounced in the Full Bench case *Tuljaram Row v. Alagappa Chettiar* (1) indicate that an order adjourning the trial of a suit is not a judgment from which, when such order is passed by a single Judge of this Court, an appeal lies to a Bench. We, therefore, uphold the preliminary objection and dismiss this Letters Patent Appeal with costs.

Appeal dismissed.

(1) 8 Ind. Cas. 340; 35 M. 1; (1910) M. W. N. 696; 8 M. L. T. 453; 21 M. L. J. 1.

BIRENDRA KISORE v. RAM CHARAN DASS.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 1021 of 1911.

April 1, 1913.

Present:—Sir Lawrence Jenkins, Kt., Chief Justice, Justice Sir Asutosh Mookerjee, Kt., and Mr. Justice Beachcroft.Maharaja BIRENDRA KISORE
MANIKYA BAHADUR—

PLAINTIFF—APPELLANT

versus

RAM CHARAN DASS AND ANOTHER—

DEFENDANTS—RESPONDENTS.

Limitation—Assertion of adverse title for more than 12 years—Landlord and tenant—Encroachment for landlord's benefit—Doctrine, applicability of.

The doctrine which would entitle the landlord to say that there is presumption that an encroachment was for his benefit has no application where the plaint and all proceedings in the suit do not suggest that the encroachment was a part of the holding. [p. 943, col. 1.]

Where more than 15 years before suit there was a direct assertion of title negating the theory of encroachment which would have conferred upon the disputed land the character of an addition to the original holding, the endeavour to escape from the plea of limitation based on adverse possession for more than 12 years fails. [p. 943, col. 1.]

Appeal against the decree of the Officiating Subordinate Judge of Noakhali, dated the 26th January 1911, affirming that of the Munsif, first Court, Feni, dated the 20th June 1910.

Babus Dwarka Nath Chuckerbutty and Gobind Chunder Dey Roy, for the Appellant.

Babu Dharendra Lal Kastgir, for the Respondents.

JUDGMENT.—The subject-matter of this litigation is a tank which, it is conceded, was excavated by the defendants' predecessors very many years ago. It is further conceded that the plaintiff has received no rent in respect of this tank, and that in fact no rent has ever been paid by the defendant who claims in this suit that it is his rent-free land. He has succeeded in both the lower Courts in establishing the plea of limitation. The facts which are conceded appear to me to support that plea. It was argued that that this case is distinguishable from those with which we have already dealt, because the encroachment by which possession is said to have been obtained of this land on which the tank is situated, constituted the relationship of landlord and tenant between the plaintiff and the defendant and that,

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therefore, the plea of limitation is not open to the defendant as being a tenant of the plaintiff. But, in my opinion, there is an error in this argument. What we have to see is whether this encroachment was considered as annexed to the holding. Now, that has not been the plaintiff's case and this argument has been advanced before us with some ingenuity at the last moment to escape from the plea of limitation. As I read the plaint and all proceedings in this suit, it was not suggested that this tank was a part of the holding. If it was not a part of the holding, then that doctrine which would entitle the landlord to say that there is presumption that the encroachment is for his benefit has no application. In fact we find that the facts are as I have already indicated, and it is established that more than 15 years before suit there was a direct assertion of title negating the theory of encroachment which would have conferred upon this tank the character of an addition to the original holding. In the circumstances, I think, the endeavour to escape from the plea of limitation based on adverse possession for more than 12 years has failed, and we must confirm the decree with costs.

Decree confirmed.

LOWER BURMA CHIEF COURT.

CIVIL APPEAL NO. 198 OF 1915.

August 12, 1915.

Present:—Mr. Justice Twomey and
Mr. Justice Ormond.

MAUNG PO MYA—APPELLANT
versus

MAUNG PO KYIN—RESPONDENT.

*Provincial Insolvency Act (III of 1907), ss. 46 (3),
47—Dismissal of application on the ground of
fraud, meaning of—Appeal—Revision.*

Under section 47 a Court can dismiss an insolvency petition if satisfied that its presentation was an abuse of the process of the Court, *i. e.*, that the petition was presented in order to perpetrate a fraud but not if the fraud is already committed.

Where the leave required under section 46 (3) is not obtained from the District Court, the Appellate Court may treat the appeal as revision under powers given by section 47 (2).

Mr. Palit, for the Appellant.

Mr. Po Han, for the Respondent.

JUDGMENT.—The appellant presented a petition in insolvency which was rejected by the District Judge on the ground apparently that he did not believe that the appellant's crops were destroyed or that the cost of cultivation was as high as the appellant stated, and also on the ground that the petition was made in order to swindle one Po Kyin, who stated that the appellant had sold 12 bullocks to him, had received the payment for them and had then fraudulently disposed of the cattle to his, the appellant's son. The petition was apparently dismissed both under section 15 and section 47 of the Provincial Insolvency Act, but under section 15 the Court could only dismiss the petition if it was satisfied that the petitioner had not right to present the petition under section 6, and that has not been found. Under section 47 the Court would have the power to reject the petition if it was satisfied that its presentation was an abuse of the process of the Court, *i. e.*, that the petition was presented in order to perpetrate a fraud. Apparently that was one of the grounds upon which the petition was rejected; but the facts as disclosed would not lead to any inference that the petition was presented in order to perpetrate a fraud. The fraud, if any, had already been committed and the insolvency proceedings could not in any way prevent Po Kyin from recovering any compensation that he might be entitled to. It is urged that for an appeal from an order made under section 47 the leave of the Court must first be obtained under section 46 (3) of the Act. In so far as this may be an appeal made under section 47 we can treat it as an application in revision; and we have that power under section 47, sub-section 2, of the Act.

We set aside the order dismissing the petition and direct that the matter be remanded to the District Court and disposed of according to law. The appellant will have his costs, two gold mohurs.

Order set aside.

NIKUNJA BEHARI CHUNDA v. RADHA KISORE MANIKYA.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 533 OF 1900.

February 5, 1903.

Present:—Justice Sir Henry Prinsep,
Kt., and Mr. Justice Stephen.

NIKUNJA BEHARI CHUNDA AND

OTHERS—PLAINTIFFS—APPELLANTS

versus

Maharaja RADHA KISORE
MANIKYA BAHADUR—DEFENDANT

RESPONDENTS.

Bengal Tenancy Act (VIII of 1885), s. 106—Order of Settlement Officer in Survey and Record of Rights—Decree—Civil Procedure Code (Act XIV of 1882), s. 13—Res judicata—Bengal Tenancy (Amendment) Act (III of 1898), s. 9, effect of—Claim of rent-free—Jurisdiction of Settlement Officer.

The order of a Settlement Officer in the Survey and Record of Rights under section 106 of the Bengal Tenancy Act of 1885 as originally passed, is a decree within the terms of section 9 of Act III (B. C.) of 1898 and will operate as *res judicata* in respect of points considered and decided. [p. 944, col. 2.]

Section 9 of the amending Act III of 1898 clearly shows that the amendment of section 106 does not apply to the order of a Settlement Officer in the Survey and Record of Rights. [p. 944, col. 2.]

Where a claim of rent-free has been made before a Settlement Officer it is his duty to find whether rent at any time has been paid for the land in dispute and the mere fact that the claim has been made does not deprive him of jurisdiction. [p. 944, col. 2.]

Appeal against the decree of the District Judge of Tipperah, dated the 22nd December 1899, reversing that of the Assistant Settlement Officer of Comilla, dated the 30th May 1898.

Moulvi Syed Shamsul Huda, for the Appellants.

Babu Gobinda Chunder Das, for the Respondent.

JUDGMENT.—We are of opinion that the view expressed by the District Judge is correct. The Raja of Tipperah applied for the settlement of fair rent on certain lands, and the present plaintiffs, as tenants, admitted that they held certain lands liable to assessment; but they contended before the Settlement Officer that other lands claimed by the Raja as forming portions of his holding or *taluk* were held by them rent free, and were, therefore, not liable to assessment. On objections so taken, the Settlement Officer found that the rent of these other lands forming portions of the *taluk* had, on three previous occasions, been settled by the Revenue Officer and that, consequently, rents had been paid for them. Such a finding necessarily means that the objection taken that the lands

were held rent free was without any substance. The tenants have now brought this suit to have it declared that the lands were rent free and not liable to assessment.

The question arises, and the case has been so dealt with in the lower Court on appeal, whether the suit is barred as *res judicata* within the terms of section 13, Civil Procedure Code. In the first place, it is clear that, within the terms of section 9 of Act III (B. C.) of 1898, the order of the Settlement Officer in the Survey and Record of Rights under section 106 of the Bengal Tenancy Act of 1885 as originally passed was a decree, and inasmuch as it was not appealed against, it was final, and there can be little doubt, having regard to the terms of the judgment delivered by that Settlement Officer, that the point now raised was considered and decided.

The learned Pleader, who appears for the appellants, first of all claims the right of suit under section 106 of the Bengal Tenancy Act of 1885 as amended by Act III (B. C.) of 1898. But it is clear from the terms of section 9 of the amending Act of 1898, which has been already referred to, that this amendment of section 106 does not apply to the order of the Settlement Officer.

The learned Pleader next contends that, however that may be, the present suit is not barred, inasmuch as the order of the Settlement Officer was without jurisdiction. Now, the Settlement Officer had, in the case before him, to find whether the plaintiffs were tenants of the Raja within the terms of the definition given in the Bengal Tenancy Act. Undoubtedly, in respect of certain lands they were tenants, but they objected to the assessment of the lands which form the subject of the present suit on the ground that they held under a rent-free grant. The mere fact that they had taken this objection did not deprive the Settlement Officer of jurisdiction. It was the duty of the Settlement Officer to find whether any rent had been at any time paid for these lands so as to show that the claim of rent free was without foundation. Unless it could be so, it would be impossible for any Settlement Officer to proceed if an objection can, though such objection be manifestly groundless, be taken and it is clear from his proceedings that the Settlement Officer did consider these points and he did hold that in the three previous Settlements

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these particular lands had been assessed as rent-paying lands so as to defeat any title such as is now set up. We, therefore, confirm the conclusion arrived at by the lower Appellate Court and dismiss this appeal with costs.

Appeal dismissed.

ALLAHABAD HIGH COURT.
FULL BENCH.

FIRST CIVIL APPEAL No. 281 OF 1913.

June 4, 1915.

Present:—Sir Henry Richards, Kt., Chief Justice, Mr. Justice Tudball and Mr. Justice Rafique.

ASHRAF ALI—DEFENDANT—APPELLANT
versus

KALYAN DAS AND OTHERS—PLAINTIFFS—
RESPONDENTS.

U. P. Court of Wards Act (III of 1899), ss. 16, 18, 20, applicability of—Mortgagee not notifying his mortgage—Suit on mortgage, if maintainable—Mortgage, if admissible in evidence—Interest after date of notification, if allowable.

Section 20 of the U. P. Court of Wards Act, 1899, applies only to the case of persons who have notified their claims under the provisions of section 16 of the Act but have failed to produce their documents. [p. 945, col. 2.]

Therefore, a mortgagee, who did not notify his claim under section 16 of the U. P. Court of Wards Act, 1899, is entitled to maintain a suit on his mortgage and his mortgage is admissible in evidence, but he will not be allowed interest under section 18 of the Act. [p. 946 col. 1.]

First appeal from a decree of the Additional Subordinate Judge of Aligarh.

Mr. B. E. O'Connor (with him the Hon'ble Dr. Tej Bahadur Sapru), for the Appellant.

The Hon'ble Dr. Sundar Lal (with him Mr. S. K. Dar), for the Respondent.

JUDGMENT.—This appeal arises out of a suit on foot of two mortgages, the *first*, dated the 7th of August 1907, for Rs. 6,500 and the *second*, dated the 11th of February 1909, for Rs. 1,000. The plaintiff claims Rs. 10,794 on foot of the two mortgages. The estate of the mortgagors was taken over by the Court of Wards and a notification was duly issued, with effect from the 29th of July 1911, under section 16 of the Court of Wards Act, III of 1899. The mortgagees did not, in compliance with

the provisions of section 16, notify their claim under the two mortgages against the estate. It appears that there was some notification of one of the mortgages in October 1912. This, however, may, for the purposes of our judgment, be disregarded. The estate is not now and was not at the time of the institution of this suit under the management of the Court of Wards. The management was given up in November 1912. The Court below has given the plaintiffs a decree for the full amount of the claim.

In appeal it is contended that the plaintiffs having failed to produce their documents before the Collector, the same are inadmissible in evidence, having regard to the provisions of section 20. Of course if the plaintiffs are unable to adduce their mortgage-deeds in evidence, they cannot sustain their suit. On the other hand, it is contended that section 20 only applies to the case of persons who have notified their claims under the provisions of section 16 but have failed to produce their documents. It seems to us that the latter contention is clearly correct. Section 17 of the Act provides that notwithstanding the provisions of the section any person who has a claim, whether it be allowed or disallowed by the Court of Wards, is entitled to institute a suit, and that notwithstanding that the claim has not been notified. It may possibly be said that this provision only applies to the matters mentioned in the earlier part of the same section.

But section 18 makes the matter abundantly clear. In section 18 the penalties for not notifying a claim are set forth. Interest is to cease to run from the date upon which the claim should be notified. Clause (2) provides that all claims not notified are postponed to all claims that have been notified. If section 20 applied to cases where there had been no notification, it would, practically speaking, amount to an enactment that no suit could be brought where a claim had not been notified. If no claim had been notified no documents would be produced. But the words of section 20 themselves show that it only deals with cases where there has been a notification under section 16. The new Act, which was not in force at the time the estate was taken over by the Court of

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Wards, has laid down entirely new penalties for the failure to notify. Section 18 provides as follows: "Subject to the provisions of section 20, every claim of the nature specified in section 17 against the ward or his property, other than debts due to or liabilities incurred in favour of the Government, which is not notified under section 17, shall be deemed, for all purposes and on all occasions, whether during the continuance of the superintendence of the Court of Wards or afterwards, to have been duly discharged." On behalf of the appellants the case of *Collector of Ghazipur v. Balbhaddar Singh* (1) is relied upon. At page 29 of the judgment there is the following passage: "It was suggested that the obligation to produce documents is laid upon creditors who notify their claims. The argument is that a creditor who does not notify his claim at all may make himself liable to the provisions of section 18 already quoted, but cannot be held liable to the further disability laid down by section 20. There is nothing in the wording of the Act to support this contention, indeed it appears contrary to the clear intention of the provisions under consideration." We cannot agree with these remarks. It seems to us that the wording of the Act shows that the contention is correct.

The only question which remains is the question of the amount of interest allowed. This is a point which is not taken in the memorandum of appeal. We think, however, that we ought to give effect to the clear provisions of section 18. This provides that every claim, save as in the section mentioned, shall cease to bear interest from the date of the expiry of the period prescribed by this section. It is true that one of these mortgages was not payable for a period of five years. It was, however, nevertheless a "claim" against the estate, and we think that under the provisions of the section it ceased to bear interest from the 29th of January 1912, that is to say, six months after the notification. At the same time we think that the plaintiffs ought to have their costs proportionate to their success in both Courts, the point not having been taken in the memorandum of appeal to this Court.

(1) 17 Ind. Cas. 25; 10 A. L. J. 234 at p. 242.

We accordingly vary the decree of the Court below by directing that interest shall be disallowed on both mortgages from the 29th of January 1912 upto the date of the institution of the present suit. From that date the plaintiffs will have simple interest at the rate of Rs. 6 per cent. per annum up to the date of payment. We extend the time for redemption for a period of six months from this date.

Decree varied.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 2522 OF 1910.

March 7, 1912.

Present:—Justice Sir Richard Harington, BART., and Justice Sir Asutosh Mookerjee, KT.
MAHARAJA BIRENDRA KISORE MANIKYA RAHADUR—PLAINTIFF—APPELLANT
versus

ANANDAPRIYA BAISHANABI AND

OTHERS—DEFENDANTS—RESPONDENTS.

Limitation—Adverse possession—Plaintiff treating defendant as trespasser—Claim for rent.

Where the plaintiff takes his stand upon the position that the defendant is a trespasser and he does not elect to treat him as a tenant, the question arises whether the plaintiff has been in possession within 12 years. If it is found that he has not been in possession his claim for assessment will be dismissed as barred by time. [p. 947, col. 1.]

Appeal against the decree of the Subordinate Judge, first Court of Tipperah, dated the 28th April 1910, reversing that of the Munsif, fourth Court at Comilla, dated the 31st May 1909.

Babus *Dwarka Nath Chuckerbutty* and *Gobind Chunder Dey Roy*, for the Appellant.

Babu *Dhirendra Lal Kastgir*, for the Respondents.

JUDGMENT.—This is an appeal on behalf of the Maharaja of Tipperah in a suit commenced by him for assessment of rent in respect of the disputed land against the representatives of one Durga Charan Chakrabarti. In 1894 the land was in the occupation of occupancy *raiyats* and when proceedings were taken under Chapter X of the Bengal Tenancy Act they appeared before the Settlement Authorities and stated that

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they held under Durga Charan, who himself was a rent-free holder. On the 21st August 1896 the Settlement Record was prepared with an entry to the effect that the Maharaja was the *zemindar*, Durga Charan was an intermediate holder and the occupancy *rai-yats* held under the latter. On the 11th April 1908 the present action was commenced for assessment of rent. The defendants pleaded that the land was not liable to be assessed with rent, and that in any event the claim for assessment was barred by limitation.

The Court of first instance overruled these contentions and assessed rent. Upon appeal the learned Judge has held that the land is liable to be assessed with rent, but he has dismissed the claim on the ground that it is barred by limitation.

It has been contended in the present appeal that the view taken by the Judge cannot be supported. The learned Subordinate Judge has held that the claim of the plaintiff is barred because in 1894 an adverse title was set up on behalf of Durga Charan by the tenants. It has been argued by the learned Vakil for the appellant that this could not operate as adverse possession in favour of Durga Charan against the *zemindar*. In our opinion, there is considerable force in this contention. But it is clear that the decree of the Subordinate Judge must be affirmed on a different ground. As has been pointed out by the learned Vakil for the respondent, the plaintiff repudiates the entry in the Settlement Records. In fact he has not produced in evidence the sheet which contains the entry about Durga Charan and he states expressly that he denies that Durga Charan held any tenure at all. The reason is that if it is admitted that Durga Charan was a tenure-holder the question would arise, why he never paid any rent and non-payment of rent might go to indicate that the holding was a rent-free grant. The plaintiff, therefore, takes his stand upon the position that Durga Charan is a trespasser and he does not elect to treat him as a tenant on receipt of rent from him. The question, therefore, arises whether the plaintiff has been in possession within 12 years. Upon the facts found it is clear that he has not been in possession within 12 years. The result is that his claim for assessment is barred by limitation.

The decree of the Court below is, therefore, affirmed and this appeal is dismissed with costs.

Appeal dismissed.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL No. 435 OF 1913.

July 28, 1915.

Present:—Sir Henry Richards, Kt., Chief Justice, and Mr. Justice Tudball.

MUHAMMAD MAHBUB ALI KHAN—

PLAINTIFF—APPELLANT

versus

RAGHUBAR DAYAL AND OTHERS—

DEFENDANTS—RESPONDENTS.

Pre-emption—Proof—Custom.

In a suit for pre-emption based upon custom it lies upon the plaintiff not merely to prove the existence of some custom of pre-emption but to prove the existence of a custom under which he himself has a right to pre-empt. [p. 948, col. 1.]

First appeal from a decree of the Officiating Subordinate Judge of Budaun.

The Hon'ble Dr. Tej Bahadur Sapru and Mr. Ibn Ahmad, for the Appellant.

The Hon'ble Dr. Sundar Lal, for the Respondents.

JUDGMENT.—This appeal arises out of a suit for pre-emption. The Court below has dismissed the claim. The plaintiff adduced as evidence of the existence of the custom, an extract from the *wajib-ul-arz* of 1865. The Court below has considered the history of the village. It has also considered the terms of the *wajib-ul-arz*. The language used in the *wajib-ul-arz* coupled with the history of the village strongly suggests that what was recorded in the *wajib-ul-arz* of 1865 was not an existing custom but an arrangement between the co-sharers. We are not prepared to dissent from the view taken by the Court below that a custom of pre-emption has not been proved in the present case. There is, however, another matter which we think is fatal to the plaintiff's claim. Since the *wajib-ul-arz* of 1865 perfect partition has taken place in the village and the plaintiff was not at the time of the sale a co-sharer with the vendor. His property was situate in a separate *mahal*. There was no joint and several responsibility between the plaintiff

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and the vendor for the payment of the Government revenue assessed upon their respective properties. Neither had any voice in the management or share in the enjoyment of the other's *zemindari*. It lay upon the plaintiff in the present case not merely to prove the existence of some custom of pre-emption, he had to prove the existence of a custom under which he himself had a right, that is to say, he had to prove the existence of a custom which gave a right to a person who was not a co-sharer with the vendor. The great importance in pre-emption cases of the co-parcenary relationship has been pointed out in the case of *Dalganjan Singh v. Kalka Singh* (1), and also in the case of *Ganga Singh v. Chedi Lal* (2). The only evidence of the existence of a custom in the present case was the extract from the *wajib-ul-arz* to which we have referred. But that record clearly relates to a right between co-sharers because at that date partition had not taken place and all the proprietors in the village were co-sharers with each other. We are not deciding that the custom (assuming that there was one) ceased as the result of partition. The custom continues, but the plaintiff not being a co-sharer with the vendor is no longer within the custom. We think that the plaintiff gave no evidence of the existence of a custom which gave a person who was not a co-sharer with the vendor a right of pre-emption. We dismiss the appeal with costs.

Appeal dismissed.

(1) 22 A. 1; A. W. N. (1899) 111.

(2) 12 Ind. Cas. 98; 33 A. 605; 8 A. L. J. 996.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL NO. 4196 OF 1910.

March 31, 1913.

Present:—Sir Lawrence Jenkins, Kt., Chief Justice, Justice Sir Asutosh Mookerjee, Kt., and Mr. Justice Beachcroft.

Maharaja BIRENDRA KISORE MANIKYA
BAHADUR—PLAINTIFF—APPELLANT

versus

RAM CHANDRA DEY AND OTHERS—

DEFENDANTS—RESPONDENTS.

Adverse possession—Limitation—Pleadings—Rent-free title—Adverseness to that extent.

Where the plaint in a suit for assessment of rent clearly proceeded upon the assumption that there was no relationship of landlord and tenant, and the same view was also advanced in the written statement, and the evidence also showed that even at the trial the case was that the defendants were in possession not as tenants but wrongfully and without any right, and it was found that the defendants had been in possession for more than 12 years on their own account, though they claimed no more than a rent-free title:

Held, that the possession in the circumstances would be adverse to that extent and would furnish an answer to the suit. [p. 948, col. 2.]

Appeal against the decree of the District Judge of Tipperah, dated the 13th June 1910, affirming that of the Munsif, first Court at Comilla, dated the 30th July 1909.

Mr. S. P. Sinha, Babus Dwarka Nath Chuckerbutty and Birendra Chandra Das, for the Appellant.

Babus Akhoy Kumar Banerjee and Bipin Chandra Bose, for the Respondents.

JUDGMENT.—This appeal must fail. Both the lower Courts have held the suit to be barred by adverse possession. But Mr. Sinha, on behalf of the plaintiff, has sought to escape from that by suggesting that the plaintiff and the defendants were respectively landlord and tenants, so that the bar of limitation could not apply. But the foundation of his argument fails. The plaint clearly proceeds upon the assumption that there was not that relationship of landlord and tenant. This is the view also advanced in the written statement, and the evidence that has been brought to our notice shows that even at the trial the case was that the defendants were in possession not as tenants, but wrongfully and without any right. The Munsif found definitely and clearly that the defendants were not the Maharaja's tenants. The finding of the District Judge is not clear on this point, but he was of opinion with the learned Munsif that the appellant was aware of the adverse title claimed by the defendants. As I understand the facts found, they come to this. The defendants have been in possession for more than 12 years and they have been in possession on their own account, though they claim no more than a rent-free title. Their possession in the circumstances would be adverse to that extent and would furnish an answer to this suit.

SURAJ BHAN v. SOMWARPURI.

BIRENDRA KISHORE MANIKYA v. GIRIS CHANDRA NAG.

For the reasons I have indicated the judgment and decree of the lower Appellate Court must be confirmed with costs.

Appeal dismissed.

ALLAHABAD HIGH COURT.

FIRST APPEAL FROM ORDER NO. 65 OF 1914.

July 26, 1915.

Present:—Sir Henry Richards, Kt., Chief Justice, and Mr. Justice Tudball.

SURAJ BHAN—DEFENDANT—APPELLANT

versus

SOMWARPURI—PLAINTIFF RESPONDENT.

Pre-emption—Bundelkhand Land Alienation Act (II of 1903), s. 3—Sanction by Collector to bring suit for pre-emption, when required.

There is no provision in the Land Alienation Act, which entitles an intending pre-emptor to get the sanction of the Collector to bring a suit for pre-emption. The sanction contemplated in section 3 of the Act applies to a voluntary transfer.

First appeal from an order of the District Judge of Allahabad.

Messrs. Durga Charan Banerji and Haribans Sahai, for the Appellant.

The Hon'ble Dr. Sundar Lal, for the Respondent.

JUDGMENT.—This appeal arises out of a suit for pre-emption. The plaintiff pre-emptor has been found by both the Courts to be a person who was not entitled to purchase the property in question having regard to section 3 of the Land Alienation Act, II of 1903, inasmuch as he was not a member of an agricultural tribe. The Court of first instance dismissed the plaintiff's suit on this ground. The lower Appellate Court seems to have considered that the Court might make a decree in the plaintiff's favour subject to the consent of the Collector to be subsequently obtained, and remanded the case. We think the view taken by the learned District Judge was not correct. The plaintiff's alleged cause of action was the fact that the vendor, being bound by a custom of pre-emption to first offer the property to the plaintiff, did not do so. We think that the Act, which provides that the property should not be sold to the pre-emptor, entirely absolved the vendor from any obligation to first offer the property to the pre-emptor. It is said

that the subsequent sanction of the Collector might smooth over all these difficulties. It seems to us that the Court's jurisdiction was either to grant a decree for pre-emption or not to do so. It would be obviously open to many objections that the sale of the property should be kept in abeyance until such time the Collector sanctions or refuses to sanction the sale. We may also point out that it is extremely doubtful whether the Collector could give any such sanction to a pre-emptor. There is no provision in the Act which entitles an intending pre-emptor to get the sanction of the Collector to bring a suit for pre-emption. If the sanction of the Collector could not be obtained before the bringing of the suit, it seems *a fortiori* that he could not grant the sanction subsequently. The sanction contemplated in section 3 is clearly in the case of a voluntary transfer. We allow the appeal, set aside the order of the learned District Judge and restore the decree of the Court of first instance with costs in all Courts.

Appeal decreed.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL NO. 3754 OF 1910.

March 31, 1913.

Present:—Sir Lawrence Jenkins, Kt., Chief Justice, Justice Sir Asutosh Mookerjee, Kt., and Mr. Justice Beachcroft.

Maharaja BIRENDRA KISHORE MANIKYA

BAHADUR—PLAINTIFF—APPELLANT

versus

GIRIS CHANDRA NAG BANIKYA AND

OTHERS—DEFENDANTS—RESPONDENTS.

Possession, suit for, based on trespass alone—Alternative relief for assessment of rent—Bengal Tenancy Act (VIII of 1885), s. 157 bearing of, on question of limitation.

In a suit for possession after establishment of title or in the alternative for assessment of rent, the plaint, written statements, and issues in the case showed that the suit was based on trespass and on trespass only.

Held, that the mere fact that there was an alternative claim for rent would not make any difference on the question of limitation, because that claim was based on section 157 of the Bengal Tenancy Act.

FAKEERAPPA v. THIPPANNA.

Appeal against the decree of the Sub-ordinate Judge of Noakhali, dated the 17th August 1910, affirming that of the Munsif, first Court at Feni, dated the 4th April 1910.

Mr. S. P. Sinha, Babus Dwarka Nath Chuckerbutty and Birendra Chandra Das, for the Appellant.

Babus Mahendra Nath Ray and Dharendra Lal Kastgir, for the Respondents.

JUDGMENT.—It was conceded at the outset by Mr. Sinha in this case that if this suit was to be treated as one based on trespass then it must fail, as it would clearly be barred. We have read through the plaint, written statements, and issues in this case, and it seems to me to be clear that the suit was based on trespass and on trespass only. The mere fact that there was an alternative claim for rent does not disturb that view, because that claim was based on section 157 of the Bengal Tenancy Act; on the contrary, this, if anything, goes to confirm the view that the suit was one of trespass.

In this view, we must confirm the decree with costs.

Decree confirmed.

MADRAS HIGH COURT.

APPEALS AGAINST ORDERS NOS. 233 AND 234 OF 1911.

November 10, 1913.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Spencer.

C. FAKEERAPPA AND OTHERS—COUNTER-PETITIONERS—APPELLANTS
versus

M. THIPPANNA AND OTHERS—CLAIMANTS
—RESPONDENTS.

Railway receipt—Title to goods—Possession as pledgee of receipt, effect of—Local custom—Charge—Provincial Insolvency Act (III of 1907), s. 16 (3).

A railway receipt is a mercantile document of title to goods [p. 950, col. 2.]

Amarchand & Co. v. Ramdas, 21 Ind. Cas. 343; 15 Bom. L. R. 890; 38 B. 255, followed.

Where the local custom of the trade was that lawful possession as pledgees of a railway receipt entitled the holder of that receipt to get possession of the goods from the carrier and to retain the goods as security for the moneys advanced on pledge of the railway receipt:

Held, that the custom really created a charge on the goods themselves in the possession of the carrier and as soon as the pledge was made the insolvent's right to get delivery from the Railway Company ceased. The goods were no longer in the eye of the law in "the possession, order or disposition of the insolvent" within the meaning of clause (3) of section 16 of the Provincial Insolvency Act as against the right of the pledgee to get possession of the goods and sell the same for reimbursing the advances made by him. [p. 951, col. 1.]

Appeal against the order of the District Judge of Bellary, in Insolvency Applications Nos. 388 and 389 of 1908, in Insolvency Petitions Nos. 9, 10 and 11 of 1908.

FACTS.—One Bhimaji carrying a business in grain, cotton, etc., endorsed and delivered to M. Thippanna on 7th December 1908 railway goods receipts Nos. 6506 and 6520 and invoices Nos. 67 and 70 for 294 bags of grain with an order to receive and sell the goods on commission. On the security of the goods, Thippanna advanced Rs. 2,000 to Bhimaji in accordance with the local custom. Bhimaji closed shop on the 8th but Thippanna did not hear anything about his bankruptcy till the morning of the 9th.

Bhimaji's creditors having put in an application for having him declared an insolvent, Thippanna put in a petition claiming that the goods covered by the above-mentioned railway receipts were not liable to seizure. Thippanna's claim was allowed by the District Judge and the creditors appealed.

Mr. T. V. Muthukrishna Aiyar, for the Appellants.

The Hon'ble Mr. T. V. Seshagiri Aiyar and the Hon'ble Mr. L. A. Govindaraghava Aiyar, for the Respondents.

JUDGMENT.—We think that the learned District Judge's finding, that the first respondent obtained the railway receipt as security for an advance *bona fide* made by the first respondent on the 7th December 1908, is fully supported by the evidence, especially the accounts of the insolvent firm and of the first respondent.

Amarchand & Co. v. Ramdas (1) decides that a railway receipt is a mercantile document of title to goods; and it is proved that by the custom of the trade in Bellary lawful possession as pledgee of a

(1) 21 Ind. Cas. 343; 15 Bom. L. R. 890; 38 B. 255.

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railway receipt entitles the holder of that receipt to get possession of the goods from the carrier and to retain the goods as security for the moneys advanced on pledge of the railway receipt. This custom really creates a charge at once on the goods themselves in the possession of the carrier and that charge ripens into a pledge of the goods themselves when the holder of the railway receipt gets possession of the goods in due course. As regards section 16, clause (3), of the Provincial Insolvency Act, as soon as the pledge of the railway receipt was made to the first respondent, the insolvent's right to get delivery from the Railway Company ceased (see section 137 of Act IV of 1882); the goods were no longer in the eye of the law in "the possession, order or disposition of the insolvent" within the meaning of clause (3) of section 16 as against the right of the first respondent to get possession of the goods and to sell the same for and reimbursing the advances made by him. Further, section 16, clause (3), is directed against "the true owner" who negligently allows the insolvent to retain goods in the insolvent's possession, order or disposition as the reputed owner. In the present case, the first respondent is admittedly not the true owner of the same, and he did not allow the insolvent to retain any goods as reputed owner thereof.

The appeal is dismissed with costs. As the first respondent has incurred unnecessary expenses in printing, the whole of the entries found in pages 22 to 42 of the documents instead of only a few of the entries in page 27, the first respondent will himself bear the costs incurred in printing pages 22 to 26 and 28 to 42.

For similar reasons the Civil Miscellaneous Appeal No. 234 of 1911 is dismissed with costs.

Appeals dismissed.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL NO. 9 OF 1914.

July 15, 1915.

Present:—Mr. Justice Tudball and
Mr. Justice Rafique.

ABDUL HAKIM KHAN AND OTHERS—
DEFENDANTS—APPELLANTS

versus

KARAN SINGH AND ANOTHER—PLAINTIFFS
—RESPONDENTS.

*Civil Procedure Code (Act V of 1908), O. II, r. 2—
Plaintiff deliberately omitting to sue for right relief—
Subsequent suit for right relief, if barred.*

Where the plaintiff knew perfectly well what relief he was entitled to and he deliberately omitted to claim the right relief, his subsequent suit in respect of the same cause of action for the right relief is barred by the provisions of Order II, rule 2, of the Civil Procedure Code. [p. 953, col. 1.]

First appeal from a decree of the Additional Subordinate Judge of Aligarh.

Mr. B. E. O'Connor (with him Mr. Iqbal Ahmad), for the Appellants.

Mr. Peary Lal Banerji, for the Respondents.

JUDGMENT.—The facts which have given rise to this appeal are as follows:—Rahim Ali Khan, one of the defendants-respondents, was the owner of $7\frac{1}{2}$ *biswas* in village Dastara. On the 5th of December 1902 he executed a sale-deed in respect of six *biswas* out of the $7\frac{1}{2}$ *biswas* in lieu of Rs. 14,000 in favour of Abdul Hakim Khan and his three minor sons. Out of the consideration money the sum of Rs. 12,000 was left with the vendees for the discharge of two prior mortgages, namely, Rs. 6,000, were to be paid on account of a usufructuary mortgage to the credit of Har Bhajan Lal and others, mortgagees, and Rs. 2,924-5 were to be paid to one Lala Sant Lal for a simple mortgage. It was further agreed that any balance left over, after payment to the two prior mortgagees, will be repaid to the vendor; the payments to the two prior mortgagees were to be made at stated times which were mentioned in the sale-deed. The prior mortgagees were admittedly not paid on the date mentioned in the sale-deed. On the 12th of September 1912 Rahim Ali Khan executed a deed of assignment in favour of Karan Singh and Ahmad Ali Khan in respect of the money due from the vendees, that is, the balance of the purchase-money and damages on account of

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non-payment of the prior mortgages on the dates mentioned in the sale-deed. On the 9th of January 1913 Karam Singh and Ahmad Ali Khan, the assignees, instituted the suit out of which this appeal has arisen for the recovery of Rs. 9,000, the amount said to be due on account of damages and the balance of purchase-money. The claim was brought against the vendees and against Rahim Ali Khan and others. The claim was resisted on various pleas, one of which was that it was barred by Order II, rule 2, of the Code of Civil Procedure. The learned Subordinate Judge, in whose Court the suit was filed, decreed it in part. The vendees have preferred the present appeal.

They challenge the decree against them on the ground, among others, that the suit is not maintainable in view of the provisions of Order II, rule 2, of the Code of Civil Procedure. The argument is based on the allegation that on the 11th of September 1905 Rahim Ali Khan brought a suit in the Court of the Subordinate Judge of Aligarh for the cancellation of the deed of the 15th of December 1902 against the appellants, on the allegation that the latter had failed to carry out their part of the contract by not paying the prior mortgages and not paying him the balance of the purchase-money. The said claim was dismissed on the ground that the remedy sought by Rahim Ali Khan was not open to him, as the non-payment of sale price or the non-fulfilment of some of the terms of the contract of sale did not entitle the vendor to ask for cancellation of the sale. It is contended on behalf of the appellants that the cause of action alleged in the suit of the 11th of September 1905 was the same as the cause of action stated in the present suit, namely, the breach of contract by the appellants. It was open to Rahim Ali Khan in the former suit to sue for damages and the return of the unpaid sale price and that his omission to do so bars the present suit under Order II, rule 2, of the Code of Civil Procedure. In support of this contention the learned Counsel for the appellants relies on the wording of the said provisions of law and on the following cases :—*Rangayya Goundan v. Naniappa Rao* (1), *Budri Bisal v. Musammat* (1) 24 M. 491; 3 Bom. L. R. 299; 6 C. W. N. 17; 28 J. A. 221 (P. C.).

Lalta Koer (2), *Raja Bahadur Shiv Lal Moti Lal v. Rajee Vappa Pampanna* (3). For the respondents the reply is that the provisions of Order II, rule 2, of the Code of Civil Procedure do not apply to the present case inasmuch as the remedy sought by Rahim Ali Khan in his former suit was misconceived and could not be granted to him. It is said that where a plaintiff sues for a relief that he is not entitled to, a subsequent suit by him for the right relief on the same cause of action is not barred by Order II, rule 2, of the Code of Civil Procedure. In support of his contention the learned Counsel for the respondents has relied on the following cases: *Piari v. Khiali Ram* (4), *Darbo v. Kesho Rai* (5), *Sarsuti v. Kunj Behari Lal* (6), *Mohan Lal v. Bilas* (7), *Bandey Ali v. Gokul Misir* (8), *Musammat Prab Devi v. Harkishn Das* (9), *Musammat Parmeshri v. Vasdeo* (10).

The strongest cases for the respondents are those reported in *Piari v. Khiali Ram* (4) and *Musammat Parmeshri v. Vasdeo* (10). If it be conceded that the proposition of law laid down in the said two cases is correct, it does not help the respondents in the present case, for it was laid down in those cases that where a plaintiff has asked for a wrong relief presumably under a misapprehension of what relief he is entitled to seek, his subsequent suit for the right relief is not barred. In the present case we find on reference to the plaint of the suit of the 11th of September 1905 that Rahim Ali Khan knew perfectly well that he was then entitled to claim both the damages and the balance of sale-price. In fact he stated in paragraph 9 of his plaint that he was entitled to recover damages and the balance of unpaid price from the defendants of the suit as well as ask for the cancellation of the sale-deed, but he was for the present asking merely for the cancellation of the sale and that he would subsequently

(2) 10 O. C. 44 (F. B.)

(3) 1 Ind. Cas. 319; 11 Bom. L. R. 46.

(4) 3 A. 857.

(5) 2 A. 356.

(6) 5 A. 345; A. W. N. (1883) 81.

(7) 14 A. 512; A. W. N. (1892) 80.

(8) 13 Ind. Cas. 154; 34 A. 172; 9 A. L. J. 111.

(9) 43 P. R. 1884.

(10) 35 P. R. 1885.

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sue in respect of the other reliefs. The cases relied upon by the learned Counsel for the respondents do not go the length of saying that in a case like the present, where Rahim Ali Khan knew perfectly well what relief he was entitled to and he deliberately omitted to claim the right relief, his subsequent suit in respect of the same cause of action for the right relief does not stand barred by the provisions of Order II, rule 2. It is clear that Rahim Ali Khan was entitled to more than one relief on his own statement in the plaint of 1905. He deliberately chose to sue in respect of one and omitted to sue in respect of the others and he did not obtain the leave of the Court in respect of the reliefs which he had omitted. The present claim, therefore, stands clearly barred under Order II, rule 2, as the cause of action in the two suits is exactly the same.

The appeal, therefore, prevails and we allow it. The decree of the lower Court is set aside and the claim of the plaintiffs is dismissed with costs in both Courts. The objections filed by the plaintiffs as regards the amount disallowed by the Court below are also dismissed with costs.

Appeal allowed.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 475 of 1911.

July 13, 1915.

Present:—Justice Sir Asutosh Mookerjee, Kt.,
and Mr. Justice Beachcroft.

**Maharaja BIRENDRA KISORE MANIKYA
BAHADUR—PLAINTIFF—APPELLANT**

versus

KALITARA DEBI AND OTHERS—

DEFENDANTS—RESPONDENTS.

*Bengal Tenancy Act (VIII of 1885), ss. 102, 104, 106
—Bengal Tenancy (Amendment) Act (III of 1898
B. C.), s. 9—Interpretation—Competency of Settlement
Officer to decide rent-free title—Res judicata.*

The words "every settlement of rent or decision of a dispute by a Revenue Officer" in section 9 of Act III of 1898 (B. C.) are applicable only to those cases which a Revenue Officer has jurisdiction to try and are not applicable to a decision of a Settlement Officer as to the validity of a *lakheraj* title under section 104 of the Bengal Tenancy Act, 1885. [p. 954, col. 1.]

Before the amendment of the Bengal Tenancy Act in 1893, a Settlement Officer was incompetent to decide the question of rent-free title, and, therefore, such a decision given before but embodied in the record published subsequently to the enforcement of the amending Act, will not operate as *res judicata* between the parties in a suit for assessment of rent of the same lands brought afterwards in a Civil Court. [p. 954, col. 2; p. 955, col. 2.]

Appeal against the decree of the District Judge of Tipperah, dated the 29th November 1910, reversing that of the Munsif of Tipperah, dated the 31st November 1909.

**Babus Dwarka Nath Chuckerbutty and
Birendra Chandra Das**, for the Appellant.

Babu Bepin Chandra Bose, for the Respondents.

JUDGMENT.—This is an appeal by the plaintiff in a suit for assessment of rent of land which, the defendants contend, they hold under a rent-free title. The Court of first instance found in favour of the plaintiff and decreed the suit. Upon appeal, the District Judge has reversed that decision, and has held, *first*, that the decision of the question by the Settlement Officer does not conclude the matter in controversy, and, *secondly*, that from the long and uninterrupted possession of the defendants without payment of rent to the plaintiff or his predecessor, the inference may legitimately be drawn that the original grant was rent free. On the present appeal, the validity of the conclusion of the District Judge upon the second aspect of the case has not been disputed; but it has been argued that the decision of the Settlement Officer, which was adverse to the defendants, operates as *res judicata*, and that it was not open to the District Judge to come to an independent determination on the merits.

From an examination of the record, it transpires that on the 17th April 1897 the Settlement Officer decided, in the course of a proceeding under Chapter X of the Bengal Tenancy Act, that the present defendants had failed to establish before him their alleged rent-free title. On the basis of this decision of the dispute between the parties, the rent was subsequently settled and the record was finally published on the 1st December 1898. The appellant now contends, with reference to sub-section 1 of section 9 of Act III of 1898 (B. C.), which came into force on the 2nd November 1898, that the

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decision of the Revenue Officer, though prior in point of time, was embodied in a Record of Rights published afterwards and precludes an investigation of the matter by the Civil Court.

Sub-section (1) of section 9 is in these terms: "Every settlement of rent or decision of a dispute by a Revenue Officer under section 104 or section 106 of the Bengal Tenancy Act, 1885, before the commencement of this Act, in respect of which no appeal has, before the commencement of this Act, been preferred to the Special Judge appointed under section 103 of the Act, shall have the force and effect of a decree of a Civil Court in a suit between the parties and shall be binding." The appellant argues that there was a decision of a dispute by a Revenue Officer under section 106 of the Bengal Tenancy Act, 1885, and that such decision has the force and effect of a decree of a Civil Court in a suit between the parties and is final. This contention is based upon a superficial view of the provisions of sub-section (1) of section 9. It was ruled by this Court in the case of *Radha Kishore Manikya v. Durganath Bhattacharjee* (1) that the words "every settlement of rent or decision of a dispute by a Revenue Officer" in section 9 are applicable only to those cases which a Revenue Officer has jurisdiction to try and are not applicable to a decision of a Settlement Officer as to the validity of a *lakheraj* title under section 104 of the Bengal Tenancy Act, 1885. This conclusion coincides with the decision of *Donay Dass v. Keshub Pruhti* (2), where Mr. Justice Ghose observed that the Legislature could not possibly have intended to accord finality to a decision of a dispute by a Settlement Officer which it was beyond the jurisdiction of the Revenue Officer to decide under section 106. This view is, in our opinion, eminently reasonable. Reliance, however, has been placed upon the later decision in *Nabin Chandra Chakrabarti v. Maharaja Radha Kishore Manikya Bahadur* (3) where the attention of the Court was not drawn to the cases of *Donay Dass v. Keshub Pruhti* (2) and *Radha Kishore Manikya v. Durganath Bhattacharjee* (1). There is a dictum in this judgment to the effect that the doctrine of *res judicata*

applies, irrespective of the question whether the decision of the Revenue Officer was or was not competent under section 104 or 106. In support of this view reliance was placed upon the decision in *Nikunja Behari Chanda v. Radha Kisore* (4). On an examination of the judgment in that case, however, it transpires that the decision is not an authority for the proposition deduced therefrom. There it was held that the particular decision of the Revenue Officer was within his jurisdiction and if the decision was within his competence, it was plainly final between the parties under sub-section (1) of section 9 of Act III of 1898. We may further observe, with reference to the decision in *Nabin Chandra Chakrabarti v. Maharaja Radha Kishore Manikya Bahadur* (3), that although reliance was placed upon the doctrine of *res judicata*, the Court yet proceeded to determine the case on the merits and came to the conclusion that the claimants had failed to establish their alleged rent-free title on the basis of the *sanads* and the other documents produced by them. We hold accordingly that the appellant can succeed only if the decision of the Settlement Officer, dated the 17th April 1897, was a decision of a dispute which he was competent to decide under section 106, Bengal Tenancy Act, as it stood before its amendment in 1898.

It cannot, we think, be seriously maintained that the Settlement Officer was competent to decide a question of this character before the amendment of the Statute in 1898. This is plainly indicated by the fact that section 102 has now been amended by the insertion of a new clause which expressly authorises the Settlement Officer to decide, when the land is claimed to be held rent free, whether or not rent is actually paid, and if not paid, whether or not the occupant is entitled to hold the land without payment of rent, and, if so entitled, under what authority. The very circumstance that the Legislature has inserted this clause in section 102 points to the conclusion that the matter provided for thereunder is not covered by the other clauses of section 102. This in fact was the view taken by a Full Bench of this Court in the cases of *Secretary of State for India in Council v. Nitye Singh* (5), and is also in

(1) 32 C. 162.

(2) 8 C. W. N. 741.

(3) 11 C. W. N. 859.

(4) 30 Ind. Cas. 944, 22 C. L. J. 148.

(5) 21 C. 38.

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accord with the decision in *Dharani Kanta Lahiri v. Gaber Ali Khan* (6). But it has been argued that the decision of the Full Bench should be limited to cases where the Settlement Officer is invited to decide whether an alleged rent-free grant constitutes a valid title, and in support of this our attention has been drawn to isolated passages in the judgment delivered by the Full Bench. But we prefer to accept the interpretation of the decision of the Full Bench as given by Mr. Justice Prinsep who delivered the leading judgment in that case; his view will be found in the case of *Rzdha Kishore Manikya v. Durganath Bhattacharjee* (1), and was confirmed on appeal by a Bench of three Judges. Reference has also been made to the case of *Karmi Khan v. Brojo Nath Das* (7), but that decision, rightly interpreted, does not support the contention of the appellant. In fact, the question whether a *lakheraj* is valid or not, does not and cannot require consideration in a case of this description; the proceeding is, not by the Government for assessment of revenue on land alleged to be held revenue free, but is by the proprietor of an estate for assessment of rent on land claimed by the occupier to be held as rent free.

It has finally been urged that if this view be taken, it would be open to any occupier of land to defeat the proceeding before the Settlement Officer by an unfounded assertion, that the land was held rent-free. There is no ground for this apprehension, for, as was pointed out by Mr. Justice Prinsep in *Nikunja Behari Chanda v. Radha Kisore* (4) it is open to the Settlement Officer to investigate whether rent has, as a matter of fact, been paid in respect of the disputed land; if it is proved that rent has been paid, the Settlement Officer is competent to assess fair and equitable rent on the land; if, on the other hand, it is proved that rent has never been paid in respect of the land, he cannot assess rent thereon, merely because he is of opinion that the alleged rent-free title has not been proved. This was the law under the Bengal Tenancy Act as it stood before its amendment in 1898. The law, however, was altered in

1898 and the controversy cannot be raised again. We hold accordingly that the decision of the Settlement Officer dated the 17th April 1897 does not operate as *res judicata* and that it was open to the District Judge to come to a determination of the matter in dispute on the evidence before him. That determination, as we have said, is not, and cannot be successfully assailed on the merits, as it accords with a long line of cases in this Court: *Birendra Kishore Manikya v. Bhoirab Chandra Chakrabarti* (8).

The result is that the decree of the District Judge is affirmed and this appeal dismissed with costs.

Appeal dismissed.

(8) 27 Ind. Cas. 12; 20 C. L. J. 295.

CALCUTTA HIGH COURT.

CIVIL REFERENCE No. 3 OF 1915.

March 15, 1915.

Present:—Mr. Justice Sharfuddin and
Mr. Justice Goxe.

RAM SARUP BHAGAT—PLAINTIFF

versus

BANSI MANDAR—DEFENDANT.

Contract Act (IX of 1872), s. 23—Bond, slavery—Overwhelming interest—Public policy.

A bond which binds down the executant to daily attendance and manual labour until a certain sum is re-paid in a certain month and penalises default with overwhelming interest is opposed to public policy and is not enforceable. [p. 956, col. 2.]

FACTS.—The suit was on a *harwahi* bond printed as foot-note to the judgment. Further facts appear from the following extract from the letter of reference of the Munsif:—

“The case of the plaintiff is that the defendant left his service without paying the debt in the month of *Jeth* 1319. Hence this suit for the recovery of Rs. 13 principal and Rs. 22 as interest, total Rs. 35.

The defendant has not appeared to contest the suit and hence it has been heard *ex parte*. This is very probably due to the fact that he is too poor to contest the claim.

Bonds of this nature are very common in this sub-division and I am told that there is no agriculturist who has not taken such a bond from his labourers. It is very difficult for agricultural operations in this

(6) 30 C. 339; 7 C. W. N. 33.

(7) 22 C. 244.

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sub-division to go on smoothly without such bonds. But it is said that such bonds are really slavery bonds, and reference to such bonds, was made in a recent Administration Report of the Government of Bihar and Orissa. If these bonds are really slavery bonds they should be declared null and void by the Courts. But in my opinion these are not slavery bonds. The contract, though for indefinite period, is determinable by the labourer on payment of money secured by the bond. The labourer is moreover to get his customary wages from the employer so long as he serves him. No doubt the provision to pay exorbitant rate of interest is such as to deter the labourer from leaving the service. The abject and poor condition of majority of these labourers are such that they are never able to pay the money secured, unless there is another employer who pays him a higher value, out of which he may redeem himself. Under such a circumstance, the stipulation to pay an exorbitant rate of interest often serves as a check on him and prevents him from leaving the service. The result is that the same family of labourers goes on serving the same family of employer from generation to generation. But this is a circumstance which is not the result of the contract itself, but of extraneous circumstances. The provision to pay interest is really a penal provision which may be relieved against by the Court.

As I entertain reasonable doubt on the point of law involved in this case, I refer under Order XLVI, rule 1, of the Civil Procedure Code, for the decision of the Hon'ble High Court the following question:—

"Whether the bond in suit is a slavery bond? Are its terms enforceable?"

JUDGMENT.—This is a reference by the Munsif of Banka, under Order XLVI, rule 1, of the Civil Procedure Code, for a decision whether a certain bond* is enforceable at

law. It appears to us that it is not so enforceable. It binds down the executant to daily attendance and manual labour until a certain sum is re-paid in a certain month and penalises default with overwhelming interest. It is remarkable that the suit, which is brought on this bond, is not contested, and this, in the Munsif's opinion, is probably due to the fact that the executor is too poor to defend himself. Such a condition is indistinguishable from slavery, and such a contract is, in our opinion, opposed to public policy and not enforceable.

Reference answered.

In the year I wish to re-pay the money, I shall re-pay it in the month of *Baisakh* of that year in one lump sum, and then I will leave his work. I shall not re-pay money in any other month except the month of *Baisakh*. If I absent myself from work without re-paying the money, then I shall pay interest at the rate of Rs. 6-4 per cent. per mensem from the date of absence to the day of realization. I have, therefore, executed this *harvahi* (ploughman's) bond on the above conditions so that it may be of use, when required."

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 572 OF 1914.

July 21, 1915.

Present:—Sir Henry Richards, Kt., Chief Justice, and Justice Sir P. C. Banerji, Kt.

DIRGPAL SINGH AND ANOTHER—

DEFENDANTS—APPELLANTS

versus

KALLU AND OTHERS—PLAINTIFFS—

RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Art. 134—Sale by mortgagee of mortgaged property—Omission of words "in good faith", effect of.

The omission of the words "in good faith" from Article 134 of the Limitation Act of 1908 does not entitle a person who purchases, with full knowledge that his vendor's title is merely that of a mortgagee, to the benefit of that Article. [p. 957, col. 2.]

Second appeal from a decree of the District Judge of Aligarh.

Mr. M. L. Agarwala, for the Appellants.

Mr. Gulzari Lal, for the Respondents.

JUDGMENT.—This appeal arises out of a suit to redeem a mortgage made in the year 1843. The facts are a little complicated, but it is unnecessary to state them in detail for the purpose of deciding the present

*The bond was as follows:—

"I have borrowed Rs. 13 in cash from Ram Sarup Bhagat, inhabitant of Bandara, to meet my household expenditure. In satisfaction of interest, I shall daily remain in attendance, and plough the land of the said Bhagat, work with spade in his land, transplant his seedlings, thresh his crops by means of *danni*, etc., and shall perform and manage all works required from me. I shall take wages and *butad* (food) according to the usage of the said village.

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appeal. It appears that in the years 1878 and 1879 persons in whom the mortgagee rights were then vested made transfers in favour of certain persons who are now represented by the appellants. In these transfers words are used descriptive of the interest transferred which would be appropriate if the transferor was absolute owner and not merely mortgagee. On the other hand, the words are not altogether inappropriate as descriptive of the right of a mortgagee in possession. The lower Appellate Court has found in concurrence with the Court of first instance that the actual interest which the transferors had at the date of the transfers was that of mortgagees in possession. It has also found (and given good reasons for its findings) that the transferees knew what the interest of the transferors was. After the transfer the name of the transferee was entered in the revenue papers as owner of the "mortgagee" interest. It is contended here that notwithstanding the findings of the Court below Article 134 of the Limitation Act bars the suit. Article 134 is as follows:—"To recover possession of immoveable property conveyed or bequeathed in trust or mortgaged and afterwards transferred by the trustee or mortgagee for a valuable consideration." The period is twelve years from the date of the transfer.

It is admitted that a mortgagor has sixty years within which to bring a suit for redemption. It is also admitted that where the mortgagee transfers his mortgagee rights as such, the transferee stands in no better position than the transferor. It is, however, urged that if the words used in the deed of transfer are applicable to the transfer of an absolute interest, then Article 134 applies, no matter whether the transferee was aware of the nature of the interest of the transferor or not. We find great difficulty in accepting this contention. The main argument in favour of it is based on a comparison between the words of Article 134 in the recent Limitation Acts and Article 134 in Act IX of 1871. In that Act the Article was as follows:—"To recover possession of immoveable property conveyed in trust or mortgaged and afterwards purchased from the trustee or mortgagee *'in good faith'* and for value."

It is said that the absence of the words "*in good faith*" in the recent Acts shows the

knowledge of the nature of the transferor's title is quite immaterial. Reliance is placed upon the case of *Yesu Ramji Kalanath v. Balkrishna Lakshman* (1). This case seems to have been considered in a later judgment of the same Court in the case of *Pandu v. Vithu* (2). We think that there is no reason for holding that the omission of the words "*in good faith*" from the recent Act entitled the person who purchased, with full knowledge that his vendor's title was merely that of mortgagee, to the benefit of Article 134. It may have been that the words were considered not altogether appropriate and that their retention would throw the onus on the transferee of proving that he had no knowledge of his vendor's title. This would be in many cases a hardship upon the person in possession of the property—he would have to prove a negative possibly after the lapse of many years. Whatever may be the reason for omitting the words, we cannot think that the Legislature intended that the mortgagee and his transferee should be able to shorten the period allowed by law for redeeming a mortgage by wilfully, and to the knowledge of both, misdescribing the interest transferred in the deed of transfer. In our opinion having regard to the findings of the Court below that the transferees from the mortgagees had actual knowledge that their vendors' title was merely that of a mortgagee and that they had no belief that they were purchasing an absolute interest, the decision of the Court below should be affirmed.

The only other point is a question of calculation. This is a matter which was not brought to the notice of the lower Appellate Court and we do not think it can be entertained here.

The result is that the appeal fails and is dismissed with costs.

Appeal dismissed.

(1) 15 B. 583.

(2) 19 B. 140.

In the goods of G. A. QUININGBOROUGH.

CALCUTTA HIGH COURT.

CIVIL REFERENCE UNDER SECTION 5 OF THE
COURT FEES ACT.

July 19, 1915.

Present:—Justice Sir Asutosh Mookerjee, Kt.
In the goods of G. A. QUININGBOROUGH,

DECEASED.

Court Fees Act (VII of 1870), Sch. I, Art. 11—
‘Amount or value of the property,’ meaning of.

For the purposes of Article 11 of the first Schedule to the Court Fees Act, the expression “the amount or value of the property” signifies what is described as the net total in Annexure A in Schedule III, obtained by the deduction of the amount shown in Annexure B as not subject to duty from the gross valuation of the moveable and immoveable property left by the deceased. [p. 960, col. 2.]

FACTS of the case appear from the following Letter of Reference of the Taxing Officer:—

“This is an application by the Administrator-General of Bengal for Letters of Administration as in case of intestacy.

The applicant being the Administrator-General no affidavit of valuation, such as is required in the case of an ordinary applicant by section 19 (I) of the Court Fees Act, has been filed, but in his petition the Administrator-General has, in accordance with the practice, set out a list (Annexure A) of the assets of the estates and also a list (Annexure B) of the items not subject to duty.

From this it appears that the gross value of the estate as shown in Annexure A is over Rs. 1,000, *viz.*, Rs. 1,244-11, the value of the items in Annexure B being Rs. 522. The net value of the assets, therefore, is below Rs. 1,000, *viz.*, Rs. 722-11-0.

In paragraph 7 of this petition the Administrator-General submits that as the net assets of the estate are under Rs. 1,000 in value no duty is payable, and I have been asked as Taxing Officer to grant a certificate that no duty is payable, or in the event of my being of opinion that I cannot do that, to refer the point under section 5 of the Court Fees Act to the final decision of the Chief Justice.

A similar question came up before the Board of Revenue in 1904, who referred the matter to the then Advocate-General, Mr. O’Kinealy, for opinion. That officer was of opinion that in such cases duty was payable notwithstanding the fact that the deduction of the debts brought the value

of the estate below Rs. 1,000. Thereafter the practice of the Court was in cases of this kind to charge duty upon the net value of the estate.

In 1913—*In the goods of Harriett Teviot Kerr* (1)—a question arose as to the rate of, and the proper method of calculating, the duty in an estate the gross value of which was Rs. 2,17,800 odd, the net value, after deduction of the items in Annexure B, being Rs. 18,000 only. The question arose in the course of correspondence between me as Registrar and the Collector of Stamp Revenue. I then submitted the correspondence with a note to Mr. Justice Fletcher, and as his Lordship was of opinion that Mr. O’Kinealy’s opinion above referred to was wrong, the Collector was informed that in future we should follow what had been our practice of deducting the amount of Annexure B from the amount of Annexure A and taking duty only on the difference when, and at the rate, payable on such difference—and that we should do this even in estates where the gross value was over, and the net under, Rs. 1,000.

The Collector subsequently drew attention to the then recent case of *Collector of Maldah v. Nirode Kamini Debya* (2) which was a case in which the gross value was Rs. 1985, the net value under Rs. 1,000 and it was there held that duty was payable.

No question, however, arose in that case as to the rate at which duty was to be charged on the net value, and as that was the principal point in *Harriett Teviot Kerr’s* case (1), I, at the request of the applicant, referred it under section 5 of the Court Fees Act.

His Lordship, the Chief Justice, appointed Mr. Justice Mookerjee to hear the reference. His Lordship’s decision will be found in *In the goods of Harriett Teviot Kerr* (1). When referring to the case of *Collector of Maldah v. Nirode Kamini Debya* (2) his Lordship on page 507 said:—“It is not necessary to decide on the present occasion whether this view (*i.e.*, that an estate is not exempted from duty in a case where the gross value is over Rs. 1,000, and the net value under) is well founded. I reserve my opinion upon this

(1) 21 Ind. Cas. 502; 18 C. W. N. 121 at p. 127; 18 C. L. J. 308 at p. 318.

(2) 15 Ind. Cas. 621; 17 C. W. N. 21.

In the goods of G. A. QUININGBOROUGH.

matter with the remark that when it arises again it may require re-examination and further consideration." The point has come up on several occasions since then, and the office, considering itself bound by the ruling in *Collector of Maldah v. Nirode Kamini Debya* (2), has taken duty—the parties not having cared to take the matter further, the estate being so small.

In the present case, however, the Administrator-General, having regard to the judgment of Mr. Justice Mookerjee in *Harriett Teviot Kerr's* case (1) and to the fact that since that ruling the Revenue Authorities have been refunding, to him duty paid by him in cases where the net value of the assets was under Rs. 1,000, desires to be heard on the point and obtain a final decision. As the point in question is one of general importance, I, at the request of Messrs. Leslie & Hinds, Attorneys for the Administrator-General, refer it under section 5 of the Act to the final decision of His Lordship, the Chief Justice."

Mr. J. E. Bagram, for the Administrator-General.

JUDGMENT.—This is a reference under section 5 of the Court Fees Act, 1870, made by the Taxing Officer on the original side of this Court. The circumstances under which the reference has been made are lucidly stated in the order of reference and need only be narrated here very concisely.

An application has been made by the Administrator-General for Letters of Administration in respect of the estate of G. A. Quiningborough as in a case of intestacy. As the application has been made by the Administrator-General, no affidavit of valuation, such as is required in the case of an ordinary application under section 19H of the Court Fees Act, has been filed. But, in accordance with established practice, the Administrator-General has set out in his petition a list of the estate, and in another list the debts payable out of the estate. The value of the estate in the first list is given as Rs. 1,244-11-0, and the amount of the debts in the second list at Rs. 522, leaving a balance of Rs. 722-11. The question for determination is, whether the fee mentioned in Article 11 of the first Schedule to the Court Fees

Act is payable in respect of the estate left by the deceased.

Article 11 of the first Schedule to the Court Fees Act provides for the payment of a fee on a Probate of a Will or Letters of Administration, with or without Will annexed, when the amount or value of the property in respect of which the grant of Probate or Letters is made exceeds Rs. 1,000. The question thus arises as to the true import of the expression "amount or value of the property in respect of which the grant of Probate or Letters is made" does it mean the gross value of the property or does it signify the net value obtained by the deduction of the debts and expenses from the gross value. Sir Richard Couch, C. J., held in the case of *In the goods of Ram Chunder Doss* (3) that in estimating the amount of the *ad valorem* fee chargeable under Article 11 of the first Schedule to the Court Fees Act, the fee must be paid in respect of the property without deducting the amount of the debts to be paid out of it. It cannot be reasonably disputed, I think, that this is a possible interpretation of Article 11 taken by itself. But since this decision was given in 1872, the Court Fees Act has been twice amended, *first*, by Act XI of 1899, and, *next*, by Act VII of 1910. In my opinion, a substantial alteration in the law has been effected by these amendments and Article 11 must now be interpreted in the light of section 19 I, which was inserted in the Court Fees Act by section 2 of Act XI of 1899. Sub-section 1 of section 19 I requires the applicant for Probate or Letters of Administration to file in the Court a valuation of the property in the form set forth in the third Schedule and to pay on such valuation the fee mentioned in Article 11. When we turn to the third Schedule, we find that the petitioner is required to state in the prescribed Form of Valuation that he has truly set forth in Annexure B all the items which he is by law allowed to deduct. Annexure A is a statement of the valuation of the moveable and immoveable properties of the deceased. On the face of the Form of Valuation, it is thus patent that the petitioner is required to state the value of the property and is allowed to

(3) 18 W.R. 153; 9 B. L. R. 30.

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deduct the amount shown in Annexure B as not subject to duty. When we turn to Annexure B we find that it is headed "Schedule of debts, etc."; then follow five different items, as to each of which a statement of value has to be made. These are as follows: (1) amount of debts due and owing from the deceased, payable by law out of the estate; (2) amount of funeral expenses; (3) amount of mortgage encumbrances; (4) property held in trust not beneficially or with a general power to confer a beneficial interest; (5) *other property not subject to duty*. Three positions are now perfectly plain; *first*, that each of the first four items constitutes property not subject to duty and that consequently the fee cannot be culculated on the gross value of the estate as also on the debts and the difference taken; *secondly*, that unsecured debts are, for this purpose, placed on the same basis as mortgage encumbrances; *thirdly*, that the second paragraph of the Form of Valuation, read with the last clause of Annexure A and the first and last clauses of Annexure B, makes manifest the Legislative intent that the fee is payable, only on the difference between the gross value of the estate and the amount of debts, as such difference alone constitutes property subject to duty. This has admittedly been always the law with regard to mortgage-debts: *In the goods of Peter Innes* (4), *In the goods of Charles Edward Maclean* (5), *In the goods of Ramchandra Lakshmanji* (6); and I feel no doubt that this is the law also in respect of unsecured debts under the Court Fees Act as amended in 1899, whatever view might have been maintained before that date. The essence of the matter is that when an estate is burdened with the payment of debts, the market value of the property is the value of the estate left after deduction of the amount of the debts: *Cooper v. Cooper* (7); *Blake v. Bayne* (8). It is worthy of note that under the Law

of England, in determining the value of an estate for the purpose of Estate Duty, allowance is made for debts and encumbrances (Finance Act 1894, Stat. 57 and 53 Vict. C. 30, section (7)). I am not unmindful that a contrary opinion was adopted in the case of *Collector of Maldah v. Nirode Kamini Debya* (2); but for reasons fully set out in my judgment in the case of *In the goods of Harriett Teviot Kerr* (1), I am unable to accept that view as a correct exposition of the true intent of the Legislature. That decision holds that the fee is to be paid on the net value of the property, but the liability for assessment is to be determined with regard to the gross value of the estate; in other words, the fee is first determined on the gross value and is then reduced by the fee calculated on the amount of debts. This cannot be right, for the debts, as already explained, are exempt from duty. I hold accordingly that for purposes of Article 11 of the first Schedule to the Court Fees Act, the expression "the amount or value of the property" signifies what is described as the net total in Annexure A in Schedule III, obtained by the deduction of the amount shown in Annexure B as not subject to duty from the gross valuation of the moveable and immovable property left by the deceased. In this view fee cannot be levied in the case before me.

Reference answered.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 468 OF 1913.

November 26, 1914.

Present:—Sir Henry Drake-Brockman, Kt.,
J. C.DHUNDIRAJ—PLAINTIFF—APPELLANT
versus

WARU BAI—DEFENDANT—RESPONDENT.

*Limitation Act (IX of 1908), Sch. I, Art. 120—Co-sharer failing to pay rental—Suit by other co-sharer to recover balance due on account.*Where in a village the rents payable by the tenants together with the rental assessed upon the *sir* and

(4) 16 W. R. 253; 8 B L. R. App. 43.

(5) 6 N. W. P. H. C. R. 214.

(6) 1 B. 118.

(7) (1874) 7 H. L. 53; 30 L. T. 409; 22 W. R. 713.

(8) (1908) A. C. 371; 77 L. J. P. C. 97; 99 L. T. 35.

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khudkasht held by a *lambardar* and his co-sharer more than suffice to meet land revenue, cesses and miscellaneous charges and by arrangement between the parties no question of demanding a contribution from the co-sharer arises until the annual account is made up by the *lambardar*:

Held, that a suit brought by the *lambardar* to recover the balance due from his co-sharer by reason of his failure to pay the rental is governed by Article 120, and not by Article 61 or 99 of the Limitation Schedule [p. 962, cols. 1 & 2.]

A suit by a *lambardar* against his co-sharer in a village for the balance due to him on an account showing the extent to which the co-sharer is chargeable after taking into account the credit to which he is entitled in respect of his share in the estate is governed by Article 120 of the Limitation Act. [p. 962, col. 2.]

Appeal against the decree of the District Judge, Wardha, dated the 14th May 1913, modifying that of the Junior Munsif, Hinganghat, dated the 30th September 1912.

Messrs M. B. Kinkhede and V. D. Kale, for the Appellant.

Mr. G. S. Lule, for the Respondent.

JUDGMENT.—The plaintiff in the suit out of which this second appeal arises, owns a 5-annas 4-pies share in *Mauza Fattepur* in the Hinganghat Tahsil of the Wardha district and is *lambardar* of the whole village. The other co-sharers are his brother and one Waru Bai, each of whom like himself owns one-third. The defendant is Waru Bai. The plaint sets out that each year the accounts of the village show a debit against the defendant, because she holds *sir* and *khudkasht* land of which the assessed rental exceeds one-third of the total assessed rental for all such land. The claim relates to the *Fasli* years 1315—1320 (1905-06 to 1910-11 A. D.). A statement annexed to the plaint shows the receipts in each year to be Rs. 141, made up of Rs. 32 collected from tenants, Rs. 48 due for the defendant's *sir* and *khudkasht* and Rs. 61 for the rest of the *sir* and *khudkasht*. Another statement gives details of the annual expenses which may for present purposes be summarised thus:—

	Rs.	a.	p.
Land Revenue	...	80	0 0
Cesses	...	4	8 0
<i>Lambardari hak</i>	...	4	0 0
Miscellaneous	...	1	2 0
TOTAL	...	89	10 0

For 1317 and 1318 *Fasli* sums of Rs. 7-8-0 and Rs. 5 respectively are added as spent in connection with Settlement operations. The total receipts for six years were thus put at Rs. 846 and the total expenditure at Rs. 550-4-0, the resulting profits being Rs. 295-12-0, of which the defendant would be entitled to claim Rs. 98-9-4. Inasmuch, however, as the defendant never paid the assessed rental for her *sir* and *khudkasht*, aggregating Rs. 288, she was bound to pay the plaintiff Rs. 189-6-8. Including Rs. 62-5-0 for interest the total sum sought to be recovered was Rs. 251-11-8.

The first Court disallowed the miscellaneous expenses and those connected with Settlement operations and held the assessed rental on *sir* and *khudkasht* held by the defendant to be Rs. 45 only. Applying Article 99 of the Limitation Schedule to the facts, it dismissed the claim in respect of the *Fasli* years 1315, 1316 and 1317 as time-barred, the suit having been filed on the 18th September 1911. The plaintiff thus obtained a decree for Rs. 82-8-0 as principal and Rs. 23 as interest.

The plaintiff appealed to the District Judge, who treated the claim as virtually one for contribution towards the Government demand for land revenue and cesses, the expenditure under these heads being put in the plaint at Rs. 507 and the aggregate expenditure at Rs. 550-4-0 only. Remarking that if the assessed rental on *sir* and *khudkasht* be left out of account there were losses each year, the learned Judge pronounced the suit to be in effect one for contribution towards losses occasioned by rents collected from tenants falling short of the land revenue and cesses due to Government and, therefore, to be governed by Article 99. Failing that Article, he considered the general Article relating to suits for contribution, namely, No. 61, to be applicable. He also considered that the charge of Rs. 5 for Settlement operations in 1318 *Fasli* was proper and slightly modified the first Court's decree accordingly.

The plaintiff has preferred this second appeal and on his behalf it is contended that the suit is governed by Article 120 of the Limitation Schedule, neither Article 61 nor Article 99 being applicable. In support of this contention two unreported decisions

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of this Court are cited, namely, *Tanaba v. Gopika Bai* (1) and *Janardhan v. Mohna Bai* (2). In the former the collections from tenants alone sufficed each year to cover all expenses, and the respondent's learned Pleader relies on this circumstance to distinguish that case from the present one. In both cases cited it was laid down on authority of the Privy Council in *Mahomed Riasat Ali v. Hasin Banu* (3) that Article 120 should be applied, unless it is clear that the suit is within some other Article.

In my opinion the Courts below were not justified in ignoring items other than rental collections and Government demand when determining the character of the suit for purposes of limitation. The claim as laid in the plaint is certainly not one to recover money paid for the defendant. To use the words of Ismay, J. C., in *Lachman Ram v. Munnalal* (4), we have here a dispute arising on a division of the annual profits and what the *lambardar* has a right to ask for, is the balance which is due to him on an account, showing the extent to which a co-sharer is chargeable after taking into account the credit to which he is entitled in respect of his share in the estate. The pleadings taken all together clearly indicate that by arrangement between the parties no question of demanding a contribution from the defendant arises until the annual account is made up by the plaintiff. To apply either Article 61 or Article 99 would be in effect to depart from this arrangement; for in either case limitation would begin to run from the time the plaintiff paid more than his share of the land revenue, cesses or miscellaneous expenses, as the case may be. I would further observe that the item *lambardari hak* is one in respect of which the plaintiff has no payment to make: it is a due to be recovered from the defendant, and no question of contribution in respect of it alone can arise as between the parties to this litigation. Yet another fact which militates against acceptance of the view adopted by the lower Court is that the rents payable by tenants (Rs. 32) together with the rental (Rs. 61) assessed upon the *sir* and *khudkasht* held by the plaintiff and

his brother more than suffice to meet land revenue, cesses and miscellaneous charges. Under the arrangement aforesaid it was the plaintiff's duty no less than the defendant's to pay the assessed rental on his share of the home-farm, and the expenses defrayed should, therefore, be regarded as paid from a common fund, not from the plaintiff's own pocket. Were the common fund completed as it should be each year, there would be profits to divide, and the present claim may thus be treated as representing profits which the plaintiff should have received as his own share.

For these reasons I hold that the suit is governed by Article 120, not by Article 61 or 99 of the Limitation Schedule. The decree of the lower Appellate Court will, therefore, be modified by adding what is due to the plaintiff for the *Fasli* years 1315, 1316 and 1317 and interest thereon. Costs in all three Courts will follow this result.

Appeal accepted.

MADRAS HIGH COURT.

FIRST CIVIL APPEAL No. 280 OF 1913.

August 20, 1915.

Present:—Mr. Justice Coutts-Trotter and
Mr. Justice Srinivasa Aiyangar.

SUPPA BHATTAR—DEFENDANT No. 7—

APPELLANT

versus

SUPPU SOKKAYA BHATTAR AND OTHERS

—PLAINTIFFS AND DEFENDANTS NOS. 1 TO 6,
8 TO 10, LEGAL REPRESENTATIVES OF DEFENDANTS
NOS. 11 AND DEFENDANTS NOS. 12 TO 18—

RESPONDENTS.

Judgment in personam—Judgment in rem—Adverse possession—Title to office—Performance of duties, necessity of, essential—Limitation Act (IX of 1908), Sch. I, Arts. 124, 141.

A judgment of a Court of competent jurisdiction pronounced against the only person or persons, who, at the time of such judgment, had any interest which would entitle them to resist the plaintiffs' title, is conclusive against all the world as to the facts stated in it and any person not a party to the suit in which it was pronounced but whose title is subsequent in origin, cannot question it on any of the grounds stated in it, except on the ground of its nullity for want of jurisdiction in the Court which pronounced it. [p. 965, col. 1; p. 966, col. 2.]

Sayam Ramamoorthi Dhora v. Secretary of State for India in Council, 19 Ind. Cas. 656; 24 M. L. J. 469; 36 M. 141; *Srinivasa Aiyangar v. Arayar Srinivasa Aiyangar*, 6 Ind. Cas. 229; 8 M. L. T. 33; 20 M. L. J. 546; 33 M.

(1) Second Appeal No. 340 of 1904.

(2) Second Appeal No. 143 of 1904.

(3) 21 C. 157 at p. 163; 20 I. A. 155.

(4) 13 C. P. L. R. 48.

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483; (1910) M. W. N. 479; *Elliott Et. Al. v. The Lessee of Peirsol Et. Al.*, U. S. Supreme Court Reports, 7 Lawyer's Edition 164 at page 170; 1 Peters 328; *Malkarjun v. Narhari*, 25 B. 337; 5 C. W. N. 10; 10 M. L. J. 368; 2 Bom. L. R. 927; 27 I. A. 216 (P. C.); *Lakshmanaswami Naidu v. Rangamma*, 26 M. 31, followed.

Peari Mohan Shaha v. Durlavi Dassya, 20 Ind. Cas. 815; 18 C. W. N. 954; 19 C. L. J. 441; *Ramnad Zamindar v. Dorasami*, 7 M. 341; 8 Ind. Jur. 188; *Goluck Monee Debia v. Ram Monee Bose*, 12 W. R. 21, distinguished.

Title to an office by adverse possession can be claimed only by performance of duties attached to the office and not by possession for the statutory period of the *manibham* lands attached to it. [p. 965, col. 2; p. 967, col. 2.]

Pydigantam Jagannadha Row v. Rama Doss Patnaik, 23 M. 197; *Bhaiaji Thakur v. Jharula Das*, 24 Ind. Cas. 501; 18 C. W. N. 1020; 27 M. L. J. 100; 1 L. W. 549; 16 M. L. T. 210; (1914) M. W. N. 636; 42 C. 244 (P. C.); 12 A. L. J. 1176; 20 C. L. J. 360; 16 Bom. L. R. 845; *Kamalathammal v. Krishna Pillai*, 8 Ind. Cas. 998; 20 M. L. J. 781; 9 M. L. T. 73; *Lilabati Misra v. Bishun Chobey*, 6 C. L. J. 621, referred to.

Query.—Whether a suit for possession of an hereditary office on the death of a limited owner is governed by Article 124 or Article 141 of the Limitation Act? [p. 965, col. 1.]

Appeal against the decree of the Court of the Subordinate Judge of Madura, in Ordinary Suit No. 88 of 1911.

FACTS of the case appear clearly from the judgment.

Mr. A. Krishnaswami Aiyar, for the Appellant:—(1) The dispute was about the genuineness of the Will and the decision in the previous suit is not *res judicata*, nor is that decision binding on the present appellant as he was no party to it. *Peari Mohan Shaha v. Durlavi Dassya* (1), *Ramnad Zamindar v. Dorasami* (2), *Goluck Monee Debia v. Ram Monee Bose* (3), *Lakshmanaswami Naidu v. Rangamma* (4). (2) The appellant was in enjoyment of the emoluments of the office for the statutory period and he can claim title by prescription. *Pydigantam Jagannadha Row v. Rama Doss Patnaik* (5), *Lilabati Misra v. Bishun Chobey* (6).

Messrs. T. Narasimha Aiyangar and C. S. Vencatachariur, for the Respondents:—The judgment was obtained against the only heir who had any right to question the genuineness of the Will, and is binding against all persons whose claim is subsequent

in origin. *Srinivasa Aiyangar v. Arayar Srinivasa Aiyangar* (7), *Sayam Ramamoorthi Dhora v. Secretary of State for India in Council* (8), *Elliott Et. Al. v. The Lessee of Peirsol Et. Al.* (9) and *Malkarjun v. Narhari* (10).

A third person like the present appellant cannot impeach the judgment or its legal efficacy.

There is nothing to show that the appellant was doing the duties of the office and mere possession of the *manibham* lands will not do to give him title by adverse possession. *Kamalathammal v. Krishna Pillai* (11), *Bhaiaji Thakur v. Jharula Das* (12).

This appeal and the memorandum of cross-objections coming on for hearing on the 16th, 17th, and the 18th August 1915, and having stood over for consideration till this day the Court delivered the following

JUDGMENT.

COUTTS-TROTTER, J.—The facts which gave rise to this appeal are as follows: A certain Chandrasekara Bhattar was entitled to certain *manibham* lands appertaining to the office of *alankara miras* in a temple in Madura. He died on the 3rd May 1881. He had no children, but he left a widow called Thalamuthammal: he also had a nephew called Rajah Bhattar, who succeeded him as *alankara mirasdar* and enjoyed the properties partly under a Will alleged to have been made by Chandrasekara Bhattar before he died and partly by an agreement with Thalamuthammal. Rajah Bhattar died on the 25th January 1882, leaving a widow Akilandammal. Questions arose between the two widows, but they were settled by agreement, and Thalamuthammal went into possession of the lands and remained in possession till her death in 1885. Meanwhile, the plaintiff who is found by the lower Court to be the nearest agnate of Rajah

(7) 6 Ind. Cas. 229; 33 M. 483; 8 M. L. T. 33; 20 M. L. J. 546; (1910) M. W. N. 479.

(8) 19 Ind. Cas. 656; 36 M. 14; 24 M. L. J. 469.

(9) U. S. Supreme Court Reports, 7 Lawyer's Edition 164 at p. 170; 1 Peters 328.

(10) 25 B. 337; 5 C. W. N. 10; 10 M. L. J. 368; 2 Bom. L. R. 927; 27 I. A. 216 (P. C.).

(11) 8 Ind. Cas. 998; 20 M. L. J. 781; 9 M. L. T. 73.

(12) 24 Ind. Cas. 501; 18 C. W. N. 1020; 27 M. L. J. 100; 1 L. W. 549; 16 M. L. T. 210; (1910) M. W. N. 636; 42 C. 244 (P. C.); 12 A. L. J. 1176; 20 C. L. J. 360; 16 Bom. L. R. 845.

(1) 20 Ind. Cas. 815; 18 C. W. N. 954; 19 C. L. J. 441.

(2) 7 M. 341; 8 Ind. Jur. 138.

(3) 12 W. R. 21.

(4) 26 M. 31.

(5) 28 M. 197.

(6) 6 C. L. J. 621.

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Bhattar brought a suit, Original Suit No. 15 of 1882, to establish his reversionary rights, apparently considering those rights jeopardised by the arrangement between the ladies. He impleaded Akilandammal and Thalamuthammal as defendants together with Kuppa Bhattar, the present 4th defendant, and Deivasikamani Bhattar, the present 6th defendant, as heirs of Thalamuthammal who had died during the pendency of that suit. In that suit the defendants raised the plea among other matters that the alleged Will of Chandrasekara Bhattar was not genuine, because without the Will the chain of devolution to the plaintiff was broken on Chandrasekara's death. The suit was decided in favour of the plaintiff; and he obtained a declaration, as against the defendants he had impleaded, that he was entitled to succeed to the properties and the office on the death of Akilandammal. Akilandammal died some time in 1910, and as by this time the defendants were setting up claims to the office and its emoluments, the plaintiff brought the present proceedings against them to establish his right to the office. What happened to the office and who performed its duties during the first few years after Rajah Bhattar's death does not appear. But in August 1888 the Committee of the Devasthanam appointed the 1st and 2nd defendants to do the duties of the office (See Exhibits R and S). It is possible this was only giving sanction to an already existing arrangement. At a later date the 1st and 2nd defendants seem to have associated with themselves the 3rd and the 6th defendants in the discharge of the duties of the office.

The present suit came on for hearing in October 1912 and was decided in February 1913 in favour of the plaintiff. The 7th defendant appeals against the judgment. The plaintiff at the trial relied upon the prior judgment in Original Suit No. 15 of 1882 as debarring the defendants from re-opening the question of the genuineness of the Will of Chandrasekara Bhattar, and the learned Subordinate Judge so held, regarding the matter as governed by the doctrine of *res judicata*. His view was that, though the 7th defendant was not a party to the prior proceedings, yet as other reversioners who stood in the same right were impleaded, the fact that the 7th defendant was not a party

did not prevent the judgment from being binding upon him. Whether on the supposed facts the decision would have been right may be open to question. Mr. Krishnaswami Aiyar cited a large number of cases to show that it was erroneous; but it is unnecessary to decide this matter, because on further examination in this Court it appeared clearly that the facts were not as the lower Court supposed them to be. At the time when judgment was given in Original Suit No. 15 of 1882 Thalamuthammal had died. The 3rd defendant in that suit, Kuppa Bhattar, the present 4th defendant, was a degree nearer the common ancestor than the present 7th defendant, and was, therefore, not a reversioner at all but the legal heir of Chandrasekara Bhattar; and the present 7th defendant was not even a reversioner and had no interest in the matter. The position then was this: the plaintiff had brought before the Court the legal heir of Chandrasekara Bhattar, to whom it was conceded the properties had originally belonged and through whom any title to them must ultimately be traced. Those proceedings definitely determined the issue as to the rightful succession to Chandrasekara as between the present plaintiff and Chandrasekara's nearest descendant. The question is, whether the present 7th defendant who at the date of that judgment had no interest in the properties and whose interest, if any, arose subsequently can be heard to challenge it. It is quite clear that the judgment is not binding on him either as a judgment *in rem* affecting status or as a determination of a matter where to he was a party or privy. But it is contended that the judgment formed a link in the plaintiff's title and that as such it cannot be challenged by any person who has not a claim prior in origin and paramount to the claim of Chandrasekara's heir. It is strange that in a matter of this importance there should be a complete absence of English authority. The principle contended for by the plaintiff has, however, often been recognized in American decisions and is expounded in two text-books of authority, Black on Judgments, Volume 2, section 607, and Bigelow on Estoppel (6th Edition), pages 50 and 167. It has also been recognised by a judgment of this Court in *Sayam Ramamoorti Dhora v Secretary of State for India in Council* (8). I guard myself from assenting

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to all the reasoning of that judgment; in particular I think the passages cited from Littleton and Lord Coke have no bearing on the present question and refer to what now-a-days would be called judgments *in rem*. But I assent to the principle of the judgment which I take to be this: that where a link in the chain of a party's title consists of a decree of a Court of competent jurisdiction pronounced against the only person or persons who at the time of such decree had any interest which would entitle them to resist the plaintiff's title, no person whose claim is subsequent in origin can challenge that decree, or go behind it or challenge the plaintiff's title as at that date on any ground which was determined by that decree as a necessary step in its result. On this short ground I am of opinion that it is not open to the 7th defendant in these proceedings to maintain the invalidity of Chandrasekara's Will either as an imperfect testamentary instrument or as alienating properties which, by law, are inalienable.

In these circumstances, the plaintiff having established what I may call his paper title, the only plea open to the defendant is that of limitation. The learned Subordinate Judge decided that the Article of the Limitation Act which applied was Article 141. I will assume for the present purposes that the defendant is right in contending that the proper Article to apply is Article 124 in accordance with the decision in *Pydigantam Jagannadha Row v. Rama Doss Patnaik* (5). The question then arises, what kind of possession must have been enjoyed by the defendant to defeat the plaintiff's title? There is no doubt evidence to show that the 7th defendant has had possession of the lands attached to the office of *alankara miras* for more than the statutory period, and it is contended on his behalf that possession of the lands was sufficient without it being necessary to show that he performed the duties of the office. That view is contrary to the decision in *Bhaiji Thakur v. Jharula Das* (12). It is also contrary to at least one decision of this Court, *Kamala-thammal v. Krishna Pillai* (11). It is enough for me to say that I respectfully agree

with those decisions and hold that possession of the lands alone will not suffice. There is no evidence at all in this case that the 7th defendant ever actually performed the duties of this office. But it is said there is evidence that the 6th defendant performed those duties, and as the 6th and 7th defendants were jointly entitled to a fourth share of Chandrasekara's original office, the 6th defendant's performance of its duties must be held to have been undertaken on behalf of himself and the 7th defendant also. All that I need say as to that is that there is no evidence that the 6th defendant believed himself or stated himself to be performing the duties on behalf of anybody except himself; there is not even any evidence that the 6th and 7th defendants were undivided brothers. In the absence of such evidence it would, in my opinion, be quite wrong to defeat the right of the true owner by straining legal doctrines of presumptive representation.

In my opinion, the appeal fails and should be dismissed with costs to the first respondent to be taxed on one-eighth of the valuation of the memorandum of appeal, which is the share claimed by the only appellant.

I should like to add that the fact that I have referred in my judgment only to two or three of the very large number of cases cited in the arguments does not mean that I consider the citation of those cases to have been irrelevant. The fact is that the learned Subordinate Judge based his judgment on a number of untenable grounds, and it was only gradually in the course of the argument that it was possible to focus the discussion on to the two real questions.

With regard to the memorandum of objections filed by the 18th defendant, I see no reasonable ground for depriving him of costs on which a discretion could be judicially exercised to do so. His memorandum is, therefore, allowed with costs.

SRINIVASA Aiyangar, J.—Though the hearing of this appeal took some time, the questions which arise for decision are fairly simple and lie in a small compass.

Plaintiff sues to recover possession of

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certain lands attached to an office in the Meenakshi temple at Madura. He claims to be the office holder. The office is a hereditary one and admittedly belonged to one Chandrasekara Bhattar. Plaintiff relies on a judgment in Original Suit No. 15 of 1882 on the file of the Subordinate Court, Madura, which finally established as against Chandrasekara Bhattar's heir, the present 4th defendant, the title of the plaintiff to succeed to the office as the heir of one Rajah Bhattar the devisee under the Will of Chandrasekara Bhattar after the death of Rajah Bhattar's widow who was then alive. The 7th defendant who is the only appellant here had admittedly no title on the date of that adjudication and all persons who could possibly be interested in the title to the office were parties to that adjudication. The judgment is relied on by the plaintiff as the final link in the chain of his title just in the same way as the plaintiff could have relied on a transfer of the property in his favour by the heir of Chandrasekara Bhattar. I have no doubt that for this purpose the judgment is relevant. As stated in Black on Judgments, Volume II, section 604, "for establishing the fact that such a verdict has been given, or such a judgment pronounced, and all the consequences of such a judgment, the judgment itself is invariably not only admissible as the proper legal evidence, but usually conclusive to prove that fact. The mere fact that such a judgment was given can never be considered as *res inter alios acta*, neither can the legal consequences of a judgment be so considered. But with reference to any fact upon whose supposed existence the judgment is founded, the proceeding may or may not be *res inter alios*, and consequently may or may not be evidence according to circumstances, considering the nature of the facts themselves and the parties," and in another place, Volume I, section 4, (page 10) it is stated that "another consequence flowing from the rendition of a judgment is that it may constitute either an evidence or a source of title." Mr. Krishnaswami Aiyar, who appeared for the appellant, did not seriously contest this position. He contends that, inasmuch as he was not a party to the previous adjudication he is entitled now to

impeach the correctness of that judgment. I think he is not entitled to do that. Just as a transfer from the heir in favour of the plaintiff would have given the plaintiff a title to the property as against the whole world, so likewise the adjudication established the title of the plaintiff to the office in question as against all the world. I assume, of course, that the property was Chandrasekara's and all the persons who had any claim to his properties were parties to the previous litigation. On this question the decisions of this Court in *Srinivasa Aiyangar v. Arayar Srinivasa Aiyangar* (7), *Sayam Ramamoorthi Dhora v. Secretary of State for India in Council* (8) and in Second Appeal No. 574 of 1909 referred to therein are conclusive. The principle is clearly stated in the judgment just now delivered, and I respectfully agree. Mr. Krishnaswami Aiyar referred us to the case of *Peari Mohan Shaha v. Durlavi Dassya* (1) as being an authority against this position; but that case is clearly distinguishable inasmuch as the title claimed by Durlavi was a title paramount to the title of the parties to the previous adjudications. The cases reported as *Ramnad Zamindar v. Dorasami* (2) and *Goluck Monee Debia v. Ram Monee Bose* (3) are also distinguishable. I am, therefore, of opinion that the 7th defendant is not entitled to question the correctness of the previous judgment; he would, however, be entitled to show that the previous judgment was a nullity just as he would be entitled to show that a conveyance by the heir of Chandrasekara Bhattar in favour of the plaintiff was void; but the grounds for declaring a judgment a nullity would obviously be different from the grounds on which a conveyance would be declared void. I think the only ground on which a judgment could be declared a nullity is an absolute want of jurisdiction in the Court over the parties or the subject-matter. "Where a Court has jurisdiction it has a right to decide every question which occurs in the cause; and whether its decision be correct or otherwise, its judgment, until reversed, is regarded as binding in every other Court. But, if it act without authority, its judgments and orders are regarded as nullities. They are not voidable, but simply void; and form no bar to a recovery sought, even prior to a

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reversal in opposition to them. They constitute no justification; and all persons concerned in executing such judgments of sentences are considered in law as trespassers." *Elliott Et. Al. v. The Lessee of Peirsol Et. Al.* (9), *Mulkarjun v. Narhari* (10). Mr. Krishnaswami Aiyar contended that the previous judgment was void, because it established the validity of an alienation of a religious office which is against public policy, and in support of his position relied on the decision in *Lakshmanaswami Naidu v. Rangamma* (4). In that case the learned Judges held that a decree passed on a compromise ordering the sale of an office was void and the decree-holder was not entitled to execute the decree. The learned Judges held that the compromise decree was in no better position than an agreement of the parties, and they thought that as the agreement between the parties was void, the decree passed on such a compromise was equally void. With all respect to the learned Judges, I think they have ignored the operation of the decree as a decree. For certain purposes a compromise decree may be of the same nature as the agreement on which it is founded. Whether a particular act is legal or illegal may itself be a subject of compromise and a decree passed on such a compromise would not be void even though the agreement may be illegal [see the observations of the Judicial Committee in *Great North-West Central Railway v. Charlebois* (13). See also section 331, Black on Judgments, Volume I.] It is, however, unnecessary to pursue this matter further as in this case the judgment was rendered after trial. In this view it is unnecessary to discuss the question raised by the learned Vakil whether an alienation of a religious office is absolutely void and a custom of alienability should not be recognised by Courts, as such a custom is against public policy. The weight of authority, however, seems to be against the contention [see *Mahamaya Debi v. Haridas Haldar* (14)].

The only other question which remains to be decided is whether the plaintiff's title to the office is extinguished by the adverse

(13) (1899) A. C. 114 at p. 124; 68 L. J. P. C. 25; 79 L. T. 35.

(14) 27 Ind. Cas. 400; 20 C. L. J. 183; 19 C. W. N. 208; 42 C. 455.

possession of the 7th defendant. Although the present suit is one for the recovery of immoveable property, still if the plaintiff had no subsisting title to the office, he could not recover the properties which are the emoluments of the office. If the 7th defendant was in adverse possession of the office for over 12 years prior to the suit, plaintiff's title would have been barred notwithstanding the fact that the widow of Rajah Bhattar was alive till 1910 [*Pydigantam Jagannadhu Row v. Rama Doss Patnaik* (5), *Lilabati Misra v. Bishun Chobey* (6)]. The 7th defendant who claims to have acquired a title by adverse possession has to prove that he took possession of the office adversely to the plaintiff. There is some evidence that he along with the other co-sharers was in enjoyment of the properties attached to the office, but that is not enough. He has to prove that he was performing the duties of the office [see *Kamalathammal v. Krishna Pillai* (11), *Bhatiji Thakur v. Jharula Das* (12)]. There is no evidence that he ever performed the duties of the office. He contends that the 6th defendant, his elder brother, did the duties of the office for himself and his brother, the 7th defendant. The 6th defendant himself who is called as a witness does not say so, nor does the 7th defendant. The only basis for this contention is a statement made by the 6th defendant that in the division of the lands belonging to Chandrasekara Bhattar a fourth share was allotted jointly to him and his brother (Exhibit II). From this Mr. Krishnaswami Aiyar wants us to infer that the duties of the office were performed by the 6th defendant not only for himself but for the 7th defendant as the joint owner of a fourth share of the office of Chandrasekara Bhattar. I am wholly unable to draw any such inference. It is further doubtful whether the possession of the 6th defendant was adverse to the plaintiff (see Exhibits R and S). I, therefore, hold that the plaintiff's claim is not barred by limitation.

I agree that the appeal must be dismissed with costs. I also agree to the order on the memorandum of objections.

Appeal dismissed.

MOTISING v. SOBHOMAL.

SIND JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 13 of 1913.

March 25, 1915.

Present:—Mr. Pratt, J. C., and

Mr. Fawcett, A. J. C.

MOTISING AND ANOTHER—PLAINTIFFS—
APPELLANTS

versus

SOBHOMAL AND OTHERS—DEFENDANTS—
RESPONDENTS.

Hindu Law—Alienation by widow—Reversioner, suit by, for declaration that alienation by widow is partially void—Form of decree—Hindu widow, power of, to alienate for future maintenance.

It is open to a Hindu reversioner to file a suit for a declaration that an alienation by a Hindu widow is partially valid and partially void as against his reversionary rights. [p. 968, col. 2; p. 970, col. 1.]

Garikipati Paparayudu v. Garikipati Rattamma, 17 Ind. Cas. 508; (1912) M. W. N. 1176; 24 M. L. J. 62; 13 M. L. T. 110; 37 M. 275 at p. 279 and *Bhagwat Dayal Singh v. Debi Dayal Sahu*, 35 C. 420 (P. C.); 12 C. W. N. 393; 10 Bom. L. R. 230; 7 C. L. J. 335; 5 A. L. J. 184; 18 M. L. J. 100; 3 M. L. T. 344; 14 Bur. L. R. 49; 35 I. A. 48, referred to.

The proper form of decree in such cases would be one declaring that the alienation should affect plaintiff's reversionary rights only to the extent to which legal necessity is proved and that it is otherwise invalid as against him. [p. 969, col. 1.]

Doorga Persad Singh v. Doorga Komvari, 4 C. 190 (P. C.); 3 C. L. R. 31; 5 I. A. 149; 3 Suth. P. C. J. 540; 3 Sar. P. C. J. 827; 2 Ind. Jur. 650; 2 Shome L. R. 21 and *Garikipati Paparayudu v. Garikipati Rattamma*, 17 Ind. Cas. 508; (1912) M. W. N. 1176; 24 M. L. J. 62; 13 M. L. T. 110; 37 M. 275 at p. 279, referred to.

Where the income derived by a Hindu widow is insufficient for her future maintenance, she has power to reasonably alienate property to provide for her maintenance. She is not bound to wait till she has incurred debts on her maintenance before being justified in making any alienation. A widow like the manager of a family must be allowed a reasonable latitude in the exercise of her powers provided she acts fairly to the expectant heirs. [p. 969, col. 2; p. 970, col. 2.]

Venkaji v. Vishnu, 18 B. 534 at p. 536; *Amarnath Shah v. Achan Kuar*, 14 A. 420; 19 I. A. 196; 6 Sar. P. C. J. 197, referred to.

Appeal against the decision of the Joint Judge, Sukkar-Larkana.

Mr. Mathradas Ramchand, for the Appellants.

Mr. Lalchand Hasomal, for the Respondents.

JUDGMENT.

FAWCETT, A. J. C.—Plaintiff sued as a reversionary heir for a declaration that the sale of a house by his deceased brother's widow was void beyond her life-time, or in the alternative that, on paying the amount of

any part of the consideration that may be held to have been for 'legal necessity,' he would be entitled to get back the possession of the house. He has been granted a declaration that after the widow's death he would be entitled to claim the house on paying Rs. 1,000 only to the alienee. The latter now appeals.

The first ground taken is that plaintiff is in any case not entitled to a declaration of the kind in question. This contention is based on the view taken by Sir Barnes Peacock in *Phool Chund Lal v. Rughooburns Suhaye* 1) which was followed by the Madras High Court in *Singam Setti Sanjivi Kondaya v. Draupadi Bayamma* (2). This latter decision has, however, been dissented from in *Garikipati Paparayudu v. Garikipati Rattamma* (3), where it is pointed out that the authority of Sir Barnes Peacock's decision is neutralised by the subsequent enactment in section 42 of the Specific Relief Act, and the Privy Council case of *Bhagwat Dayal Singh v. Debi Dayal Sahu* (4). I concur with the reasoning in the later Madras decision and think there is nothing contrary to law in such a suit as the present. In fact illustration (d) to section 42 of the Specific Relief Act plainly shows that such a suit is one authorized by that section. It also is desirable that such questions should be litigated during the widow's life-time rather than after her death, when less evidence as to the legal necessity, or otherwise, of the alienation will ordinarily be available. There is, however, one point which may be noticed. In *Garikipati Paparayudu v. Garikipati Rattamma* (3) it is said that the proper form of decree in a case of this kind would be to make merely a declaration that the alienee has a charge for a certain sum of money. There is no doubt an objection to declaring that the reversioner who sues will be entitled to possession on payment of a certain sum of money. It might, for instance, turn out that he was not really the nearest reversioner. And in this

(1) 9 W. R. 108.

(2) 31 M. 153; 18 M. L. J. 11; 3 M. L. T. 251.

(3) 17 Ind. Cas. 508; 37 M. 275 at p. 279; (1912) M. W. N. 1176; 24 M. L. J. 62; 13 M. L. T. 110.

(4) 35 C. 420 (P. C.); 12 C. W. N. 393; 10 Bom. L. R. 230; 7 C. L. J. 335; 5 A. L. J. 184; 18 M. L. J. 100; 3 M. L. T. 344; 14 Bur. L. R. 49; 35 I. A. 48.

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particular case plaintiff has two brothers (defendants Nos. 3 and 4), and though they did not appear in the suit, yet their reversionary rights, which are admitted by the plaintiff, should not be ignored by the Court, as has been done in the declaration given to plaintiff. A preferable form of decree would be one declaring that the alienation should affect plaintiff's reversionary rights only to the extent to which legal necessity is proved and that it is otherwise invalid as against him. This would have the effect of giving the alienee a charge on the property for the ascertained sum as against the reversionary heir [cf. *Doorga Persad Singh v. Doorga Konwari* (5)], and at the same time not prejudice the rights of any others who may have an interest in the reversion.

Coming to the merits, the main facts held proved by the lower Courts are that the house had been mortgaged by the widow's husband for Rs. 600, and to pay off this debt, another debt of Rs. 75 incurred for pilgrimage expenses and her husband's funeral expenses she mortgaged it to defendant No. 1 for Rs. 1,000. The house included a shop, which brought in Rs. 4-12 per month as rent, subsequently increased to Rs. 6. From this she used to defray the interest on the mortgage, viz., Rs. 3-6 per month. She then sold the house to defendant No. 1 for Rs. 4,500, alleging that she was full owner of it under a Will of her husband, which has, however, been held to be not proved. In her written statement she pleads that she sold the house in order to discharge the mortgage-debt and for her maintenance expenses, to meet which she had no other means. On the other hand, it has been held that her husband left her about Rs. 100 worth of debts and moveables, and about Rs. 100 worth of ornaments. The Sub-Judge holds that the widow was in need of raising Rs. 1,000 to pay off Motising, but holds that she was not justified in raising more for her maintenance, (1) because a widow is not entitled to anticipate her wants by raising money, but must wait till the necessity arises, and (2) because "Rs. 6 of the rent of the shop would be entirely at the disposal of the widow and would be

(5) 4 C. 190 P. C.; 3 C. L. R. 31; 5 I. A. 146; 3 Suth. P. C. J. 540; 3 Sar. P. C. J. 827; 2 Ind. Jur. 650; 2 Shome L. R. 21.

quite enough for her maintenance." The Joint Judge in appeal concurred in this view, saying that "legal necessity" excludes anticipation of wants by raising money to meet them and that such "legal necessity" accordingly did not cover more than Rs. 1,000 as held by the lower Court.

The first of the above reasons is based on the statement to that effect contained in Mayne's Hindu Law, 8th Edition, section 633, at page 882. But this statement itself follows one that a widow may, of course, mortgage or sell the property so as to procure maintenance for herself. It is quite clear that a stage may be reached when, in order to provide for her future maintenance, a widow may reasonably alienate property: and I do not think Mr. Mayne can be taken to have meant that a widow must necessarily wait till she has incurred debts on her maintenance before she is justified in making alienation for procuring maintenance for herself. No hard and fast rule of that kind can, in my opinion, be laid down; and as has been said in *Venkaji v. Vishnu* (6) "a widow, like a manager of the family, must be allowed a reasonable latitude in the exercise of her powers, provided.....she acts fairly to the expectant heirs." This passage, it may be noted, has been cited by Mr. Mayne himself in section 635 at page 884 of the 8th Edition of his work on Hindu Law. The cases contemplated in the other passage relied on by the lower Courts are clearly ones where the circumstances show no actual pressure on the widow of real necessity for raising money. Thus in *Mullakal v. Mada Chetty* (7), the only case cited in the footnote to the passage in question as authority for it, the widow had made the alienation in consideration of the alienee undertaking to celebrate her funeral ceremonies at his own expense, and it was held that there was no 'legal necessity', because the occasion for incurring the expense could not arise until the death of the vendor and it was in any case unnecessary for her to make provision for such an outlay.

In the present case the widow, after payment of interest, had only Rs. 2-10-0

(6) 18 B. 534 at p. 536.

(7) 6 Mad. Jur. 261.

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per month available for her own maintenance out of the rent of the shop, and the view of the Sub-Judge that after discharging defendant No. 1's mortgage-debt the entire rent would have been at her disposal is one that implies for its basis a finding that the house could have been sold without the shop. This is a point which does not seem to have been considered by the lower Courts. Again, it is sometimes impossible for a widow to arrange a sale of the portion of the property exactly sufficient to raise the amount required, and in such cases a sale of more would be justified, cf. Trevelyan's Hindu Law, page 468, and *Felaram Roy v. Bagalanand* (8).

The view of the law taken by the lower Courts has, in my opinion, been far too strict against the widow and the finding that the sale is valid only to the extent of Rs. 1,000 cannot, therefore, be accepted. That decision is based on an erroneous view of the law, and the evidence on the record is insufficient to enable this Court to determine properly the extent to which 'legal necessity' for the sale is shown. I would, therefore, direct the lower Appellate Court under Order XLI, rule 25, Civil Procedure Code, to take additional evidence relevant to the following issues and return such evidence, together with its findings thereon and reasons therefor, to this Court within three months, viz :—

(1) Was there 'legal necessity' for the widow (appellant No. 2) raising money for her own maintenance by sale of the premises in suit or any portion thereof?

(2) If there was no 'legal necessity' for raising as much as Rs. 4,500, for discharging debts incurred for her maintenance, was it possible for her to have sold only a portion of the house sufficient to raise the requisite amount and if so, to what extent is the alienation valid?

PRATT, J. C.—I concur that it is open to a reversioner to sue for a declaration that an alienation is partially void as against his reversionary rights and that the form of decree proposed by my learned colleague would be appropriate to such cases.

The lower Courts have refused to admit maintenance as a necessity justifying the alienation in the present case, on the ground that legal necessity "excludes anticipation of wants by raising money to meet them." This is too narrow a view of the widow's power of alienation. If the widow's income was insufficient for her maintenance, it would be absurd if the law required her to go through the circuitous and expensive process of first incurring debt and then alienating in order to pay off that debt. In such a case the insufficiency of the income would be a pressure justifying immediate alienation. The Privy Council take the same view as the Bombay High Court that a widow should be allowed a reasonable latitude in the exercise of her powers. This, I think, is apparent from the case of *Amarnath Shah v. Achan Kuar* (9). The widow there had succeeded to a family money business as well as to immoveable property. The money business was in difficulties and to support it the widow raised money by mortgaging immoveable property. The High Court held that the widow should have wound up the money business and not mortgaged the landed estate. The Privy Council refused to endorse this view, implying that the alienation may have been justified by the requirements of the business.

On the other hand, the alienation must not be in excess of the requirements of the case. And it is on this point that I agree that further evidence is necessary. In *Mullakkal v. Mada Chetty* (7), the Court considered that the widow could have provided for her maintenance by alienating her life-interest only. But it is not clear if this was feasible in the present case as the property was mortgaged. Nor is it clear that the sums so realizable would have sufficed. The Sub-Judge appears to have considered that the widow could have sold the residential part of the premises and lived on the rent of the shop. But the evidence does not disclose whether this was possible.

Suit remanded.

(9) 14 A. 420; 19 I. A. 196; 6 Sar. P. C. J. 197.

(8) 6 Ind. Cas. 207; 14 C. W. N. 895.

SUNDARAMMAL v. SUBRAMANIA CHETTIAR.

MADRAS HIGH COURT.

FIRST CIVIL APPEAL NO. 251 OF 1912.

December 15, 1914.

Present:—Sir John Wallis, Kt., Chief Justice,
and Mr. Justice Seshagiri Aiyar.SUNDARAMMAL *alias* SOWBHAGI-

AMMAL—DEFENDANT NO. 2—

APPELLANT

versus

V. SUBRAMANIA CHETTIAR AND OTHERS

—PLAINTIFFS—RESPONDENTS.

*Negotiable Instruments Act (XXVI of 1891), s. 118—
Promissory note—Presumption of consideration, when
rebutted—Burden of proof.*

Where in a suit, based upon three promissory notes executed by the 1st defendant, who died pending the suit, and before evidence was gone into, it appeared that the promissory notes followed each other in quick succession, that the 1st defendant, a young man of reckless habits, was just emerging from his minority when he began his borrowing, that he in his written statement admitted having received only a portion of the consideration and that the plaintiff's accounts did not show that he had enough money to make such advances:

Held, that the circumstances were such as to shift the burden of proof and to throw upon the plaintiff the obligation of satisfying the Court that he had paid the consideration in full; [p 972, col. 1; p. 974, col. 1.]

Appeal from the decree of the Court of the Subordinate Judge of North Arcot in Original Suit No. 65 of 1911 (Original Suit No. 4 of 1909 on the file of the District Court of Salem).

Messrs. K. Srinivasa Aiyangar and C. A. Seshagiri Sastri, for the Appellant.

Mr. L. A. Venkata Raghava Aiyar (with him Mr. L. A. Govinda Raghava Aiyar), for the Respondent.

JUDGMENT.

WALLIS, C. J.—This is an appeal from the decision of the Subordinate Judge of North Arcot giving judgment for the plaintiff in a suit on three promissory notes, which were executed by the 1st defendant who died before the trial. The Subordinate Judge has written a very careful judgment, and I do not find it necessary to dissent from any of the conclusions of fact at which he has arrived. He has decided the case on the ground that under the Negotiable Instruments Act, the burden is on the

representative of the 1st defendant to show failure of consideration in whole or in part and he has observed in the course of his judgment that but for the burden of proof being this way he would probably, on account of the suspicious circumstances of the various transactions to which he refers, have decided the suit against the plaintiff except to the extent of the consideration admitted by the 1st defendant in his written statement. Farran, C. J. in *Moti Gulabchand v. Mahomed Tharia Topan* (1), held that the fact that the defendant in that case was a young man of extravagant habits who was kept out of the enjoyment of his property which was in the hands of a Receiver was sufficient to throw the burden on to the plaintiff. It appears to me that the facts of the present case are very much stronger than the facts in *Moti Gulabchand v. Mahomed Mehdi Tharia Topan* (1), and that they have that effect. The 1st defendant was a young man of extravagant habits, who, though, as the Subordinate Judge finds, he was supplied by his family with abundant means for his maintenance, borrowed in a very extravagant manner both from the present plaintiff and from others after he came of age, so that his elder brother was obliged to sue for partition. All the transactions in this suit took place before the 1st defendant obtained his share of the property on partition. The transactions with the present plaintiff fall under three heads. In the year 1906, the 1st defendant borrowed over Rs. 1,600 from the plaintiff and afterwards denied receipt of consideration. This put a stop to the transactions between the parties for sometime. But in 1908 they were resumed, and between March 1908 and May 1908 the 1st defendant is said to have borrowed from the plaintiff a sum of over Rs. 6,000 on promissory notes which have been made the subject of separate suits. Lastly, we come to the plaintiff transactions, three promissory notes for Rs. 3,000, Rs. 3,400 and Rs. 3,000 which are said to have been borrowed in June, August and November 1908. So that between March and November 1908, the 1st defendant is said to have borrowed more than Rs. 15,000 from the plaintiff.

(1) 20 B. 367.

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The Subordinate Judge has enumerated the various suspicious circumstances which attended these transactions, and I think it only necessary to refer to one or two of them as sufficient to shift the burden. The Subordinate Judge finds that the plaintiff has not means to make the advances shown in his accounts to the 1st defendant and his other clients. According to the plaintiff's own evidence his transactions with other clients were on a very small scale. He says that their total indebtedness to him was Rs. 3,000, whereas he purports to have made advances of no less than Rs. 15,000 in the course of these few months to the 1st defendant. The Subordinate Judge finds, and I agree with him, that the plaintiff's accounts do not show that he had enough money to make such advances. It is, of course, possible that these accounts may not fully represent his transactions and may have been prepared for the purpose of deceiving the income-tax authorities. In the course of cross-examination the plaintiff set up various false cases as to how he got the money. One absurd story he told was that he had sold all his wife's jewels for the purpose of getting money to make these advances to the 1st defendant. I think that is quite incredible. I do not believe the allegation of the 1st defendant in his written statement as to what he received on these promissory notes. On the other hand, I am equally far from believing that the plaintiff really advanced the whole of these amounts as he says. It seems to me that where the relation is such as that which existed between the plaintiff and the 1st defendant very little is needed to shift the burden.

The other evidence is fully dealt with by my learned brother in his written judgment, and it is sufficient for me to say the effect of that evidence is to shift the burden which was on the defendant to show that the full consideration of the promissory notes has not been paid, and that being so, judgment can only be given for the amounts which are admitted to have been received by the 1st defendant. The appeal must, therefore, be allowed and the decree will be modified accordingly with costs throughout.

SESHAGIRI Aiyar, J.—I have come to the same conclusion. The plaintiff sues on three promissory notes, Exhibits A, A1, and A2

executed by the 1st defendant on the 4th June 1908, 20th August 1908 and 11th November 1908 respectively. The 1st defendant pleaded that excepting small sums of money paid on the occasion of the registration of each of the three promissory notes, there was no consideration for them. He died pending the suit and before evidence was gone into. His widow has been brought on the record as his legal representative. The Subordinate Judge in a very careful judgment, in which he draws attention to all the salient features of the case, came to the conclusion that the burden of proof was upon the defendants and that it was never shifted on to the plaintiff, and upon that ground alone, although he was of opinion that there were many suspicious circumstances connected with the execution of the promissory notes, he gave a decree for the plaintiff as prayed for. The widow of the 1st defendant has appealed. I am unable to agree with the Subordinate Judge that in the circumstances of the case to which I shall presently refer the burden of proof was not shifted to the plaintiff.

The father of the 1st defendant died in 1900 leaving behind him the 1st defendant who was then a minor and another son, the step-brother of the 1st defendant. He died possessed of considerable property and on his death, their management passed into the hands of the 1st defendant's step-brother who was older in years. While the step-brother was managing the 1st defendant Appava Chetty began to contract debts. The first transaction was about September 1906 when a promissory note was executed by Appavu for Rs. 2,000 in favour of the plaintiff in consideration of the latter transferring a deed of mortgage executed to him by a third party. No explanation has been given as to why Appavu was saddled with the collection of a mortgage-debt and why he gave a promissory note in exchange. The mortgage which was transferred was for Rs. 1,200, and it was suggested that at the time of the promissory note, probably the amount of the principal and interest due on the mortgage amounted to Rs. 2,000. The deed itself has not been put in evidence. This is a very suspicious circumstance. The next promissory note was executed by Appavu to plaintiff on the 28th October 1906 for Rs. 176 carrying interest at 18 per cent.

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per annum. Three days later, on the 1st November 1906, a third promissory note for Rs. 200 was given. Eight days after, a fourth for Rs. 450, and after three weeks on the 2nd December 1906 a fifth promissory note for Rs. 500 was executed, all bearing interest at 18 per cent. per annum. On the 4th January 1907 Appavu sent a registered notice, Exhibit R, through his Vakil to the effect that full consideration was not paid in respect of the fourth and fifth promissory notes and that he would not be liable for their payment. To this, a reply, Exhibit R1, was given on the very next day, saying that the contents of the notice were "highly surprising, fraudulent and shocking." The notice went on to say: "Further, you should pay me within 31st January 1907, the amount of the principal and interest due on the abovesaid (5) five promissory notes which you have executed in my favour, endorse payments on the respective bonds and obtain return of those. If you do not do so, suit will be filed at once in Civil Court and the amounts recovered with costs." In or about September 1907, the elder brother of Appavu filed a suit against the plaintiff for partition of the family properties, the apparent object being to relieve himself from liability for the debts which Appavu was recklessly contracting at this time. The suit itself terminated in a compromise, Exhibit IX, on the 15th October 1909. During the pendency of this suit, 1st defendant began to borrow further sums of money from the plaintiff. The borrowings are preceded by an abject apology, Exhibit S dated the 14th March 1909, for having given the notice, Exhibit R. Then on that very day, a promissory note for Rs. 675 was executed by the 1st defendant to the plaintiff. Four days after, on the 18th March, a promissory note for Rs. 2,175 was executed. Twenty days after on the 10th April 1908, another for Rs. 2,000 was executed. Then we come to the suit promissory notes. The first of them was on the 4th June 1908 for Rs. 3,000, the second was on the 20th August 1908 for Rs. 3,400 and the third was on the 11th November 1908 for Rs. 3,000. These promissory notes following in quick succession naturally create a great deal of suspicion. It has to be remembered that, even according to the evidence of the plaintiff, 1st defendant Appavu was 21 years of age

in 1908. When he began his borrowings in 1906 he had just emerged from his minority. He was a man of large expectations and was out of possession, because the management of the properties was in the hands of his brother. Those circumstances, in my opinion, shift the burden of proof on to the plaintiff and the facts that the executant is dead and that the plaintiff now seeks to recover the amount from a young woman, who admittedly has no knowledge of the circumstances under which the promissory notes were executed, make it more incumbent upon the plaintiff to prove that there was consideration for the promissory notes sued on. In *Moti Gulabchand v. Mahomed Mehdi Tharia Topan* (1), Sir Charles Farran, Chief Justice, says:—"The defendant, when he executed the notes sued upon, was a young man who had only attained his majority nine months previously. He appears to have been of an extravagant and reckless character. He was entitled to a large amount of property under the Will of his father, the late Sir Tharia Topan of Zanzibar, but had not come into possession of it, as on account of family disputes it was, in common with the rest of the family estate, in the hands of a Receiver appointed by this Court. The plaintiffs are a Marwadi firm who are by profession money-lenders. These facts being admitted (apart from the technical rule laid down in section 118 of the Negotiable Instruments Act), the ordinary presumption that a negotiable instrument has been executed for value is so much weakened that the allegation of the young man that he has not received full consideration is sufficient to shift the burden of proof and to throw upon the money-lender the obligation of satisfying the Court that he has paid the consideration in full. This, we think, the practical effect of illustration (c) to section 114 of the Evidence Act, and its Explanation." In the present case also the plaintiff is a money-lender. It is also in evidence that Appavu was a man of reckless character and was leading a wasteful life. He denied consideration except to a small extent. Therefore the observations of the learned Chief Justice apply to the present case to their full extent. I think that the present case is even stronger than the case before the Bombay High Court. As I pointed out, the transactions began with a suspicious transfer of a

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mortgage document. Appavu was involved on litigation with his brother. On these additional reasons and having regard to the principles laid down by the learned Chief Justice, I have no hesitation in holding that the burden of proof is heavily on the plaintiff in this case to show that consideration passed for the plaint notes.

[NOTE.—The rest of the judgment is not material for the purposes of this report.—*Ed.*]

Appeal allowed; Decree modified.

LOWER BURMA CHIEF COURT.

CIVIL RULE No. 58 OF 1914.

November 23, 1914.

Present:—Mr. Justice Robinson.

YANG TSZE INSURANCE ASSOCIATION, LTD.—PLAINTIFF

versus

THE BRITISH INDIAN STEAM NAVIGATION Co., LTD.—DEFENDANT.

Company—Documents, inspection of—Report of Company's agent for the express purpose of laying it before Company's Solicitor, whether privileged.

A letter written by an agent of a Company giving details of a claim, in pursuance of an order of the Company to submit reports in all cases of claim of a serious nature not merely as an ordinary duty but expressly to be laid before the Company's Solicitor, is privileged and its inspection cannot be granted in a suit for that claim if there is nothing to show that the letter was sent for any other purpose. [p. 977, col. 1.]

Anderson v. Bank of British Columbia, 2 Ch. D. 644; 45 L. J. Ch. 449; 35 L. T. 76; 24 W. R. 624; *Southwark & Vauxhall Water Co. v. Quick*, 3 Q. B. D. 315; 47 L. J. Q. B. 258; 26 W. R. 341; *Woolley v. North London Railway Co.*, 4 C. P. 602; 38 L. J. C. P. 317; 20 L. T. 813; 17 W. R. 650 and *Cook v. North Metropolitan Tramway Co.*, (1889) 6 T. L. R. 22, referred to.

Messrs. *Giles and Coltman*, for the Plaintiff.
Messrs. *Lentaigne, McDonell and Clifton*, for the Defendant.

ORDER.—A collision occurred in the Rangoon river between the S. S. "Glenogle" and a cargo-boat, which was being towed by the defendant Company's steam launch "Ailsa" on February 12th, 1913. The next day the owner of the cargo-boat made a claim to the local agents of the defendant Company for Rs. 4,000 compensation for the loss of his boat. Defendant Company's local agents repudiated liability *in toto* and on the following day wrote to the manag-

ing agents of the Company in Calcutta informing them of the claim. The owner of the cargo which was in the cargo boat has now brought a suit to recover damages for the loss of the cargo, and the point I have to decide is as to whether he is entitled to inspection of that letter. Mr. P. H. Browne has filed an affidavit setting out the facts recited above and stating that this letter was sent setting out a short account of the collision for the information of the defendant Company's Solicitors. I have seen that letter. He further states that the local agents have standing orders to send "reports of claims of a serious nature made against the defendant Company to the managing agents of the said Company in India, in order that the circumstances under which the said claims are made may be laid before the defendant Company's Solicitors in Calcutta as to what action should be taken in such cases." On the one hand, it is urged that this letter is privileged on the ground that it is information collected by the local agents and reported to the managing agents for the use of their Solicitors in respect of a pending or anticipated litigation. The argument on the other side is that the letter was not so written; it was merely information from the local agents from which the managing agents might prepare a report which they would submit to the Solicitors, that it was not written merely for this object, and further that it was written in the course of their ordinary duty to report a collision. I have been referred to a certain number of authorities and as there are very few cases in India I will deal with these. In *Anderson v. Bank of British Columbia* (1), a case decided in 1876, the point is fully dealt with. That was a case in which a claim was made on the Bank for a certain sum of money which, it was said, had been transferred from an account in which the plaintiff and others were interested to the private account of one of those others, and that this transfer was fraudulent and void. The manager of the Bank stated that on receiving the claim and on considering what had passed between him and the plaintiff in an interview he considered that litigation was imminent and

(1) 2 Ch. D. 644 45 L. J. Ch. 449; 35 L. T. 76; 24 W. R. 624.

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thought it right that the Bank should have legal advice and that for that purpose he should obtain from the branch manager the full particulars of all the facts and circumstances of the case likely to be required by the Solicitor of the Bank. He telegraphed for full particulars, and in reply received a letter, inspection of which was claimed. Jessel, M. R., decided that that letter was not privileged. He points out that in the telegram "there is not a syllable there which shows that any communication, direct or indirect, expressed or implied, was made to the agent to the effect that his communication was to be a confidential one for the purpose of being submitted to the professional man, that is, the Solicitor—for advice. If it had been so, I apprehend that it would have been protected upon principles well understood. If you ask your agent to draw out a case for the opinion of your Solicitor, or for the opinion of your Counsel, that is a confidential communication made for that purpose. Here there is nothing of the sort. Nor is it suggested or alleged that, without being requested, the agent did make the communication with the object of its being laid before the Solicitor for advice. He, therefore, did not make it as a confidential communication in any other sense than that in which every communication from an agent to his principal, or from a sub-agent to the chief agent of the principal, is confidential. . . . This communication, then, as regards the sender, was not made or sent for the purpose of being laid before a professional adviser, nor was there any intimation of such purpose sent by the person who required the communication. All that you have got is a statement of the person who sent the telegram as to the state of his feelings at a particular time, which is not sufficient for the purpose of the point I have to determine." He then proceeds to deal with what is the rule and what is the meaning of the rule, referring to the previous authorities, then what is the extent of the rule, pointing out that it refers to a communication other than those made by the client to the professional man himself. He points out further that neither the Solicitor nor the client is bound to collect information or testimony himself. This is more so in a case where the information or testimony has to be obtained from a distance.

This decision went up on appeal, and James, L. J., remarks: "Looking at the *dicta* and the judgments cited, they might require to be fully considered, but I think they may possibly all be based upon this, which is an intelligible principle, that as you have no right to see your adversary's brief, you have no right to see that which comes into existence merely as the materials for the brief." He points out that the manager merely called for full information and that that was his ordinary duty. "It is the duty of a man, in the ordinary course of business, to do it, and it is not necessarily connected with the litigation either actually commenced or expected. It is the information of the agent, and the principal ought to know what the agent knows. The knowledge of the agent in the matter of the agency is, or ought to be, the knowledge of the principal." Mellish, L. J., deals with a supposititious case at sea and states that before determining whether he will bring or defend an action a man writes to say: "Get me an account from all the passengers and crew what each man can say respecting this transaction, write it down as accurately as you can, and send it up to me." "It might be that that would be privileged just as much if he sent and asked for it before he determined whether he would bring an action or defend an action as it would be if it was sent after the action was commenced, and he wished to obtain information as to what evidence such persons would probably give." As to that he considers that "as a general rule, it may be he is not bound to give the discovery respecting that, but I cannot think that that ought to be held to apply to information which a principal asks his agent to give respecting the matters which the agent has done for and on account of the principal. That is information respecting matters which in point of law are the acts of the principal himself, and it is information respecting matters as to which the knowledge of the agent is the knowledge of the principal. In point of law, the principal is to be deemed to have known the facts before he has actually got personal information about them." Now in that case the particulars supplied were as to the acts and conduct of the agent. In the present case the local agents did not know anything of their personal knowledge. They were reporting what other persons, who would be

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in a position to give evidence if the case came before a Court, could and would say. In that case there was nothing either in the telegram or in the letter in reply suggesting that the information was asked for or supplied for the purpose of being laid before the Bank's professional adviser. In the present case Mr. Browne's affidavit shows that they acted not on a request made after the collision had occurred, but on standing orders to send a report in order that the circumstances under which the claims are made may be laid before the defendant Company's Solicitors for advice, and the affidavit also shows that this letter was sent as a confidential communication for the information of the defendant Company's Solicitors. This authority further shows, it appears to me, that in the opinion of the learned Judges of the first Court and the Appellate Court who heard that case, a document such as the one I have to consider would be privileged.

That the rule is not to be further extended is, I think, shown by the decision in the case of the *Southwark & Vauxhall Water Co. v. Quick* (2), where it is held that documents prepared in relation to an intended action, whether at the request of a Solicitor or not, and whether ultimately laid before the Solicitor or not, are privileged if prepared with a *bona fide* intention of being laid before him for the purpose of taking his advice. Cockburn, C. J., dealt with the documents, which were transcripts of a shorthand writer's notes of conversation with possible witnesses prepared to be furnished to the Company's Solicitor for advice, and the same of an interview between the Chairman of the Company and certain servants of the Company prepared for the same reason, and a statement of the facts drawn up by the Chairman to be submitted to the Company's Solicitor. He says, "It is clear that they were documents containing information which had been obtained by the plaintiffs with a view to consulting their professional adviser.....I can see no distinction between information obtained upon the suggestion of a Solicitor, with the view of its being submitted to him for the purpose of his advising upon it, and that procured spontaneously by the client for the same purpose. If the Court or the Judge at Chambers

is satisfied that it was *bona fide* procured for the purpose, it appears to me that it ought to be privileged." Then, referring to the decision which I have just been dealing with, he says: "I do not feel bound nor am I disposed to carry the doctrine of those decisions to the extent suggested on behalf of the defendant." On appeal the Lord Justice's judgment which I have already quoted was referred to with approval and the appeal was rejected.

The letter I have to deal with refers to what persons present could and did say with reference to the facts of the collision. But it is further urged that this letter was merely written in the ordinary course of duty, and I am referred to *Woolley v. North London Railway Co.* (3) and *Cook v. North Metropolitan Tramway Co.* (4). In the first of these cases reports of the defendant Company's inspectors, guards, locomotive superintendent and so on and those of the passengers and a report made by an officer of the Company in the course of his duty for the information of the Company, without reference to any litigation begun or anticipated, were held not privileged. Bovill, C. J., says: "I think, therefore, we may safely lay it down that, where information and opinions are obtained with a view to litigation, they are to be considered as privileged." In the other case, which was one relating to daily reports submitted by conductors and drivers, they were held not to be privileged because though it might have been contemplated in a general way that they should be used in litigation, if litigation should arise, such documents were not protected, they being merely reports made in the course of conductors' daily duties. Mr. Justice Manisty concurring observes that "in the case cited it appeared that an action was intended, and that the document had been obtained to be laid before the Solicitor for the purpose of having his advice with reference to such action. That case was very different from the present, in which a report was made daily, and as to every accident that occurred, without reference to any actions." The standing orders in the present case, it is proved, refer to all cases of a serious nature and the reports were called for by

(*) 4 C. P. 602; 38 L. J. C. P. 317; 20 L. T. 813; 17 W. R. 650.

(4) (1889) 6 T. L. R. 22.

(2) 3 Q. B. D. 315; 47 L. J. Q. B. 258; 26 W. R. 341.

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these orders, not merely as an ordinary duty but expressly to be laid before the Company's Solicitor; and in addition the letter, which I have seen, is sent for the express purpose of being laid before the Company's Solicitor. It has been urged that the authorities show that to be privileged it must be sent merely for that purpose. There is nothing before me to show that it was sent for any other purpose, and it being a report of what other persons saw and knew and would depose to and not being information in the knowledge of the local agents personally which can be presumed to be the knowledge of the principal, the letter is, in my opinion, privileged and inspection cannot be granted. Plaintiff must pay the costs of this hearing to defendants, Advocate's fees three gold mohurs.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL NO. 2604 OF 1913.

September 3, 1915.

Present:—Justice Sir William Ayling, Kt.,
and Mr. Justice Tyabji.

THAYOTH PUTHIA PURAYIL SEETHI
DEFENDANT NO. 3 APPELLANT

versus

MANGOTTIL RYRATH UMMAYYA AND

OTHERS—PLAINTIFFS—RESPONDENTS.

Murumakkattayam Law—Stridhanam gift made by mother to her daughter at time of marriage, nature of—Donees, rights of—Tarwad property, incidents of.

In the case of Moplahs governed by Marumakkattayam Law, in the absence of proof of any special custom or course of conduct to the contrary, a gift to daughters made by their mother, at the time of their marriage enures for the lives of the donees and their descendants how low soever and is not terminable on their death or divorce. Such a gift has all the incidents of *tarwad* property. [p. 980, col. 2.]

Packrichi v. Kunhacha, 13 Ind. Cas. 236; 36 M. 385; (1911) 2 M. W. N. 538; 22 M. L. J. 122, distinguished.

Nawab Umjad Ally Khan v. Musammatt Mohumdee Begum, 11 M. I. A. 517 at p. 548; 10 W. R. 25 (P. O.); 2 Sutr. P. C. J. 98; 2 Sar. P. C. J. 315; 20 E. R. 195; *Kunhambi v. Kalanathar*, 24 Ind. Cas. 528; 16 M. L. T. 17; 27 M. L. J. 156; *Kunhacha Umma v. Kutti Mammi Hajee*, 16 M. 201; 2 M. L. J. 224; *Mochikandi Parkum Maramittath Tharuvil Mootha Chattiham Veettil Chakkara Kannan v. Varayalankandi Kunhi Pokker*, 30 Ind. Cas. 755; 18 M. L. T. 255; 29 M. L. J. 481, referred to.

Second appeal against the decree of the Court of the Subordinate Judge of North Malabar in Appeal Suits Nos. 38 and 47 of 1912, preferred against the decrees of the Court of the District Munsif of Kuthuparamba, in Original Suit No. 623 of 1910.

Mr. K. Govinda Marar, for the Appellant.

Mr. K. Ramanatha Shenai, for the Respondents.

This second appeal coming on for hearing on the 18th November and the 3rd December 1914, the Court (Oldfield and Tyabji, JJ.) delivered the following

JUDGMENT.—The parties are Moplahs, and neither side put forward any special plea as to the applicability to the family they belong to of Marumakkattayam Law or any system other than the Muhammadan. The construction of the *stridhanam* deed, Exhibit A, will, however, unless it is governed by special custom, depend on which of these systems should be applied.

The District Munsif, without stating clearly whether he eventually proceeded on Muhammadan or Marumakkattayam Law or special custom, evidently considered that no ordinarily prevalent law would suffice for the decision of the case. For he referred to his ignorance of the incidents of such a transaction, the absence of authority and the evidence as to those incidents. The lower Appellate Court appears to have held that that evidence, so far as it was in the defendants' favour, was counterbalanced by the effect of the decision in *Packrichi v. Kunhacha* (1). In doing so it assumed what is not clear, that the document then under consideration was similar in terms to Exhibit A and was executed in similar circumstances. It also assumed that this authority was applicable to transactions between members of the plaintiffs' family and represented a custom binding on all the community, to which they belong, of which the Court could take judicial notice. As observed in *Kunhambi v. Kalanathar* (2), the Courts

(1) 13 Ind. Cas. 236; 36 M. 385; (1911) 2 M. W. N. 538; 22 M. L. J. 122.

(2) 24 Ind. Cas. 523; 16 M. L. T. 17; 27 M. L. J. 156.

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have power to take judicial notice of a custom, only when its existence among the class affected by it has been proved repeatedly before them. In the present case the lower Appellate Court had before it only one instance of such proof and no clear evidence as to the class then in question or its identity with that of the present parties.

In these circumstances, we cannot accept the lower Appellate Court's decision and must call for a finding on the issues:—

- "1. Whether the parties are governed by Marumakkattayam or Muhammadan Law?
- "2. What are the legal incidents attached to Exhibit A as between the parties with reference to special custom, or if special custom is not established, the ordinary law to which they are subject?"

Fresh evidence should be taken. Findings will be submitted in two months; and seven days will be allowed for filing objections.

In compliance with the above the District Judge of North Malabar submitted the following

FINDINGS.—I am required by the terms of this reference to decide—

- (1) Whether the parties are governed by Marumakkattayam or by Muhammadan Law?
- (2) What are the legal incidents attached to Exhibit A as between the parties with reference to special custom or if special custom is not established, the ordinary law to which they are subject?

2. As regards the 1st issue both sides are agreed that they are governed by Marumakkattayam Law. I find accordingly.

3. As regards the second issue having regard to the 8th paragraph of 3rd defendant's written statement and to the evidence of the trustworthy witnesses examined before me, I find that the parties are governed as regards the legal incidents of Exhibit A not by special custom, which is not now pleaded on either side, but by the ordinary Marumakkattayam Law. It is proved before me that direct *Stridhanam*

donees cannot mortgage nor alienate their property. In the two *panayams* that preceded the *kanom* that forms the subject of the suit the donor joined; so if the *kanom* was proper so far as the *stridhanam* right is concerned, she would have been made to join in it. But this was not done.

4. There are two ways of regarding Exhibit A. I am asked by defendants' Pleader to regard it as merging all previous rights under the *stridhanam* grants. If this be so, the legal incidents of Exhibit A are that two of the three donees cannot encumber nor part with the property. So the *kanom* is totally invalid.

5. If, as I hold, Exhibit A conveys the reversion of the rights of the donor to the donees in the *stridhanam* property already granted and also a new gift of the house on item No. 2, but without disturbing the *stridhanam* rights, and arrangements already existing, the preservation of which rights and arrangements is the explanation for the clause forbidding the donees "creating any debts thereon by yourselves" then again the incidents attaching to Exhibit A are such as to make any *kanom* on *stridhanam* property invalid. It does not seem to me that Exhibit A is a simple deed of gift but that, as their Lordships have said, it is a *stridhanam* gift and, therefore, the ordinary incidents of such a gift attached to it, which is also borne out by the action of the executants of the *kanom*-deed who made their respective husbands attesting witnesses to it, which corresponds to what is said before me in evidence to-day, *viz.*, that whatever may have been the custom long ago, *stridhanam* gifts are now-a-days invariably made in the names of wives who hand the property over to their husbands for management.

This second appeal coming on for final hearing on the 12th of August 1915, after the return of the findings of the District Court upon the issues referred by this Court for trial, and having stood over for consideration till this day, the Court delivered the following

JUDGMENT.—The questions that have to be determined in this appeal have reference to the rights of three sisters, the 1st plaintiff and the 1st and 2nd defendants, and of the 3rd

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defendant who claims under the 1st and 2nd defendants in regard to two *parambaks* or plots of land.

It is admitted that these two plots of land together with a third to which these proceedings do not relate, originally belonged to the mother of the three sisters. The mother purported to grant, on two occasions, certain rights over the two plots of land, and over a house built on the first of the two plots.

On the first of these occasions the grants were oral. They have been conveniently, though not very accurately, referred to as *stridhanam* gifts. They consisted of three separate gifts of the three plots of land respectively made to the sisters at the time when they were married—about 20 years prior to the suit.

On the second occasion there was one grant by Exhibit A executed on the 13th August 1902.

In 1901, *i. e.*, after the first and before the second of these occasions, the said house had been built by the mother on the first of the plots of ground (which had been granted as *stridhanam* to the 1st defendant) and that house and the moveables in it are also included in the grant under Exhibit A.

As the 3rd defendant derives his title from two of the three sisters (the 1st and 2nd defendants and not from the 1st plaintiff), it is necessary to consider (1) what interest the 1st and 2nd defendants acquired in the first and second items of property under the *stridhanam* gifts, in order to determine what they were competent to transfer to the 3rd defendant; (2) whether the 1st and 2nd defendants acquired any further interest in the said properties under Exhibit A and if so, (3) whether the interest was transferable and (4) whether it has been validly transferred to the 3rd defendant.

The so-called *stridhanam* gifts were ostensibly made to the husbands of the three sisters. But it has been admitted before us that the real beneficiaries are the sisters themselves, and that the gifts must be construed as though they were to the sisters.

There was some dispute before us as to the law by which the various transactions must be governed.

In order that we may determine the effect of the *stridhanam* gifts, *Packrichi v. Kunhacha* (1) was cited to us, in which it is stated that under Muhammadan Law a girl when married passes over to her husband's family, and that there is no obligation on the members of her natural family to maintain her after her marriage, even if she is divorced. But under Muhammadan Law though after marriage the wife goes to live in the house of her husband, there is no severance of the family ties. Her right to maintenance from her blood relations is no doubt suspended so long as she can claim maintenance from her husband. The claim against her husband, however, is lost on divorce, and then her right against her relations by blood may revive, though she might then be under some other personal disability (such as possession of property) preventing her from claiming any maintenance from her blood relations. But the law of maintenance under Muhammadan Law is somewhat elaborate, and need not be referred to for the present case.

In *Packrichi v. Kunhacha* (1) it is, however, merely decided that for the reasons stated, the gift which had to be considered in that case did not become void on the wife being divorced. The gift then under consideration was, it seems, similar in the following respects to the gift in the present case, *viz.*, (1) it was also referred to as *stridhanam* gift (2), it was made at the time of marriage and (3) for the maintenance of the wife, (4) but ostensibly to the husband. We see no reason to doubt the correctness of the result arrived at in *Packrichi v. Kunhacha* (1), even though the reference to the Muhammadan Law of maintenance was not quite accurate; but it would not affect the present case in which there is no dissolution of the marriage by divorce or death, and no allegation that the *stridhanam* gifts had become void. But there are other difficulties to which we shall allude below in the way of our importing the terms of the gift that was under consideration in *Packrichi v. Kunhacha* (1) into the gift we have to consider.

Similar remarks apply to the unreported case mentioned in *Packrichi v. Kunhacha* (1). We have, however, looked into the records of Second Appeal No. 1746 of 1895 and we find that the decision was arrived at after evi-

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dence had been taken as to custom. That evidence cannot affect the present case.

In the present case we have a finding by consent that the parties govern themselves by the Marumakkattayam Law. In determining the appropriate system of law that has to be selected by the Court for deciding any question before it, the fact that the parties have been governing themselves in regard to similar transactions by a particular system of law or by some special custom may be of great assistance; and the choice of the law is in some matters made by the Legislature to depend entirely upon this circumstance. But in the present case we find that there is no evidence that the parties considered themselves to be bound, in regard to such transactions as those with which we have to deal, by any specific rule either of a recognised system of law or of custom proved in the present case.

Hence in accordance with justice, equity and good conscience the proper course would be to give effect as far as possible to the intention of the parties, unless there is something repugnant to any legislative enactment or to public policy. *Nawab Umjad Ally Khan v. Musammatt Mohumdee Begum* (3)

The District Munsif was, therefore, right in turning to the evidence in this case for determining what the intention of the parties was when the oral *stridhanam* gifts were made; and the Subordinate Judge erred in considering that the incidence of the gift referred to in *Packrichi v. Kunhacha* (1) (the terms of which were contained in a document) had necessarily to be imported into the gifts in the present case. It is true that if it is known that on certain occasions (*e. g.*, on marriage) gifts are customarily made amongst members of a certain community or other class of persons with specific incidents, and the Court has to determine the incident of a gift made on a similar occasion by a member of the said community, it is legitimate to infer in the absence of something to the contrary that the gift in question must have been with the incidents known to be usual or customary: Indian Evidence Act, section 114. But this presupposes the existence of some usual or common course of conduct brought within the

cognisance of the Judge either by his taking judicial notice of the fact or through evidence adduced before him. *Kunhambi v. Kalanathar* (2). In the present case the District Munsif expressly disclaims any experience as to similar gifts, which he says have seldom come before him for decision. Nor does the Subordinate Judge rely on any such experience, but after referring to the evidence, consisting of the 1st plaintiff's admissions which as he says "would tend to give some support to the 3rd defendant's contention," adds "but there is distinct authority for holding that it is not legal and sound" and cites *Packrichi v. Kunhacha* (1). That decision as already pointed out turns upon the construction of a particular document of gift. The construction of that gift cannot merely owing to its having some common features affect the decision in the present case, unless in some such way as we have mentioned, *e. g.*, if a common form so to say of such gifts had been within the cognisance of the Court.

The Subordinate Judge has already dealt with the evidence and it is clear that he would have arrived at the same conclusion as the District Munsif, if he had not thought that he was bound by authority to come to a different conclusion.

The result is that the so called *stridhanam* gifts must, in the present case, be taken to have been intended to enure for the lives of the donees and their descendants, how low soever, and not terminable on the death or divorce of the donee. With reference to the interests taken by the three donees under Exhibit A, we are of opinion that the principle of *Kunhacha Umma v. Kutti Mammi Hajee* (4), re-affirmed in the recent Full Bench case *Machikandi Parkum Maramittath Tharuvil Mootha Chettiam Veetil Chakkara Kannan v. Varayalankandi Kunhi Pokker* (5) supports the conclusion at which both Courts have arrived, that that interest must have the incidents of *tarwad* property.

The appeal will, therefore, be allowed and the District Munsif's decree restored with costs here and in the lower Appellate Court.

Appeal allowed.

(4) 16 M. 201; 2 M. L. J. 226.

(5) 30 Ind. Cas. 755; 18 M. L. T. 255; 23 M. L. J. 481.

(3) 11 M. I. A. 517 at p. 546; 10 W. R. 25 (P. C.); 2 Suth. P. C. J. 98; 2 Sar. P. C. J. 316; 20 E. R. 195.

KARNIDAN v. MEGHRAJ.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 744 OF 1913.

June 16, 1915.

Present:—Mr. Batten, A. J. C.

KARNIDAN AND ANOTHER—PLAINTIFFS—
APPELLANTS

versus

MEGHRAJ—DEFENDANT—RESPONDENT.

Mortgage—Conditional sale—Payment by instalments—Mortgagee, whether can enforce security before expiry of term—Intention of parties Foreclosure.

A suit for foreclosure can be brought for interest of an instalment of money secured by a mortgage by conditional sale. [p. 982, col. 2.]

The right of a mortgagee to enforce his security before the expiry of the term fixed for repayment of the whole of the principal, depends upon the intention of the parties as evidenced by the terms of the bond. [p. 982, col. 2.]

Where, therefore, a mortgage deed provided for payment by instalments in the interests of the debtor, and provided against failure to pay by a condition for compound interest adding that if the amount be not paid as stipulated, the mortgaged property will stand foreclosed:

Held (1) that the parties intended that there should be foreclosure only after failure to pay the whole amount in the manner stipulated, [p. 982, col. 2.]

(2) that a separate suit for the first instalment with interest did not lie. [p. 982, col. 2.]

Appeal against the decree of the District Judge, Nagpur, dated the 19th August 1913, modifying that of the Senior Munsif, Katol, dated the 14th April 1913.

Messrs. J. Mittra, N. B. Kinkhede and W. R. Puranik, for the Appellants.

The Hon'ble Sir Bipin Krishna Bose and Mr. V. Bose, for the Respondent.

JUDGMENT.—The facts of the case are simple. The suit is brought on a mortgage by conditional sale, dated the 13th May 1899, with a consideration of Rs. 200. The passage in the deed with which we are concerned may be translated as follows:—

"I have borrowed.....total Rs. 200. I will pay interest at Re. 1 per cent. per mensem till the satisfaction of the amount. I will pay Rs. 00 on account of principal together with interest on the whole amount in the month of Poush 1309, and will further pay Rs. 100 in the month of Poush 1310, together with interest.....If I fail to pay at the stipulated time, I will pay interest at compound rate.....If the amount be not paid as stipulated" (or, "in accordance with the agreement"), "the mortgaged property will stand foreclosed."

Poush 1309 ended on the 30th January 1900, and Poush 1310 on the 20th January 1901. The suit for foreclosure was instituted on the 12th December 1912, more than 12 years after the 30th January 1900, but less than 12 years after the 20th January 1901. The defendant-respondent did not contest the suit as regards the instalment of Rs. 100 payable in January 1901 with interest thereon, but pleaded that the suit, as regards the instalment of Rs. 100 payable in January 1900 and interest thereon, is time-barred. The solution of the question whether the suit is time-barred as regards the first instalment, depends on the question whether the plaintiff would have brought a suit for foreclosure on the first instalment before the second instalment fell due. The learned Counsel for the appellants concedes that if he could have sued before the 20th January 1901 the suit for the first instalment is time-barred.

The learned Munsif held that a suit brought before the second instalment fell due would have been premature, since on the terms of the document he considered that the real intention of the parties was that the mortgage should not be enforced unless the whole debt had become payable, and decreed the claim in full. On appeal the learned District Judge took a different view, and dismissed the claim in respect of the first instalment.

The sole question is whether a suit lay on default of payment of the first instalment with interest, before the second instalment with interest fell due.

The question falls under two heads, namely, whether in India, as in England, there can be foreclosure for part of the money secured by a mortgage by conditional sale, and whether on a proper construction of the document there could have been such a foreclosure in this case. In England the law is clear. There may be a covenant not to call in the money during a certain period, and if there is such a covenant no default in payment of interest will enable the mortgagee to sue; but if there is no such covenant the mortgagee can sue at any time after default of the payment of interest however distant the day at which the payment of the principal

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money is reserved. That this is the English Law is evident from *Burrowes v. Molloy* (1) and *Edwards v. Martin* (2) [referred to in *Kamod' Singh v. Raja Raghoji Rao* (3)]. Both these cases are referred to with approval in *Williams v. Morgan* (4). If a suit lay for interest, *a fortiori* it would lie for an instalment of principal together with interest. In India, there are no reported cases of suits for foreclosure for interest only or for part of the mortgage-money. The case of *Mahadeo v. Bukhtawar Mall* (5) is on a different point. But there are cases in which it has been held that a suit for sale on a simple mortgage lay for interest only. *Kashi Pershad Singh v. Jamuna Pershad Singh* (6) is a case in point. It is argued for the appellants that section 67 of the Transfer of Property Act contemplates foreclosure only when the whole mortgage money is due, and that the form of the decree under Order XXXIV, rule 2, and sub-rule (3) of Order XXXIV, rule 3, contemplate a suit for the whole of the mortgage-money. For the respondent it is urged that the provisions of the Civil Procedure Code apply irrespective of the amount of the mortgage debt sued for. I am bound to say I can find no reason for distinguishing between suits for sale and suits for foreclosure, as regards the question whether a suit can be brought for interest for an instalment.

The true rule appears to be that contained in the English rulings and expounded by Ismay, J. C., in *Kamod Singh v. Raja Raghoji Rao* (3), that the right of a mortgagee to enforce his security before the expiry of the term fixed for re-payment of the whole of the principal depends upon the intention of the parties as evidenced by the terms of the bond. In *Kannu v. Natesa* (7) the mortgage-bond provided that in default of the payment of the interest at 8 per cent. on the due dates, interest at 9 per cent. should be

(1) (1845) 69 R. R. 358; 8 Ir. Eq. R. 462; 2 Jo. & Lat. 521.

(2) (1856) 25 L. J. Ch. 284; 4 W. R. 219; 105 R. R. 279.

(3) 15 C. P. L. R. 78.

(4) (1906) 75 L. J. Ch. 480; 1 Ch. 804; 94 L. T. 473.

(5) 2 C. P. L. R. 229.

(6) 31 C. 922.

(7) 14 M. 477.

charged on the interest in arrears, and the interest on the principal should be raised to 9 per cent. It was held that the true intention of the parties was to postpone the sale of the mortgaged property until the principal became due, and to give the mortgagee, on default of payment of interest, only a right to the enhanced rate of interest on principal and on arrears of interest, and that the mortgaged property could not be brought to sale for arrears of interest before the principal was due. The terms of the bond in the present case are not the same. But it is argued for the appellants that the parties provided a particular remedy for failure to pay the first instalment, namely, compound interest, and did not contemplate foreclosure on each default. It is argued ingeniously for the respondent that the debtor might have paid Rs. 100 principal but no interest, in which case the above arguments for the appellants would not apply. But it appears to me on a careful scrutiny of the terms of the bond that payment by instalments was provided for in the interests of the debtor, that failure to pay the first instalment was sufficiently provided for by the condition for compound interest, and that by the words, "if the amount be not paid as stipulated the mortgaged property will stand foreclosed", the parties intended that there should be foreclosure only after failure to pay the whole amount due in the manner stipulated. It must be presumed that the intention of the parties was that the money should be paid, and I do not believe that they contemplated the possibility of a series of foreclosure suits as a means of enforcing the payment. I am of opinion that a separate suit for the first instalment with interest did not lie, and it follows that the suit was in time in respect of the whole mortgage-money. I restore the decree of the first Court, with the modifications that the date for payment is altered from the 14th October 1913 to the 14th October 1915, and that the interest at 6 per cent. per annum will be added to the decretal amount, less costs. The respondent-defendant will pay his own and the plaintiffs' costs in all Courts.

Appeal accepted.

ATTAPERUMAL ODAYAN v. RAMASAMI CHETTIAR.

MADRAS HIGH COURT.

SECOND CIVIL APPEALS NOS. 1870 TO 1936
AND 2239 TO 2241 OF 1912.

March 30, 1915.

Present:—Mr. Justice Spencer and
Mr. Justice Coutts-Trotter.

ATTAPERUMALODAYAN AND
OTHERS—DEFENDANTS—APPELLANTS

versus

S. R. M. A. R. RAMASAMI CHETTIAR—

PLAINTIFF—RESPONDENT.

Madras Estates Land Act (I of 1908), ss. 26 (3), 27, 28—Presumption re condition of tenure, how rebutted—Amani system—Payment of rent in money—Temporary arrangement—Landlord's right to revert to original usage.

Section 27 of the Madras Estates Land Act raises a presumption that a *ryot* holds under the same conditions as in the previous revenue year: but that presumption can be rebutted by showing that these conditions were not in accordance with the agreement or usage prevailing between the parties. [p. 986, col. 1; p. 987, col. 1.]

Under section 26 (3) no *pattahs*, which have been granted by any landholder, at rates lower than the rates payable upon such lands or upon neighbouring land of similar quality and description, shall be binding upon his successor, unless *bona fide* granted for the purpose of making permanent improvements and unless the tenant shall have conformed to the condition upon which such lower rates were allowed. [p. 985 col. 2.]

The rule of law contained in sections 27 and 28 of the Act that the rent paid for the previous *Fasli* should be presumed to be fair, will not apply when it is fixed by an *ex parte* decision in which all the points upon which the parties were at variance were left open. [p. 986, col. 1.]

Where in a suit brought by a landlord to compel his *ryots* to accept *pattahs* on the *amani* system, the tenants contended that they were entitled to be assessed at a money rate of rent and denied the usage set up by the plaintiff to pay rents in kind and it was found that the arrangement to pay money rents was a purely temporary one liable to be given up at any time if the *zemindar* preferred to go to the trouble of collecting his *waram*:

Held, that whether the rates were high or low either party was at liberty to revert to their original contract or usage, shown to have been merely in abeyance during the years when the rents payable from year to year were uncertain and when temporary arrangements prevailed. [p. 986, col. 1.]

When no data are available to fix the *waram* rates, the proper procedure is to adopt the *pamaish* rate. [p. 985, col. 1.]

Second appeals respectively against the decrees of the District Court of Tanjore in Appeal Suits Nos. 177, 641 to 665, 667, 668, 670 to 674, 681 to 689, 691, 693 to 699, 701, 702, 703, 706, 708, 709, 711, 713, 717,

720, 723, 725, 726, 728, 729, 730, 731, 174, 385 and 455 of 1911 respectively, preferred against the decree of the Court of the Deputy Collector of Pattukottah Division in Summary Suits Nos. 700 to 734, 741 to 747, 750, 751, 753, 755 to 761, 763, 764, 767, 768, 770, 771, 773, 775, 779, 782, 785, 787, 788, 790, 791, 792, 793, 504, 419 and 497 of 1909.

Messrs. T. Rangachariar, K. V. L. Narasimham, and V. Narasimha Aiyangar, for the Appellant.

Messrs. P. R. Srinivasa Aiyangar, T. R. Ramachandra Aiyar and G. S. Ramachandra Aiyar, for the Respondent.

JUDGMENT.

SPENCER, J.—These and other connected suits were brought under the provisions of section 56 of the Madras Estates Land Act, 1908, by a landholder to compel his *ryots* to accept the *pattahs* tendered to them for *Fasli* 1318. In such suits it is the duty of the Revenue Court, under section 57 of the Act, to determine what is a proper *pattah*. The proprietor claimed that a usage existed in this village to collect rents according to the *amani* system; in other words, that the *ryots* should give rents in *waram* which implies a division of the crop between the landholder and the *ryot* (*vide* section 29 of the Madras Estates Land Act, 1908). To this the *ryots* rejoined that by a long standing custom they had been paying fixed money rents, and they denied the usage set up by the plaintiff to pay rents in kind. The question thus arose whether money rents or *waram* rents were the rents established by agreement or custom in this village.

The Deputy Collector who tried these suits found that the plaintiff had not proved that the rents contended for by him were the rents lawfully payable. He also found that the rents contended for by the defendants had not been proved to be the fixed money rents lawfully payable.

He then proceeded to discuss the plaintiff's contention that he had a right to revert to the *amani* system in the light of Act I. of 1908; which he considered to have altered the law as laid down in section 11 of the Madras Rent Recovery Act (VIII of 1865). This section provided that, if either

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party were dissatisfied with the rates determined by the Collector according to local usage or to rates paid for neighbouring lands, he might claim to have the rent discharged in kind according to the *waram*. There is no similar provision in the Madras Estates Land Act (I of 1908); but section 27 of that Act declares: "If a question arises as to the amount of rent payable by a *ryot*, or the conditions under which he holds in any revenue year, he shall be presumed, until the contrary is shown, to hold at the same rate, and under the same conditions, as in the last preceding revenue year;" and the next section creates a presumption that the rent payable for the time being is fair and equitable, until the contrary is proved. Finally, the Deputy Collector decided that the proper rents payable for *Fasli* 1318 should be those decreed in the plaintiff's suit to recover rent for *Fasli* 1317. The District Judge on appeal agreed with the Deputy Collector's findings of fact except as to the date up to which the *amani* system prevailed. In his opinion, there was evidence that it prevailed up to the year 1871, whereas the Deputy Collector found that it was not in force subsequent to 1868.

There are five periods of management to be considered in the history of this Sillathur *zemindari*. The first is the period between 1855 and 1867 when the estate was under the management of Rani Ammal; the second is the period between 1868 and 1870 when the Court of Wards were in charge; and the third is the period between 1871 and 1900 when Rangasami Pannikondar was the *zemindar*. During the fourth period of 1900-1905, the ownership of the estate was in litigation and a Receiver appointed by the Sub-Court was managing it. The fifth and the last period dates from 1905 when the present plaintiff came into possession by purchase. Whether the *amani* system lasted till 1867 or till 1870 is not of much consequence, so far as the date is concerned. The important matter is whether the payments of rent in money which the tenants made from time to time were really payments in lieu of *waram*, and whether that system had been entirely abandoned by the parties, or was in reality underlying all their relationships up to the date of suit. The District

Judge held that the arrangement to pay money rents was a purely temporary one liable to be given up at any time if the *zemindar* preferred to go to the trouble of collecting his *waram*. This is a finding of fact which is binding on this Court in second appeal. Moreover, the observation of the District Judge that the rent payable under the periodical Settlement called *gadupattukkattu* was a provisional arrangement, appears to be sound. It is supported by the derivation of the word, and it has been shown that the payments varied according to the crops grown on the land, as disclosed by the evidence of defendants' witness No. 12 who says, "Every four or five years, the land is classified, the lower class being taken into the higher class and increased rentals levied. The higher class lands are never altered into the lower class." Defendants' witness No. 3 admitted that *gadupattukkattu* villages were those in which money rent was paid for a definite period in lieu of the *waram* due and Exhibit O1 shows that Kottakadu was a *gadupattukkattu* village. Even the Deputy Collector found that the money rents payable were not fixed rents.

The District Judge also held that the Deputy Collector was wrong in basing his decision on the result of the suit for recovery of rent for *Fasli* 1317; and in this I think that the District Judge was clearly right. The *ryots* were *ex parte* in that suit. There was no adjudication on the question, what was a proper *pattah*; and in the plaint, the plaintiff reserved his right to have the question whether he was entitled to collect *waram*, determined in separate proceedings.

During the period under the Court of Ward's management (*Faslis* 1278 to 1280 corresponding to 1868 to 1870), the District Judge thinks that the *amani* system prevailed. He bases his decision on certain documents, Exhibits W, GG series, and B. An objection has been taken that Exhibit GG13 to which he refers does not relate to the village of Kottakadu, with which these appeals are concerned. From the appellants' 10th ground of appeal, it appears that the appellants took no objection to the admissibility of Exhibit GG13 but endeavoured to explain its effect away. But

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assuming that the District Judge was guilty of clerical error in referring to this particular Exhibit, which is of the year 1869, as a lease of 1868, he would not have been wrong if he had referred to Exhibit GG13, which relates to 1868. From the extent given in this document it is probable that Kottakadu lands were included. Even if this were not the case, the document would be relevant as evidence of usage prevalent in the neighbouring parent village, and it contains similar terms to those in Exhibit GG13.

It has also been urged that the last clause of Exhibits of this series which permits the landholder to appropriate the produce of the *ijara* lands towards the *ijara* arrears in accordance with the *amani* rules, is only a reproduction of the landholder's right to attach the crops of his tenants for default of payment of rent, as provided in section 14 of the Act of 1865. But this does not seem to be so. There was no need to mention the *amani* rules in this connection.

It is further argued that the District Judge has misconstrued Exhibit W and that he was wrong in admitting Exhibit B as evidence that the *waram* rates prevailed in this period and the preceding period. Exhibit B is a *takeed* of 1869 which clearly refers to the difficulty in effecting a division of *waram* in the parent village of Venkarai. As regards Exhibit W, it relates to *Fashi* 1277 and to this village of Kottakadu and it contains an estimate of the gross outturn of the crops in the holdings of different *ryots*; and although stress is now laid on the absence of the evidence to prove for what purpose this document was prepared, the defendants' Vakil admitted in the lower Appellate Court that he could not suggest any other purpose besides a division of produce. The genuineness of this document is not in dispute.

In the end, the District Judge, as there was no reliable oral evidence as to the correct *waram* rates, adopted the *paimash waram* rates. It does not lie in the mouth of the defendants, who contended in the District Court that, if any *waram* rates were to be taken, *paimash* rates were the correct rates, to say that the District Judge was wrong in so doing. They also conceded at the hearing of the suits that the *amani*

system prevailed at the time of the *paimash* (1829-1830).

The real contention between the parties was on the question whether money rents or grain rents were payable; and on this point the District Judge's finding being one of fact is final, unless it can be shown that it is vitiated by an error in law or by there being no evidence to support his conclusion. In this case his findings are not based merely on the construction of documents.

It is next contended that the lower Appellate Court was wrong in introducing into these suits, which were tried under the provisions of the Madras Estates Land Act, a provision whereby either party, dissatisfied with the rates determined according to the local usage, was at liberty under the former Act to revert to the *waram* rates, and it is urged that the District Judge has wrongly applied section 26 (3) of the Madras Estates Land Act, the provisions of which are prospective. This section merely provides that, if a landholder grants a lease of land at a rate lower than the lawful rate payable before the grant, his successor shall not be bound to adopt the same concession. In this respect, it is merely a repetition of the provisions of section 11, clause 4, of the Act of 1865, that no *pattahs* which have been granted by any landholder at rates lower than the rates payable upon such lands or upon neighbouring lands of similar quality and description shall be binding upon his successor, unless *bona fide* granted for the purpose of making permanent improvements and unless the tenant shall have conformed to the conditions upon which such lower rates were allowed. This has been the law both before and after the passing of Act I of 1908. I do not think that the District Judge meant to base the landholder's right to have *waram* rates of rent upon this provision only. He found in his judgment that there was no permanent arrangement to pay money rents and the only alternative, therefore, was to go back to the *waram* system and this is all that his decision amounts to.

Mr. T. Rangachariar has pressed on our attention that no foundation was laid for the District Judge's assumption that the rates prevailing in these years were low

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rates. Whether they were high rates or low rates, either party was at liberty to revert to their original contract or usage if it has been shown to have been merely in abeyance during the years when the rents payable from year to year were uncertain and when temporary arrangements prevailed.

If the District Judge had allowed the plaintiff to exercise this option because it was the law laid down by section 11 of Act VIII of 1865, he would have been wrong in making the repealed Act the ground of his decision, but he would have been right in principle under the circumstances of this case, because if there is a fundamental agreement between the parties it should be upheld in spite of temporary lapses sanctioned by mutual consent. This was the principle under which *Oliver v. Markanda Aiyar* (1) was decided, and in that case even 70 years of agreement to pay money rents for limited periods was not considered to give rise to a necessary implication of a contract to adopt money rents for ever. A similar view was taken by the Calcutta High Court in *Sohobut Ali v. Abdool Ali* (2). The period of transition in these suits was only about 40 years.

Mr. T. Rangachariar wished to make out a refusal on the part of the District Judge to apply sections 27 and 28 of the Madras Estates Land Act to the circumstances of this case. These sections only provide that a presumption will arise that a *ryot* is bound to pay rent at the same rate as he paid in the preceding revenue year, *until the contrary is shown*. When it has been shown, as in this case, that the rent paid in the preceding revenue year was fixed by an *ex parte* decision in which all the points upon which the parties were at variance were left open, and when there is a finding of fact that up to the present rate there has been no contract between the landholder and the *ryot* to pay a fixed money rent, this is equivalent to showing the contrary of the presumption referred to in those sections. [Vide *Beni Pershad Koeri v. Raj Kumar Chowbey* (3), as to the value to be attached to the prior decision.]

If the *ryots* are still dissatisfied with the *waram* rates fixed in these suits, they have

(1) 3 M. L. J. 263.

(2) 3 C. W. N. 151.

(3) 17 Ind. Cas. 111; 16 C. L. J. 124.

always a remedy provided in section 40 of the Madras Estates Land Act of suing before the Collector to have their rents commuted into definite money rents. But the present suits have not been contested in such a way as to permit the equivalent of the *waram* rates being now determined in money. For this purpose, it would be necessary to have evidence as to the prices prevailing in the preceding ten years.

We dismiss the second appeal with costs. The memos. of objections are not pressed and are dismissed.

COUTTS-TROTTER, J.—As this is a matter of some little difficulty and doubtless one of great importance to the parties, I think it right to add my own reasons for our decision. There were a very large number of suits; a great quantity of documents was produced; numerous witnesses were examined and many points were discussed in the lower Courts. The Advocates are to be commended for having focussed the attention of this Court upon a single point, illustrated by only a few of the many documents exhibited.

These suits arose between the proprietor of the Sillattur *zemindari* and his *ryots* in the village of Kottakadu in the *taluk* of Pottukottai. They were brought by the landlord to compel the *ryots* to receive *pattahs* and execute *muchilikas* in respect of their holdings, in accordance with the provisions of Chapter IV of the Madras Estates Land Act, I of 1908. The sole issue which we have to try is this: the landlord contends that his *ryots* must accept *pattahs* on the *amani* system, whereby the rent consists of a fixed portion of their produce; the tenants contend that they are entitled to be assessed at a money rate of rent, and that, therefore, the *pattahs* tendered are bad. In the view I take of the case, it is not necessary to decide the further question as to what that money rate should be.

The Act is neither very clear nor very well arranged; but I think the language of section 59 illustrates the issue which the Courts below had to determine. That section provides that rent shall be payable in instalments according to agreement or in the absence of agreement, according to established usage; and on that analogy I think the *ryot* must accept a *pattah* the general conditions of which conform to such

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agreement or usage. Section 27 raises a presumption that a *ryot* holds under the same conditions as in the previous revenue year; but that presumption would be rebutted by showing that those conditions were not in accordance with the agreement or usage prevailing between the parties. It is obvious that the matters to be determined in the suits are ultimately questions of fact; and the determination of the lower Court can only be challenged in one of three ways. There may be no evidence to support the findings; or the learned Judge may have misdirected himself in law in the process of arriving at those findings; or it may be said that his findings of fact, while not open to such objections, do not warrant the conclusion which he has drawn from them. It is in this last way that the appellants' case has been framed; and it, therefore, becomes necessary to examine the judgment, and see exactly what it is that the learned Judge has found.

After a careful review of the somewhat troubled history of the *zemindari* in the light of such materials as were available to him, the learned Judge comes to the following conclusions:—

1. That up to the year 1871 the *amani* system prevailed in full force, and the rent consisted of a definite percentage of the produce.

2. That after that time the *ryots* succeeded in making the successive *zemindars* agree to take money and not produce as rent.

3. That the amount of such money payments were not fixed once and for all, but was altered every few years on the initiation of the *zemindar*, and was always altered in the direction of enhancement.

4. That every such alteration was preceded by an inspection of the lands and an estimate of their productivity.

Now so far as we have pure findings of fact and nothing more, they are amply supported by the evidence, and no serious attempt has been made to challenge them. From them the learned Judge has proceeded to draw these further conclusions: that the money payments from 1871, onwards were varied in accordance with the amount of the produce and must be regarded as being made under the *amani* system, inasmuch as the essence of that system consists in

taking from the *ryot* a contribution varying with the amount of produce; that the fact that the actual physical commodity taken was money and not grain was a mere matter of convenience to the parties; and that *pattahs* providing for payment of a fixed proportion of the produce must, therefore, be accepted by the *ryots*. For the *ryots* it is argued that though there may have been no fixed money rent, it is clearly proved that rent has been paid in money for the last 35 years, and that accordingly to give validity to a *pattah* on the *amani* system would be to disregard the outstanding feature of the usage obtaining between the parties. They further say that it is mere surmise to hold that the variation of the money rents paid was based on the proportion in force in the period before 1871, and that the estimates made of the productivity of the land may have been made for other purposes than the fixing of rent.

Mr. T. Rangachariar was, of course, faced with this difficulty: that when it came to fixing the amount of rent payable, the *pattah* would either have to be silent, or to prescribe such rent as the *zemindar* should choose or be able to exact. To avoid such an absurdity he points to sections 27 and 28 of the Act, and puts his case in this way: the evidence shows that a money rent was paid; its amount varied no doubt from time to time, but its variation was determined either at haphazard or by factors no longer ascertainable, and accordingly the presumption should take effect that the sum paid in the last revenue year was the proper one to enforce.

I do not think that this contention is sound. Mr. Rangachariar was quite unable to suggest any purpose for which the ascertainment of the produce of the land would be necessary or useful, other than this, one of fixing the rent. Rebuttable presumptions are guides to the ascertainment of the facts; it is an abuse of their true function to convert them into an excuse for evading that ascertainment. I think there was material on which it was open to the Judge to find that the payment in money from 1871 to 1909 was a mere incident which did not affect the principle upon which the payment was made, and that the tenure remained throughout an *amani*.

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tenure. He has so found, in my opinion, not by way of mere surmise or conjecture, but upon a reasonable resolution of the probabilities of the case. That being so, we cannot disturb his conclusion, even if we would have arrived at a different conclusion had we been in his place. I think the learned Judge was mistaken in seeking to apply section 26 (3), which, in my opinion, has nothing whatever to do with this case; but that misconception in no way affects or vitiates his essential findings. The second appeals fail and must be dismissed with costs.

Appeals dismissed.

CALCUTTA HIGH COURT.

CIVIL RULE NO. 881 OF 94.

November 23, 94.

Present: Mr. Justice Sharfuddin and

Mr. Justice Taunon.

TARAK NATH ADHIKARI AND OTHERS—

JUDGMENT DEBTORS—PETITIONERS

versus

BHUBANESHWAR MITRA—DECREE.

HOLDER OPPOSITE—PARTY.

Civil Procedure Code (Act V of 1908), O. XXXIV, r. 14—Transfer of Property Act (IV of 1882), s. 99—Mortgage—Mortgagee purchasing property in execution of his money decree unconnected with mortgage.

Order XXXIV, rule 14 of the Code of Civil Procedure has repealed section 99 of the Transfer of Property Act and under the present rule a mortgagee is competent to have his mortgaged property sold in satisfaction of any claim which he may have against the mortgagor unconnected with the mortgage. [p. 988, col. 2.]

Civil Rule against the order of the District Judge of Midnapore, dated the 28th May 1914, reversing that of the Munsif of that District, dated March 17th 1914.

Dr. Rash Behari Ghose (with him Babu Mohini Mohon Chatterji), for the Petitioners.

Babu Baidyanath Dutt (with him Babu Mohini Nath Bose), for the Opposite Party.

JUDGMENT.—This is a Rule on the opposite party to show cause why the order passed by the learned Judge in appeal should not be set aside on the ground that the sale was contrary to the provisions of Order XXXIV, rule 14, and also on the ground that the sale was made without taking the permission of the Court which appointed a Receiver.

The second point (in the Rule) has not been argued by Dr. Ghose who appeared on behalf of the petitioner.

The petitioner is the judgment-debtor. Some of his properties have been sold and he complains against the sale. It appears that the opposite party had obtained a money-decree against the judgment-debtor and in execution of that money-decree, he sold and purchased certain properties which were mortgaged to him by the petitioner judgment-debtor under a certain mortgage-deed. The opposite party had also instituted a mortgage suit for the recovery of his mortgage-money under his mortgage-deed and while this mortgage suit was pending, he executed his money-decree and in execution of the decree purchased some of the mortgaged properties himself. The case for the petitioner is that notwithstanding the fact that an alteration in the law has been made by the provisions of Order XXXIV, rule 14, of the present Civil Procedure Code, section 99 of the Transfer of Property Act should be given effect to. We find, however, that under the provisions of section 99 of the Transfer of Property Act a mortgagee could not bring the mortgaged property to sale in satisfaction of any claim whether arising under the mortgage or not, except by institution of a suit under section 67 of that Act. Order XXXIV, rule 14, has introduced a change, limiting the restriction on the mortgagee's right to sell the mortgaged properties to claims arising under the mortgage. It is clear, therefore, that the Code has repealed section 99 of the Transfer of Property Act and in its place this present rule has been enacted. The first part of the section provided that a mortgagee should not bring the mortgaged property to sale otherwise than by instituting a suit under section 67 of the Transfer of Property Act. In so far as it precluded the mortgagee from selling the mortgaged property under a judgment unconnected with the mortgage-debt, the restriction has been considered inexpedient and has been removed. It follows, therefore, that a mortgagee is competent to have his mortgaged property sold in satisfaction of any claim which he may have against the mortgagor unconnected with the mortgage.

ANANTHA DESIKACHARIAR v. VISWANADHA MUDALY.

For the above reasons, we discharge this Rule with costs.

Rule discharged.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL NO. 181 OF 1913.

August 6, 1915.

Present: — Mr. Justice Seshagiri Aiyar and
Mr. Justice Napier.

ANANTHA DESIKACHARIAR AND
OTHERS— PLAINTIFFS—APPELLANTS

versus

VISWANADHA MUDALY AND OTHERS—

DEFENDANTS—RESPONDENTS.

Easement—Right to take water—Channel running through Government lands—Non-user for some years—Obstruction by trespasser—Injunction.

A person having had enjoyment of an easement for less than the statutory period can obtain an injunction against a trespasser. [p. 990, col. 1.]

Achanna v. Venkamma, 5 M. L. J. 24; *Kondapa Rajan Naidu v. Divarakonda Suryanarayana*, 6 Ind. Cas. 266; 20 M. L. J. 803; 7 M. L. T. 352; 34 M. 173; (1910) M. W. N. 117, followed.

Where the plaintiffs had been taking water with the permission of the Government to a tank along a channel which mostly ran through Government *oramboke* lands, but had for some years prior to suit not used this channel, on a suit being brought for declaration of their right against the defendants trespassers:

Held (1) that the non-user by the plaintiffs did not disentitle them to the relief claimed by them against the defendants who had no right either by grant or by prescription; [p. 990, col. 1.]

(2) that the plaintiffs were entitled to a decree restraining the defendants from interfering in any way with the plaintiffs in their enjoyment of the channel and of the water flowing in it. [p. 990, col. 1.]

Second appeal against the decree of the Subordinate Judge of North Arcot in Appeal Suit No. 96 of 1911, preferred against that of the District Munsif of Ranipet in Original Suit No. 319 of 1902.

FACTS.—The plaintiffs were the inhabitants of Pundi village and the defendants of Chinnasamudram and Gudimallore in North Arcot. The plaintiffs sued for a declaration that they were entitled to take water from river Palar through the Pundi channel. The defendants set up a grant from Government of the water of this channel and said that the plaintiffs had by non-user lost their rights. The District Munsif of Ranipet dismissed the suit. On appeal, the Subordinate Judge held that the channel was the channel of the plaintiffs and they were taking the flood water of the Palar river through this channel, but they had not taken

the spring water of the said river for the last 30 years. He accordingly gave a decree declaring their right to take flood water, and dismissed the suit so far as the spring water was concerned, directing the plaintiffs to pay the defendants' costs as spring water was an important subject of discussion between the parties. The present appeal is against that decree and judgment.

Messrs. *T. Rangachari* and *U. V. Ananthakrishna Aiyar*, for the Appellants, contended that (1) the distinction drawn by the Subordinate Judge between flood water and spring water was unfounded, and it did not matter if the plaintiffs had failed to take the spring water through this channel for some time. (2) The Government was the owner of the bed of the river and the defendants could not object to the plaintiffs repairing the spring water channel in the bed of the river, to enable it to get into the channel. (3) The grant from Government, in favour of the defendants having been found against them, the suit ought to have been decreed wholly in the plaintiffs' favour.

Mr. *K. Raja Aiyar* (with him Messrs. *Srinivasa Aiyangar* and *O. P. Venkataraghachari* for Mr. *V. C. Seshachariar*), argued *contra*.

JUDGMENT.—The Subordinate Judge has found that the plaintiffs dug the channel in the bed of the Palar river. that with the permission of the Government they have been taking water to the Pundi tank along a channel which mostly run through Government *poramboke* lands and which during the remainder of its course passed through channel *poramboke* lands. He has also founded that up to 1862, the plaintiffs took both spring and fresh water to their tank through this channel but that after 1862 and till 1892, they have not been shown to have removed the silt so as to enable spring water to pass through it. The defendants' case is that the Government made a grant of the right to take water through this channel to their fields as the plaintiffs did not require it any longer. The Subordinate Judge has found against this case. Apart from the fact that Exhibits III and IV purport to be grants to certain individuals only of the right in question, there is Exhibit G which shows that these grants were not acted upon, even assuming that it was open to a Head Assistant Collector to make such grants.

D. N. GHOSE v. POPAT NARAIN.

In this Court Mr. Raja Aiyar based his contention upon the ground that his clients acquired a prescriptive right against the plaintiffs by taking the spring water themselves through the channel to the exclusion of the plaintiffs. There has been no issue regarding this prescriptive right and we are at present unable to see how such a right could have been acquired. We have not been placed in possession of materials for arriving at a conclusion upon this point.

The next contention of the respondents' Vakil is that as his clients are in possession, the non-user by the plaintiffs disentitles them to ask for an injunction. We fail to see any force in this contention. The fact that the grant by the Government has not been availed of may enable the Government to revoke it, but so long as the grant subsists and the Government raises no objection to the intermittent use of the channel, we fail to see how the defendants who have no right either by grant or by prescription, can deny the right of the plaintiffs. The decisions in *Achanna v. Venkamma* (1) and *Kondapa Rajan Naidu v. Dwarakonda Suryanarayana* (2) establish the proposition that as against a trespasser, a person having had enjoyment of an easement for less than the statutory period can obtain an injunction. In the present case, the position of the plaintiffs is very much stronger in that they have been continuously using the channel at least for taking flood water to their tank.

We are not able to follow the Subordinate Judge in regard to his classification of the easement claimed. We may observe that no question of easement really arises; but even granting that the right claimed is of that description, the right to take the spring water along the channel is not separable from the right to dig and take water from the bed of the river.

On the materials before us we are unable to find any right in the defendants to interfere with the plaintiffs' use of the water.

We must, therefore, reverse the decrees of the Courts below and grant a decree to the plaintiffs restraining the defendants from in any way interfering with the plaintiffs in their enjoyment of the channel and of the water flowing in it. In the absence of

(1) 5 M. L. J. 24.

(2) 6 Ind. Cas. 266; 20 M. L. J. 308; 7 M. L. T. 352; 34 M. 173; (1910) M. W. N. 117.

the Government, we are not in a position to make a declaration regarding the right of the plaintiffs to the channel in question.

The defendants must pay the costs of the plaintiffs in all the Courts.

Appeal allowed; Suit decreed.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL CIVIL NO. 68 OF 1914.
January 28, 1915.

Present:—Sir Lawrence Jenkins, Kt., Chief Justice, and Mr. Justice Woodroffe.

D. N. GHOSE AND BROTHERS—DEFENDANTS
—APPELLANTS

versus

POPAT NARAIN BROTHERS—PLAINTIFFS—
RESPONDENTS.

Reference—Damages, assessment of—Practice.

Cases should only be referred to other persons for assessing damages where the inquiry involves questions of detail which it would be wasting the time of the Court to investigate. [p. 991, col. 1.]

Appeal from the judgment of the Hon'ble Mr. Justice Chitty, dated the 7th July 1914.

Messrs. A. N. Chaudhuri and B. K. Ghosh, for the Appellants.

Messrs. B. L. Mitter and Bhattacharjee, for the Respondents.

JUDGMENT.

JENKINS, C. J.—This is an appeal which arises out of a suit between a vendor and a purchaser of coal and one which should have been disposed of at the trial both on the question of liability and on the question of damages. However, a reference was directed.

More than once this Bench has protested against a reference being directed in cases of this nature. I wish again to repeat the protest, and I do this in the language of the Court of Appeal in England, when Lord Justice Bowen expressed his desire to protest against the melancholy spectacle which the case before him presented. He said, he "sometimes feared that profane persons might not be entirely wrong in complaining that the Courts of justice had, at least, some of the attributes of the Circumlocution Office. His Lordship had never said anything disrespectful of the Chancery Division, but it was a melancholy spectacle to see a common law cause which might have been heard in one day transformed and inflated into a Chancery suit which had lasted Heaven knew how long and

SHRINIVASA RAYA v. RAMAPPA HEBBARA.

was going to last Heaven knew how much longer. It must not be taken as a thing in which their Lordships were to acquiesce that in every case in the Chancery Division the Court ought to direct an inquiry as to damages instead of assessing the damages itself. Cases ought only to be referred to other persons to assess the damages where the inquiry involved questions of detail which it would be wasting the time of the Court to investigate." The opinion so expressed by Lord Justice Bowen was shared by Lord Justice Cotton and Lord Justice Fry, the latter of whom said that "he had more than once expressed his fears lest the practice of directing inquiries should lead to two trials when one was sufficient. Sending an action to a Referee might be necessary in some cases, but as a general rule his Lordship objected to the splitting up of the trial into two inquiries—first, as to the right, and, secondly, as to the amount of damages. This case might have been entirely disposed of by the Judge": *Wallis v. Sayers* (1). We share the opinion to which expression is given in *Wallis v. Sayers* (1), and the case amply illustrates the undesirability of a needless reference. I have described the nature of the suit. It was commenced a long time back; there was a decree establishing the right in 1913, and we are now in 1915 dealing with an appeal on exceptions to the Referee's report as to the quantum of damages. I trust that cases of this kind will not be referred to the Referee. It is not merely that this is an error of procedure, but where the question is one between a seller and a purchaser and the point in dispute may be *readiness and willingness to sell*, it is obviously of prime importance to know how the market has gone with reference to the contract price. In this case the matter went before the Referee. It did not take a very direct course, and I am not clear that the real points were properly appreciated, but the result has been that the plaintiff has failed to prove the amount of damages in respect of this particular coal, Lodna rubble, unless he can rely on an allegation in the defendant's statement of facts. But that allegation was made provisionally. The plaintiff never insisted upon it before the Referee as being a correct statement of

(1) (1890) 6 T. L. R. 356.

the market rate, and it is obvious from the course which the case took before the Referee, that both parties gave the go-by to that statement and endeavoured to establish by evidence before him what the market rate was. The plaintiff has failed to prove that the market rate exceeded Rs. 1-12. Therefore, I think, Mr. Justice Chitty ought not to have interfered with the conclusion of the Referee.

This appeal is allowed, and the order of Mr. Justice Chitty is set aside with costs of this appeal and the exceptions before Mr. Justice Chitty.

WOODROFFE, J.—I agree.

Appeal allowed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 2649 OF 1913.

August 10, 1915.

Present:—Mr. Justice Spencer and

Mr. Justice Kumaraswami Sastri.

SHRINIVASA RAYA—PLAINTIFF—

APPELLANT

versus

RAMAPPA HEBBARA AND ANOTHER —

DEFENDANTS—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Art. 141—Adverse possession against female holder—Suit by reversioner, whether barred.

Article 141 of the Limitation Act gives a fresh starting point to the reversioner on the death of the female limited owner, and a suit brought by the reversioner will not be barred even though the female owner was not in possession within 12 years before her death. [p. 992, col. 2.]

Runchordas Vandravandas v. Parvatibai, 23 B. 725; 26 I. A. 71; *Venkataramayya v. Venkatalakshminamma*, 20 M. 493; 7 M. L. J. 204, followed.

Where, therefore, in a suit brought to recover possession of certain property, it appeared that the original owner died in 1876 leaving a daughter and a daughter-in-law (wife of a predeceased son) and the daughter, before dying in 1907, adopted a son who conveyed the suit properties to the plaintiff in January 1911 while the daughter-in-law sold them to the 1st defendant's father in 1901:

Held, that the suit was governed by Article 141 of the Limitation Act and was not barred. [p. 992, col. 2.]

Lachhan Kunwar v. Manorath Ram, 22 I. A. 25; 22 C. 445; *Mahabir Pershad v. Adhikari Koer*, 23 C. 942; *Hari Nath Chatterjee v. Mothur Mohun Goswami*, 21 C. 8; 20 I. A. 183; *Sham Kaer v. Dah Koer*, 29 C. 664; 4 Bom. L. R. 547; 6 C. W. N. 657; 29 I. A. 132, distinguished.

Second appeal against the decree of the District Court of South Canara, in Appeal Suit No. 277 of 1912, preferred against that of the Court of the District Munsif of Coondapore, in Original Suit No. 242 of 1911.

SHRINIVASA RAYA v. RAMAPPA HEBBARA.

Mr. B. Sitarama Rao, for the Appellant.

Mr. K. Sundara Rao, for the Respondents.

JUDGMENT.—The plaintiff is the appellant. One Subroya Udupa died in the year 1876 leaving a daughter Venkamma, and daughter-in-law, Satyabhama, the widow of this predeceased son, Krishna Udupa. Venkamma adopted Subroya Adiga, who conveyed the suit properties to the appellant by a registered deed of sale, dated 5th January 1911. Satyabhama sold the suit properties to the 1st defendant's father and died in the year 1901. Venkamma died in the year 1907 and the appellant sues to recover possession of the property, on the ground that he represents the adopted son of Venkamma who as daughter's son of the last male holder became entitled to the properties on her death.

Both the lower Courts have found that Satyabhama took adversely to Venkamma and that her adverse possession commenced in the year 1876. They dismissed plaintiff's suit as barred by limitation on the ground that adverse possession against Venkamma barred the reversioner also.

We are of opinion that the decision of the lower Courts cannot be supported on this point. In considering the authorities on the subject they have failed to notice that while under the Limitation Act of 1859 dispossession of a female owner caused time to run not only as against her but also against the reversioners, Act IX of 1871 and the subsequent Acts gave the reversioners a fresh starting point from the date of the death of the female limited owner.

The present case clearly falls within the ruling of the Privy Council in *Runchordas Vandravandas v. Parvatibai* (1), where their Lordships held that Article 144 has no application to suits governed by Article 141 of the second Schedule of the Limitation Act.

In *Venkataramayya v. Venkatalakshamma* (2), it was held that under Article 141 of the Limitation Act the reversioners had 12 years from the date of the death of the last male holder's daughter. Though the Allahabad High Court was at one time disposed to treat the decision in *Ram Kali v. Kedar Nath* (3) as overruled by *Lachhan*

Kunwar v. Manorath Ram (4) and to treat adverse possession as against the female heir as barring reversioners, that view has not found favour after the decision of the Privy Council in *Runchordas Vandravandas v. Parvatibai* (1). In *Amrit Dhar v. Bindesri Prasad* (5) and *Jhamman Kunwar v. Tiloki* (6) their Lordships after distinguishing *Lachhan Kunwar's* case (4), held on the authority of the decision of the Privy Council in *Runchordas Vandravandas v. Parvatibai* (1), that Article 141 gave a fresh starting point to the reversioner on the death of the widow and that a suit brought by the reversioner will not be barred even though the widow was not in possession within 12 years before her death.

Reference has been made by the respondent's Vakil to *Lachhan Kunwar v. Manorath Ram* (4) where their Lordships of the Privy Council inclined to the view that adverse possession against the widow would bar the reversioners, but as pointed out in *Venkataramayya v. Venkatalakshamma* (2) the rights of the reversioners had become barred under Act XIV of 1859 before the provisions of Act IX of 1871 had come into force. Similarly in *Mahabir Pershad v. Adhikari Koer* (7) adverse possession had ripened before the passing of the Act IX of 1871. *Hari Nath Chatterjee v. Mothun Mohun Goswami* (8) was a case where the plaintiff's mother representing the estate brought a suit which was dismissed as barred and the decree was held to be binding on her son as *res judicata*. In *Sham Koer v. Dah Koer* (9) the widows being only entitled to maintenance had no life-interest in the estate and adverse possession commenced from the death of Bhan Nath Singh, who was a member of an undivided Hindu family.

We are of opinion that the suit is not barred by limitation and reverse the decree of the lower Court and remand the appeal for disposal on the other issues raised. Costs will abide and follow the result.

Appeal allowed; Case remanded.

(4) 22 C. 445; 22 I. A. 25.

(5) 23 A. 448; A. W. N. (1907) 133.

(6) 25 A. 435; A. W. N. (1903) 93.

(7) 23 C. 942.

(8) 21 C. 8; 20 I. A. 183.

(9) 29 C. 664; 4 Bom. L. R. 547; 6 C. W. N. 657; 29 I. A. 132.

(1) 23 B. 725; 26 I. A. 71.

(2) 20 M. 493; 7 M. L. J. 204.

(3) 14 A. 156; A. W. N. (1892) 22.

AHMADALI V. EMPEROR.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CRIMINAL MISCELLANEOUS PETITION No. 32
of 1914.

December 24, 1914.

Present:—Sir Henry Drake-Brockman, Kt.,
AHMADALI—APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

*Criminal Procedure Code (Act V of 1898), s. 344—
Remand, when ordered—Practice.*

A remand to custody should not ordinarily be ordered under section 344, Criminal Procedure Code, without first recording some evidence, where such evidence is available, to show that good ground exists for believing the accused person to have committed a non-bailable offence. [p. 993, col. 2.]

Where after one remand the accused is again brought up, some direct evidence of the guilt of the accused should be required to justify the refusal of bail and with each remand the necessity for producing such evidence increases. [p. 993, col. 2.]

Ponnusami Chetti v. Queen, 6 M. 69; 2 Weir 413, followed.

Miscellaneous petition against the order of the Sessions Judge, rejecting an application for bail.

Mr. M. R. Bobde, for the Applicant.

JUDGMENT.—The petitioner has been *chalaned* with four other persons for kidnapping a girl aged 14 years from lawful custody, a non-bailable offence punishable under section 363, Indian Penal Code. The first information was laid on the 9th ultimo, but only two persons, one unnamed, are therein said to have committed the crime. The petitioner was arrested on the 25th ultimo, though this fact has improperly been omitted from the *chalan*. He was placed before the Magistrate on the 26th *idem* along with three of his co-accused, but was at once remanded to Jail because one of the accused persons had not been arrested and was believed to have absconded. On the 8th current a farther postponement to the 22nd current was ordered and now the case stands fixed for the 6th proximo. No evidence whatever has been recorded to show that a *prima facie* case exists against the petitioner, and his mother now puts in an affidavit complaining that she is in serious distress, as the petitioner is the only member of the family who earns anything for its support. The family is said to consist of the petitioner's wife and two small children in addition to his mother, the petitioner being a bookbinder's employee earning Rs. 15 per mensem.

It does not appear that the Magistrate has been moved to grant bail. An application to the Sessions Judge has been rejected, partly on this ground and partly because the Judge had other work to do before leaving his headquarters for the Christmas holidays and could not spare time to consider any applications.

It is, I trust, unusual for a Sessions Judge to treat an application for bail with such scant consideration as has been meted out to the petitioner's. The Magistrate's order-sheet does not show that he was asked to release the petitioner on bail, but I am told that he was moved to do so and declined to grant the prayer. It ought to be understood by all Magistrates that remands to custody should not ordinarily be ordered under section 344, Criminal Procedure Code, without first recording some evidence, where such is already available, to show that good ground exists for believing the accused person to have committed a non-bailable offence. The ordinary course is to examine a Police Officer to ascertain that the Police possess information, they believe to be trustworthy, that an offence has been committed and that the accused person was concerned in its commission. When after one remand the accused is again brought up, some direct evidence of the guilt of the accused should be required to justify the refusal of bail and with each remand the necessity for producing such evidence increases. This is the view expressed by Turner, C. J., and Kernan, J. in *Ponnusami Chetti v. Queen* (1), and I agree with it. In the present case the petitioner has already been over four weeks under arrest and almost a fortnight more must elapse before the trial can begin. The Courts are now closed for the Christmas holidays and there may be difficulty in moving the trying Magistrate to pass an order in writing either granting or refusing bail. It further appears that innocent persons are suffering by reason of the petitioner's incarceration. In these circumstances I direct that the petitioner be released on furnishing a bond in Rs. 50 with one surety in a like sum for his appearance before the trying Magistrate on the 6th proximo. The surety must be

(1) 6 M. 69; 2 Weir 413.

KARACHI MUNICIPALITY v. BHOJRAJ.

approved by the Magistrate deputed by the District Magistrate to deal with criminal cases and applications during the current holidays.

Application allowed.

SIND JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION APPLICATION NO. 9
OF 1915.

June 21, 1915.

Present:—Mr Pratt, J. C.

KARACHI MUNICIPALITY—APPLICANT
versus

BHOJRAJ AND OTHERS—OPPONENTS.

Penal Code (Act XLV of 1860), s. 415, Explanation—Cheating—Dishonest concealment of facts, what constitutes—False representation of title, not inducing bargain, effect of—Transfer of Property Act (IV of 1882), s. 55 (1) (a)—Duty of seller to disclose defects in title.

No concealment is dishonest within the meaning of section 415, Indian Penal Code, unless there is a legal obligation to disclose it. [p. 994, col. 2.]

Emperor v. Bishen Das, 27 A. 561; A. W. N. (1905) 98; 2 A. L. J. 268; 2 Cr. L. J. 218, referred to.

Defects in title being defects in the property under section 55 (1) (a) of the Transfer of Property Act, there is no duty on the seller to disclose them unless the buyer could not with ordinary care discover them. [p. 994, col. 2.]

A, one of the several members of a joint Hindu family, sold certain land to a Municipality without disclosing that the land was mortgaged or that the other members of the family had a share therein. A received the price and executed a sale-deed containing the usual covenant about title and indemnity in case of any defect of title. A was prosecuted for cheating:

Held, that A was not guilty of any dishonest concealment of facts within the meaning of the Explanation to section 415, Indian Penal Code, as there was no legal obligation upon A to disclose the mortgage or the fact of his being a member of a joint family, the Municipality knowing that he was a Hindu. [p. 994, col. 2.]

Haji Essa v. Dayabai, 20 B. 522, referred to.

Application for revision against the order of the Additional City Magistrate, Karachi.

Mr. *Rupchand Bilaram*, for the Applicant.

Mr. *P. V. McInerney*, for Opponents Nos. 1 and 2.

Mr. *Lalchand Hassomal*, for Opponent No. 3.

Mr. *Partabrai D. Punwani* (Assistant Public Prosecutor), for the Crown.

JUDGMENT. This is an application to revise an order of discharge made by the Additional City Magistrate, Karachi.

The accused was charged with cheating the Karachi Municipality.

He executed a sale-deed to the Karachi Municipality for certain land and received the price. It was subsequently discovered that the land was mortgaged by the accused and the other members of his family were interested in it.

Mr. Rupchand refers to the Explanation to section 415 that a dishonest concealment of fact is a deception and argues that the accused dishonestly concealed the fact of the mortgage and the fact that he was member of a joint Hindu family. But no concealment is dishonest unless there is a legal obligation to disclose. A defect in title has been held to be a material defect in the property under section 55 (1) (a) of the Transfer of Property Act, *Haji Essa v. Dayabai* (1). There is no duty on the seller to disclose these, unless the buyer could not with ordinary care discover them. The Municipality could easily have ascertained the existence of a prior mortgage and knew that the seller was a Hindu.

Mr. Rupchand then relies on the express covenant of title in the sale-deed, but the representation contained in this covenant was not that which induced the Municipality to agree to buy the property. The agreement had been effected before the sale-deed was signed. The effect of this covenant was merely to give the Municipality a right to sue for damages if the title proved to be defective.

The cheating must refer to some false representation which induced the Municipality to agree to buy the land. As to such representation there is only the evidence of one witness, the land clerk, and as he is not supported by the correspondence, I think the

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Magistrate was right not to act upon his evidence.

Mr. Rupchand refers to illustration (1) to section 415, but that refers to a case where the seller has no title and his conduct in selling amounts to deception. That is not the case here. The law on this point is, I think, correctly stated in the case of *Emperor v. Bishen Das* (2).

Application rejected.

(2) 27 A. 561; A. W. N. (1:05) 98; 2 A. L. J. 268; 2 Cr. L. J. 218.

LOWER BURMA CHIEF COURT.
CIVIL MISCELLANEOUS APPLICATION No. 62
OF 1914.

August 26, 1915.

Present:—Mr. Justice Ormond and
Mr. Justice Twomey.

*In the matter of A FIRST GRADE PLEADER,
RANGOON—RESPONDENT.*

Professional misconduct—Pleader accepting fees for whole case and failing to appear after few hearings—Presumption—Terms of engagement—Procedure.

Where an Advocate receives instructions from his lay client or his friends, it is incumbent on him to see that the terms of his engagement are clear and are understood by his client; and in the absence of a special contract to the contrary, the fee should be presumed to have been taken for the whole case. It is desirable that an Advocate should take a note in writing from the person paying the fee of the terms of the engagement and should make a similar note on the receipt for fee given by him. [p. 996, col. 2.]

Where a case takes more hearings than anticipated by an Advocate at the time of his engagement and he refuses to appear in the case unless he is paid a further fee he is guilty of professional misconduct. [p. 997, col. 1.]

JUDGMENT.

ORMOND, J.—The respondent, a first Grade Pleader of this Court, is charged with professional misconduct, the charge being that he having received from the complainant sums aggregating to Rs. 1,150 as fees for defending Maung Ok Gyi and Ma San Me in a criminal case before the Senior Magistrate, Mandalay, after appearing on two occasions when the case was not heard, failed without any good cause to make further appearance on behalf of his clients or to make proper arrangements for the

conduct of their defence by another Advocate:

The petitioner, Po Tin, is the brother-in-law of Ok Gyi and the husband of Ma San Me. His case is that on the 7th September he engaged the respondent to defend Ok Gyi in the criminal case for a fee of Rs. 900, the respondent to pay his own expenses, and paid him Rs. 400 on that day. Respondent gave petitioner a receipt (Exhibit A) for "Rs. 400 on account of criminal case Mandalay, balance Rs. 500." A few days later he engaged the respondent to appear also for Ma San Me for a fee of Rs. 250. The case was fixed for the 23rd September. The respondent attended in the Court but the case was postponed until the 30th September, because one of the other accused was not present. The respondent attended on the 30th September, but the case was again postponed for the same reason as before until Monday, the 12th October. On 12th October the case was postponed until 23rd October for the same reason as before. The evidence for the prosecution was taken on the 23rd, 24th and 26th October. On 27th October Ok Gyi with others was charged and San Me was discharged; and the case was postponed until 24th November.

The respondent did not appear on the 12th October or any subsequent date, his case being that he was engaged to go to Mandalay on two occasions or for two hearings for the said sum of Rs. 1,150. On the 20th or 21st October the respondent left for Ceylon without leaving any one to look after this case for him.

On the morning of Sunday, 11th October, the petitioner arrived in Rangoon, and with Po Kun went to the respondent's house to pay him the balance of the Rs. 1,150 which remained unpaid, viz., Rs. 100. The respondent was out, did not return to his house until 1-30 or 2 p. m. The petitioner went off to catch the midday train for Mandalay and left the money with Po Kun, who paid it to the respondent at a time when it was impossible for the respondent to have got to Mandalay by the next morning in time for the case. The respondent gave Po Kun a receipt (Exhibit B) for "the fees of Rs. 1,150, as agreed upon for two appearances only." The petitioner in his supplementary

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petition says that on the 12th October he was waiting for the respondent who had promised to come; and in his evidence he first stated that his interview took place some days before 12th October. He subsequently admitted that he was in Rangoon on the 11th October; that he missed the midday train and arrived in Mandalay on Monday the 12th to find that the case had been adjourned. And Po Kun bears out petitioner's first story and says that petitioner himself paid the money to respondent on the 12th October. It is clear that petitioner and Po Kun are unreliable. The respondent in his written explanation says he was paid the balance a day or two after the second adjournment. It is clear, however, that this money was paid on the day before the third adjournment, *i.e.*, on the 11th October. The respondent states that Po Kun paid him the balance of the fees, Rs. 1,150, and tried to induce him to go up again in the case; that the respondent said he would go upon a reduced fee, he thinks it was Rs. 250 and that Po Kun said he would try and persuade the clients to pay it. Apparently it must have been contemplated either that the case would be adjourned or that the respondent should go up as soon as possible. The petitioner came again to Rangoon before the 23rd October but he learned that the respondent had gone to Ceylon. From the statements made by the respondent in answer to the Court, the facts of the case, I think, are these. The petitioner went to engage the respondent to defend Ok Gyi in the criminal case and asked what his fee would be. Ok Gyi was accused of being in possession of stolen property. The respondent elicited the particulars of the case from the petitioner and learned that none of the stolen property was found on the accused or in his house. The respondent, therefore, thought there was a good chance of the accused not being called upon to enter upon his defence and in that case one trip to Mandalay only would be necessary and that two trips, one for the case for the prosecution and one for the case for the defence, would in any case see the case through. The respondent states that neither party contemplated his making a trip to Mandalay when the case was not taken up. He put it to the petitioner that the case would take two days' hearing, *i.e.*,

would require two trips to Mandalay, and he agreed to defend Ok Gyi for a fee of Rs. 900. Nothing was said at the interview of the 7th September about any further fees being payable in the event of the case necessitating more than two trips to Mandalay. And the receipt for "Rs. 400 on account of the criminal case Mandalay, balance Rs. 500" would show that Rs. 900 was the fee for the whole case.

The case set up by the respondent in his written answer that there was an agreement for two visits only, is certainly not made out. And the respondent was ill-advised in calling his three clerks and the client, Oung Dun, to prove statements by the petitioner that the petitioner had engaged the respondent for two trips. I attach no weight to the evidence of these witnesses; and if the petitioner did ever speak of two trips in connection with this contract, he must have meant that the respondent agreed to go up to Mandalay not only for the prosecution but also for the defence and to see the case through.

It is not too much to expect that statement made by Advocates to the Court should be made with the utmost candour. If the respondent in his written explanation had stated the case in its true light, the matter would have borne a very different complexion and this hearing might have been obviated.

In this country where Advocates receive instruction from the lay clients themselves (or their friends), it is incumbent on the Advocate to see that the terms of his engagement are clear and are understood by his client. And in the absence of any special contract, the fee must be taken for the whole case. The proof of the terms of the contract should not have to depend upon the evidence of the Advocate's clerks, whose evidence is, as a rule, valueless. The witness-box is not a proper place for the lawyer's clerks. There is no reason that I can see why a note in the writing of the person paying the fee should not be taken by the Advocate and also made on the receipt given by him to the client, of the terms of the engagement.

In the present case the respondent agreed to defend Ok Gyi and Ma San Me in a criminal case at Mandalay for the sum of Rs. 1,150. He calculated that two trips would see the case through. The petitioner

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who was less concerned with adjournments than with hearing and result of the case, engaged the respondent to appear at the *hearing* of the case, and if in order to be present at the hearing the respondent had to make preliminary trips to Mandalay, the fee would include these trips.

The risk of making a trip to Mandalay and the case being adjourned fell on the respondent. He did his best to provide against this happening, but circumstances were against him; and the contract as it turned out was an unprofitable one.

The respondent told his clients that two trips would be necessary. Neither party contemplated more than two trips being made. The respondent made two ineffectual trips on account of adjournments and refused to make any more trips except upon payment of a reduced fee of Rs. 250, that is to say, that the respondent after receiving his fee refused to appear further in the case, and thereby committed an act of professional misconduct. But I am of opinion that he honestly thought that he was entitled to demand an additional reduced fee; and consequently no further action is necessary.

TWOMEY, J.—The petitioner, Po Tin, and his witness, Po Kun, have not given a true account of the incident of 11th October when the last instalment of the fee was paid at Rangoon. These men are untrustworthy. But it does not follow that we must accept the evidence of the respondent's clerks as to the original arrangement of September 7th. They would make out that there was a clear stipulation well understood by the petitioner that in any event the respondent was to go only twice to Mandalay. This is in direct conflict with the petitioner's statement that the fee of Rs. 1,150 was to cover the whole case irrespective of the number of trips that might be necessary. The truth is discernible in the documentary exhibits and the respondent's own admissions, and I agree with my learned colleague in rejecting the evidence of the lawyer's clerks and the client Aung Dun. The receipt given on 7th September showing a lump-sum fee and a balance of Rs. 500 still due tells strongly in support of the petitioner's version which is, moreover, in accordance with probabilities. The respondent admits that neither he nor the petitioner contemplated the possibility of the

respondent going to Mandalay for mere adjournments. But, if the respondent was engaged specifically for two trips only, the possibility of adjournments would almost certainly have been considered. The respondent knows that Magistrates' cases up country are apt to hang fire from one cause or another, especially when as in the petitioner's case there are several accused and when the witnesses have to come from various other districts. This was clearly a case that was prone to suffer adjournments. In such a case it is hardly conceivable that a Rangoon lawyer would be engaged without the question of adjournments being considered. The fact that this matter was not discussed with the petitioner, points only to the conclusion that the respondent was engaged for the whole case. It is urged that if an Advocate goes to Mandalay his expenses are just as great when there is a mere adjournment as when there is an effective hearing and, therefore, the respondent would necessarily fix a maximum number of trips with reference to the amount of fee paid. But this would not be so obvious to the petitioner as to the respondent. It can be argued with an equal force that the petitioner would not have engaged the respondent and paid the fee if he had been told that the respondent proposed to pay only two visits to Mandalay, however the case might go, and that an additional fee would be payable for any further attendance in the event of the respondent, owing to defective information or otherwise, going to Mandalay twice for mere adjournments. So far as I can see the petitioner had no inkling that he was liable to be treated in this manner. It is in the last degree unlikely that he would have agreed to such an arrangement. It clearly should have been explained to him at the beginning, and I should have expected to see a note of the fact on the receipt given on 7th September. The truth appears to be that the respondent, relying on inadequate information about the case, was satisfied in his own mind that two trips would see it through and that he could safely take the fee of Rs. 1,150 for the whole case. Afterwards when his calculation miscarried and two trips to Mandalay went in mere adjournments he seems to have persuaded himself that the number of trips was an essential term of the contract with the petitioner instead of being merely

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the basis on which the the lump-sum fee was concluded.

I am content to accept my learned colleague's finding that there was no bad faith on the part of the respondent. I would attribute to faulty memory the respondent's statement that the petitioner was made to understand that the fee of Rs. 900 was "for two occasions, viz., two visits to Mandalay." I agree that no further action need be taken in the matter.

Order accordingly.

SIND JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPEAL NO. 27 OF 1915.

June 26, 1915.

Present:—Mr. Pratt, J. C., and Mr. Crouch, A. J. C.

SAIDINO AND OTHERS—ACCUSED—APPELLANTS
versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), s. 300 cls. 1 to 4—Murder, brutal assault with lathis, when amounting to.

A brutal assault with lathis resulting in the death of the person assaulted does not ordinarily amount to murder unless the accused intended to cause death [section 300 (1)] or to cause such bodily injury as is sufficient in the ordinary course of nature to cause death [section 300 (3)]. [p. 998, col. 2.]

Emperor v. Hashim, 20 Ind. Cas. 619; 14 Cr. L. J. 459; 7 S. L. R. 29, followed.

Elem Molla v. Emperor, 6 Ind. Cas. 921; 11 Cr. L. J. 417; 37 C. 315, referred to.

Hanuman v. Emperor, 21 Ind. Cas. 1005; 35 A. 560; 14 Cr. L. J. 685; 11 A. L. J. 926, dissented from.

Appeal against the decision of the Sessions Judge, Larkana.

Mr. T. G. Elphinston (Public Prosecutor for Sind), for the Crown.

JUDGMENT.—We have no doubt that the facts are as found by the Sessions Judge. The four accused attacked the deceased with lathis and beat him with such brutality that he died. Those facts are proved by the evidence of eye-witnesses and the dying declaration of the deceased.

The Sessions Judge has found that the accused did not intend to cause the death of the deceased—section 300 (1), and he does not find that the accused intended to cause such

bodily injury as was sufficient in the ordinary course of nature to cause death—section 300 (3). He has nevertheless convicted them of murder as he considers that the act is covered by section 300 (4). We do not think that section 300 (4) applies to cases where there is an intention to cause bodily injury to any particular person. It refers primarily to cases where there is no such intention but the accused has knowledge that the act involves imminent risk of human life, according to the degree of the risk the offence is either culpable homicide not amounting to murder under section 299 (c) or murder under section 300 (3). As pointed out in *Reg. v. Govinda* (1) furious driving and firing at a mark near the public road are instances of offences under section 299 (c) and 300 (4). We differ from the case of *Hanuman v. Emperor* (2) where section 300 (4) was applied to a case similar to the present.

The Sessions Judge also refers to the case of *Elem Molla v. Emperor* (3) which was also a case of brutal assault with lathis. The Judge there held that the accused "either intended to cause his death or that they attacked him in such a brutal manner regardless of the consequences, well knowing that they would be likely to cause his death". On the first hypothesis the offence was of course murder under section 300 (1). If the second hypothesis is intended to apply section 300 (4), then the same criticism applies to this case as to *Hanuman v. Emperor* (2). And if it is intended to apply section 300 (2), then we differ also for the material words in the part are "the person to whom the harm is caused". The essence of section 300 (2) is that the particular person injured is suffering from some infirmity known to the accused which would make his death a probable result of the harm caused. Apart from this special case, brutal assaults such as the present do not ordinarily amount to murder unless the accused intends to cause death or to cause such bodily injury as is sufficient in the ordinary course of nature to cause death: *Emperor v. Hashim* (4).

(1) 1 B. 342.

(2) 21 Ind. Cas. 1005; 25 A. 560; 14 Cr. L. J. 685; 11 A. L. J. 926

(3) 6 Ind. Cas. 921; 11 Cr. L. J. 417; 37 C. 315.

(4) 20 Ind. Cas. 619; 7 S. L. R. 29; 14 Cr. L. J. 459.

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We, therefore, alter the convictions of the accused to culpable homicide not amounting to murder under section 304, part first. We confirm the sentences of accused Nos. 1, 3, and 4. But accused No. 2 is a boy of 16 acting under the influence of his father: we reduce the sentence to rigorous imprisonment for five years and direct the sentence to be carried out in the Juvenile Jail at Dharwar.

Convictions altered; Sentence partly reduced.

LOWER BURMA CHIEF COURT.
CRIMINAL REVISION No. 188 B OF 1915.

September 2, 1915.

Present:—Mr. Justice Parlett.

MG. TUN MYAING—APPELLANT

versus

NGA KAUK SAN AND OTHERS—

RESPONDENTS.

Criminal Procedure Code (Act V of 1898), s. 495—Revision—Records called for by Sessions Judge on his own motion and returned without interference—Subsequent application by complainant to re-open the case—Duty of Sessions Judge.

A Sessions Judge, who himself calls for the records of a case in which the accused has been discharged and returns the same with the remark that in his opinion there is no cause for interference, is not precluded but on the other hand is bound to entertain an application for reopening the case, presented by the complainant. He cannot reject such application on the ground of his previous non-interference on his own motion.

Review of the order of the third Additional Magistrate of Nyaunglebin, dated the 28th of May 1915, passed in Criminal Trial No. 22 of 1915.

JUDGMENT.—Mg. Tun Myaing prosecuted four persons under sections 379 and 381 of the Indian Penal Code before the third Additional Magistrate of Nyaunglebin, who on 28th May 1915 discharged them all.

On the first July, on perusal of the statement of the cases dealt with by the Criminal Courts in the Pegu District during May, the Sessions Judge called for the proceedings in the case. On the 12th July the Sessions Judge ordered the record to be returned, "on a perusal of the record no cause appearing for interference."

On the same day an application was filed by an Advocate on behalf of Mg. Tun Myaing asking the Sessions Judge to re-open the case in which the Magistrate had discharged the accused, and the Judge called for the proceedings. On 19th July he returned the petition to be presented to the Chief Court as the case had been before him in revision. The application was then filed in this Court. I doubt whether the order returning the petition for presentation to this Court was correct, as I know of no provision for such a course. I think the correct procedure would have been to deal with the petition, and if it was rejected leave the petitioner to take any further steps which he might be advised to take.

I think, however, that the Sessions Judge may have regarded a consideration of the petition on its merits as being of the nature of a review of his order of 12th July returning the proceedings, and, therefore, have thought that he was not competent to enter upon it.

Though, however, a mere perusal of the record may not have disclosed sufficient cause to the Sessions Judge to interfere on his own motion, when the complainant came forward and alleged specific reasons for interfering I do not think the Sessions Judge was precluded from hearing him, and, if the arguments led him to do so, from altering his view. I think, therefore, that he should have heard complainant's Advocate, and if he was of opinion that there were grounds of re-opening the case against any of the accused, he should have given him or them an opportunity to show cause against that being done. The application will, therefore, be returned to the Sessions Judge for disposal accordingly.

Application returned.

EMPEROR v. KAMAL.

SIND JUDICIAL COMMISSIONER'S
COURT.

CRIMINAL REVISION No. 26 OF 1915.

April 7, 1915.

Present:—Mr. Pratt, J. C., and Mr. Boyd,
A. J. C.

EMPEROR—APPLICANT

versus

KAMAL—RESPONDENT.

*Criminal Procedure Code (Act V of 1898), s. 439
(3)—High Court's power to enhance sentence beyond
power of trying Magistrate—Practice.*

In cases of convictions by second or third class Magistrates, the High Court has power to enhance the sentence beyond the power of the trying Magistrate.

The power of enhancement of sentence conferred upon the High Court by section 439, Criminal Procedure Code, is limited only by clause (3) of that section which clause does not regard the difference in the powers of the trying Magistrates under section 32 of the same Code but lays down the general rule that in cases of sentences passed by Magistrates not empowered under section 34, the limit of enhancement shall be the sentence that may be inflicted by a Presidency or a first Class Magistrate. [p. 1000, col. 2.]

The practice of this Court to accept the conviction as conclusive and to consider the question of enhancement of sentence on the basis of the facts found by the lower Court, would not be followed when it is proposed to enhance a sentence beyond the powers of the trying Magistrate. In such cases both the conviction and the sentence are open to revision. [p. 1000, col. 2.]

Emperor v. Chinto Bhairava, 10 Bom. L. R. 93; 7 Cr. L. J. 119; 32 B. 162, referred to.

Mr. E. Raymond, (Public Prosecutor for Sind), for the Crown.

JUDGMENT.—This is a reference by the District Magistrate, Karachi, under section 438, Criminal Procedure Code.

The accused has been convicted of the theft of five camels worth Rs. 270 by the 2nd Class Magistrate, Manjhand, and has been sentenced to five months' rigorous imprisonment.

The District Magistrate recommends that the sentence be enhanced.

The prosecution was instituted before a Magistrate who under section 32 is not empowered to pass a sentence of imprisonment exceeding 6 months. But the accused cannot on that account claim that the sentence should not exceed six months, for the second Class Magistrate might under section 349 have referred the case to a Sub-Divisional Magistrate or District Magistrate for

severer punishment. In that case the conviction would have been that of the Sub-Divisional or District Magistrate and it might be contended that if the conviction of the accused is by a second Class Magistrate the sentence cannot be enhanced to more than six months. But the power of enhancement conferred upon the High Court by section 439 is limited only by clause (3) of that section. That clause does not regard the difference in the powers of trying Magistrates under section 32 of the Code, but lays down the general rule that in the case of sentences passed by Magistrates not empowered under section 34, the limit of enhancement shall be the sentence that might have been inflicted by a Presidency Magistrate or Magistrate of the first Class. This, therefore, gives us power to enhance the sentence of imprisonment to two years.

It has been the invariable practice of this Court to accept the conviction as conclusive and to consider the question of enhancement of sentence on the basis of the facts found by the lower Court. This is also the practice of the Bombay High Court, *Emperor v. Chinto Bhairava* (1). But I think that that the practice should not be followed when it is proposed to enhance a sentence beyond the limit of the powers of the trying Magistrate. The Legislature regards a conviction by a second Class Magistrate as an insufficient basis for a sentence of more than six months' imprisonment. Therefore before the Court of revision enhances the sentence beyond that term, it should satisfy itself that the conviction is correct. I, therefore, treat both the conviction and the sentence in the present case as open to revision.

There is no doubt the conviction is correct for the accused pleaded guilty. As to the sentence there is no evidence of the previous conviction to which the Magistrate refers, but having regard to the value of the property stolen and the necessity for deterrent sentences in cases of cattle theft, I would enhance the sentence to one of rigorous imprisonment for nine months.

BOYD, A. J. C.—I concur.

Sentence enhanced.

(1) 32 B. 162; 10 Bom. L. R. 93; 7 Cr. L. J. 119.

In re RAMASAMIER.

MADRAS HIGH COURT.
CRIMINAL REVISION CASES NOS. 375 AND 376
OF 1915.

CRIMINAL REVISION PETITIONS NOS. 296
AND 297 OF 1915.
October 7, 1915.

Present:—Justice Sir William Ayling, Kt.

In re RAMASAMIER AND OTHERS —

ACCUSED—PETITIONERS.

Criminal Procedure Code (Act V of 1898), ss. 203, 204, 439—Criminal case, abatement of—Death of complainant—Another complaint on the same facts, maintainability of.

As there is no abatement of a criminal case on the death of the complainant, a fresh complaint on the same facts will not lie but the old complaint must be treated as pending and proceeded with to its disposal.

Petitions, under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Court of the Stationary Second Class Magistrate of Pattukottah in Calendar Case No. 341 of 1915, dated the 22nd June 1915

Mr. A. Ramaswami Mudaliar, for Mr. T. V. Gokalswami Mudaliar, for the Petitioners.

Mr. P. R. Grant, for the Government.

Mr. G. S. Ramachandrier, for the Complainant.

ORDER.—The order of the second Class Magistrate of Pattukottah, dated 12th April 1915, purporting to dispose of Calendar Case No. 1308 of 1913 runs as follows:—
“In this case, while the trial was proceeding the complainant is dead, and so it abates and is closed without any judgment.”

There is no abatement of a criminal case on the death of complainant and the order is illegal and of no effect whatever. Calendar Case No. 1308 of 1913 must be regarded as still pending.

The subsequent complaint presented by Singaravelu Thevan, which has been taken on file and numbered as Calendar Case No. 341 of 1915, admittedly related to exactly the same facts, as those which formed the subject-matter of the Calendar Case No. 1308 of 1913. It should, therefore, have been dismissed under section 203 of the Code of Criminal Procedure. Instead of this the Magistrate directed that it should be filed and process issued under section 204 of the Code of Criminal Procedure.

Under section 423 (b) of the Code of Criminal Procedure, read with section 439

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The Code of Criminal Procedure, I reverse that order and direct the dismissal of Singaravelu Thevan's complaint. I further direct that Calendar Case No. 1308 of 1913 be restored to file and that the Magistrate do proceed to dispose of it according to law. The case against accused Nos. 1, 2, 8 and 9 has, of course, already been disposed of by their discharge.

Petition granted; Order set aside.

SIND JUDICIAL COMMISSIONER'S
COURT.

CRIMINAL REVISION APPLICATION No. 44
OF 1915.

May 6, 1915.

Present:—Mr. Pratt, J. C., and Mr. Boyd,
A. J. C.

RAM HAKKH—APPLICANT

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 263 (h)—Summary trial—Conviction, reasons for, what to show.

In cases tried summarily under section 260, Criminal Procedure Code, the statement of reasons for a conviction which the Magistrate is bound to record under section 263 clause (h), should present a clear statement of the facts constituting the offence and should show also that each of the ingredients for a conviction has been considered and held proved by the Magistrate. [p. 1002, col. 1.]

Queen-Empress v. Shidgauria, 18 B. 97, *Queen-Empress v. Mukundi Lal*, 21 A. 189; A. W. N. (1899) 34, referred to.

Application against the order of the Additional City Magistrate, Karachi.

Mr. Khanchand Gopaldas, for the Applicant.

Mr. T. G. Elphinston (Public Prosecutor for Sind), for the Crown.

JUDGMENT.—We have carefully studied the magisterial record in this case and are unable to extract from it a clear view of the facts. The conviction is based upon the evidence of two witnesses, Murdanali and Fateh Mahomed, Police Constable. Murdanali, the Magistrate says, saw the accused, a shunting porter, tear a bag of sugar and take some out of it. But it does not appear whether this bag was on the ground or on the waggon. He does not say that the accused after taking the sugar filled the sugar that he took into another bag. He says that he chased him but the accused got on his

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engine and went away. Apparently the accused knew that he was pursued and, therefore, escaped on an engine. Then he says that a minute or two after he caught the accused with sugar. It does not appear where he caught the accused, *i.e.*, whether the accused was then on the engine or on the ground. Nor it is clear what is meant by the expression 'caught the accused with sugar.' Does this mean that the accused had a small bag of sugar in his hands or in his pocket at the time or that the accused was merely standing near the place where the stolen sugar was or that he was merely standing near the original bag of sugar? The other witness, Fateh Mahomed, merely says that the bag of sugar was with the accused when he seized him. Does this mean the original bag or does it refer to some fresh bag in which the accused had placed the sugar? Does it mean that the accused had the sugar in his hands or in his pocket or only that he was standing near it? It seems improbable that the accused had retained possession of sugar if he had been seen and chased by Murdanali. The judgment is so ambiguous that it is not clear that possession of stolen sugar by the accused was proved.

The record in summary cases is very brief, and, therefore, it has been repeatedly held that the statement of reasons for a conviction which the Magistrate is bound to record under section 263, clause (h), Criminal Procedure Code, should present a clear statement of the facts constituting the offence and should show that each of the ingredients for a conviction has been considered and held proved by the Magistrate. See the cases of *Queen-Empress v. Shidgauda* (1) and *Queen-Empress v. Mukundi Lal* (2).

The Magistrate's record is imperfect and it does not disclose sufficient materials to support the conviction.

We, therefore, reverse the conviction and sentence and order the accused to be set at liberty.

Conviction and sentence reversed.

(1) 18 B. 97.

(2) 21 A. 189 A. W. N. (1899) 84.

ALLAHABAD HIGH COURT.
CRIMINAL REVISION No. 450 OF 1915.
July 10, 1915.

Present:—Mr. Justice Tudball.

TULSHI RAM—APPLICANT

versus

ABRAR AHMAD AND OTHERS—

OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), Ch. XII, ss. 145, 522—Magistrate's power to dispossess a person and place another in possession—Revision.

There is no provision in Chapter XII of the Criminal Procedure Code which gives a first Class Magistrate power to oust one person and to place another person in possession. The only provision of the Code which entitles a Magistrate to dispossess a person of property and re-place him by another person who is entitled, is section 522 of the Code, and for the purpose of exercising powers therein granted, it is necessary that there should have been a conviction of an offence. [p. 1003, col. 1.]

An order of a District Magistrate declining to carry out such an order passed by a first Class Magistrate is not open to revision. [p. 1003, col. 1.]

Criminal revision against an order of the District Magistrate of Bijnor.

Mr. Satya Chandra Mukerji, for the Applicant.

Dr. S. M. Sulaiman, for the Opposite Party.

Mr. R. Malcomson (Assistant Government Advocate), for the Emperor.

JUDGMENT.—The applicant has come to this Court on revision in the following circumstances. There is a certain house which is in dispute between him and the opposite party and he applied to a Magistrate to take action under section 145 of the Code of Criminal Procedure. On the 5th of December 1914, the Magistrate passed an order under section 145 calling upon the parties concerned in the dispute to attend his Court and to put in written statements of their respective claims. The Magistrate proceeded to make his enquiry and he came to the conclusion that Tulshi Ram had been wrongfully dispossessed on the 25th of November 1914 by the opposite party. He accordingly treated him as having been in possession on the date of his order of the 5th of December 1914, acting under the first of the provisos of clause 4 of section 145. He thereupon passed an order under clause 6 of that section declaring Tulshi Ram to be entitled to possession of the house until evicted therefrom in due course of law, and he forbade all disturbances

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of such possession until such eviction. So far the order of the Magistrate appears to have been good and well within his jurisdiction. He, however, added the following sentence: "The possession of the house in question will be given to Tulshi Ram through the Police." This latter portion of his order is based upon no provision in the Code of Criminal Procedure of which I am aware. Chapter XII nowhere gives a first Class Magistrate any such power as to oust one person and to place another person in possession. The only provision in the Code of Criminal Procedure which entitles a Magistrate to dispossess a person of property and re-place him by another person who is entitled, is section 522 of the Code, and for the purpose of exercising powers therein granted it is necessary that there should have been a conviction of an offence. This latter portion, therefore, of the Magistrate's order, that the possession of the house could be given to Tulshi Ram through the Police, appears to be *ultra vires* completely. Tulshi Ram in good faith applied to the Magistrate to enforce this portion of the order. The Magistrate sent on the petition to the Superintendent of Police asking that it might be done and the Deputy Superintendent of Police might be deputed to see the order carried out. The Superintendent of Police referred the matter to the District Magistrate, pointing out that the order should have come from the District Magistrate and expressing his readiness to maintain order and peace. He seems in his order of reference to have assumed that the dispossession was to be carried out by some Revenue Official. On this the District Magistrate passed an order which is the subject of revision; that order being "I am not going to order actual possession to be given by the Police." In other words the District Magistrate, who is the district head of the Police, declined to carry out the order of the first Class Magistrate that the opposite party should be dispossessed by the Police. It is against this order that Tulshi Ram has come to this Court in revision. In the circumstances of the case the order of the first Class Magistrate being, as I have pointed out, *ultra vires*, the District Magistrate's order declining to allow the Police to be utilised for the purpose of carrying out an illegal order is, in my opinion a very proper order indeed, in which I would not interfere.

It seems to me that it is an order which is not open to revision by this Court at all. It is curious that under section 145 of the Code the Magistrate is allowed to treat a person, who has been wrongly and forcibly dispossessed, as having been in actual possession on the date on which he passed his initial order under clause 1 of the section, while the section provides no machinery under which or through which the Court may proceed to remove the wrongdoer from possession and put the other man in his place. As far as I can see the remedy for Tulshi Ram in the present case is to make a complaint in respect of his wrongful and forcible dispossession and to prosecute the other side, and if the Magistrate should convict, then it would be open to him to apply to the Magistrate to exercise the powers granted by section 522 of the Code. It is quite clear that in proceeding under section 145, as the law stands, it is impossible for the Magistrate to forcibly turn out one person and place another in possession of the property. The application is dismissed.

Application dismissed

SIND JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION APPLICATION No. 17 OF 1915.

June 25, 1915.

Present: - Mr. Pratt, J. C., and Mr. Fawcett, A. J. C.

LUNIDOMAL—APPLICANT

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), s. 379—Dishonest intention—Burden of proof—Assertion of bona fide claim of right.

When a person is prosecuted for the offence of theft, it is for the prosecution to show that he was acting dishonestly. If the circumstances show that he was acting in the assertion of a *bona fide* claim of right, a dishonest intention cannot be attributed to him. [p. 1004, col. 1.]

Application for revision against the order of the first Class Magistrate, Kambar.

Mr. Mulchand Manjhanmal, for the Applicant.

Mr. C. M. Loco (Assistant Public Prosecutor), for the Crown.

JUDGMENT.—The bailiff of the Civil Court, Larkana, attached in the house of the

In re HASSAN SAHIB.

accused an article called either "Batli" or "Bati" which, the Magistrate says, is a cooking utensil. The accused snatched the utensil from the bailiff's hand and for so doing has been convicted of the offence of theft. The defence of the accused is that the cooking utensil was not liable to attachment. As to this the Magistrate says that "the point is a law point and the accused instead of taking the law into his own hands could very well have urged it in a competent Court". The criticism would have been just if the accused had been prosecuted under section 186, Indian Penal Code, for unlawfully obstructing the bailiff in discharge of his public functions. In that case, provided the bailiff was acting in good faith, the legality of the attachment would be immaterial. See the case of *Queen-Empress v. Poomalai Udayan* (1). But the accused is prosecuted for the offence of theft, it is for the prosecution to show that he was acting dishonestly and if the circumstances show that the accused was acting in the assertion of a *bona fide*, claim of right a dishonest intention cannot be attributed to him. Here the accused claims that the utensil was not liable to attachment and his claim was not only *bona fide* but is well founded, having regard to section 60 of the Code of Civil Procedure. We think there was no dishonest intention on the part of the accused and, therefore, reverse the conviction and sentence and order that the fine, if paid should be refunded.

Conviction and sentence reversed.

(1) 21 M. 296; 1 Weir 135.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 464 OF 1915.

CASE REFERRED No. 53 OF 1915.

October 11, 1915.

Present:—Justice Sir William Ayling, Kt.

In re HASSAN SAHIB—ACCUSED.

Madras District Municipalities Act (IV of 1884),—*Ootacamund Municipality By-law No. 54*—"Other building material", meaning of—Sand, if included in the term.

In By-law No. 54 of the Ootacamund Municipality the expression "the other building material" must be "*ejusdem generis*" to bricks, stone and road metal in its potentially deleterious effect on the public thoroughfare. Therefore it does not include sand. [p. 1005, col. 1.]

Case referred for the orders of the High Court, under section 438 of the Criminal Procedure Code, by the Sessions Judge of Coimbatore Division, in his letter D. No. 6094, dated the 23rd July 1915.

The *Public Prosecutor*, for the Government.

ORDER.—This reference involves the question of whether sand falls within the category of "other building material" in By-law No. 45 of the Ootacamund Municipality.

The By-Law runs as follows:—"Every vehicle used within the Municipality for the conveyance of bricks, stone, metal, or other building materials shall be so constructed that the contents shall be duly secured therein during transit through the public streets. Owners of vehicles failing to secure such conditions shall be liable to a fine not exceeding Rs. 20."

The majority of the Bench were of opinion that sand should be regarded as "other building material". One member of the Bench, Mr. Parsons, in a very able minute of dissent took the opposite view, in which he is supported by the Sessions Judge, who has referred the case under section 438 of the Criminal Procedure Code.

The question is one by no means easy of decision: but on the whole it appears to me that the view of the dissenting Magistrate is correct. As has been pointed out, sand may be used for many purposes unconnected with building and in the present case there appears to be no evidence to show for what purpose the sand in the cart was destined. Apart from this, the object of the section is obviously the protection of the public streets from the obstruction caused by the accidental falling out of the contents of moving carts. In the case of bricks, stone and metal (by which is presumably meant road-metal) this obstruction is obvious, inevitable and a serious nuisance. So much cannot be predicated of sand. No doubt the upsetting of a cartload of sand in the road would be a nuisance and obstructive to traffic, but

In re GONTLA KRISHNAMMA.

the falling of sand in such small quantities as would be due to the absence of a back board to the cart (the defect in the present case) could hardly be either. I think the dissenting Magistrate was right in holding that the "other building material" must be "*ejusdem generis*" to bricks, stone, and road-metal in its potentially deleterious effect on the public thoroughfares, and that sand does not satisfy this requirement.

The conviction and sentence are reversed and the fine, if paid, will be refunded.

Conviction set aside.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE NO. 204 OF 1915.

CRIMINAL REVISION PETITION NO. 163 OF 1915.

September 30, 1915.

Present:—Justice Sir William Ayling, Kt.

In re GONTLA KRISHNAMMA—ACCUSED
—PETITIONER.

License—Breach of conditions—Every breach a distinct offence—Joinder of charges—Criminal Procedure Code (Act V of 1898), ss. 234 to 236, 239.

Every breach of the conditions of a license or permit is a distinct offence and under section 233 of the Criminal Procedure Code, 1898, should be made the subject of a separate charge and tried separately.

Petition, under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of the Sub-Divisional Magistrate of Gooty, in Criminal Appeal No. 84 of 1914, preferred against the judgment of the Court of the Stationary Sub-Magistrate of Tadpatri, in Calendar Case No. 291 of 1914.

Dr. S. Swaminadhan, for the Petitioner.

Mr. P. R. Grant, for the Government.

ORDER.—Every act in breach of the conditions of the license or permit is a distinct offence and under section 233 of the Criminal Procedure Code should be made the subject of a separate charge and tried separately. The trial together of the four charges framed against petitioner cannot be covered by sections 234, 235, 236 or 239 of the Criminal Procedure Code. The conviction is set aside and a re-trial ordered.

Re-trial ordered.

In re SENNIMALAI GOUNDAN.

MADRAS HIGH COURT.

CRIMINAL APPEAL NO. 131 OF 1915.

April 22, 1915.

Present:—Mr. Justice Oldfield and
Mr. Justice Seshagiri Aiyar.

In re SENNIMALAI GOUNDAN AND OTHERS

—PRISONERS NOS. 1, 2, 4, 9 AND 11—

APPELLANTS.

Criminal Procedure Code (Act V of 1898), ss. 220, 233, 235, 269 (3), 299—Accused charged with different offences—Some triable by Jury others by Assessors—Joint trial, if illegal—Assessors, individual opinion of—Consultation between Assessors, if allowed—Misdirection in charge to Jury.

In cases triable by a Judge with the aid of Jurors and of Assessors respectively, a joint trial for different offences is not illegal under section 269 (3) of the Code. [p. 1006, col. 1.]

There is nothing in the Code of Criminal Procedure authorising or forbidding a Judge to allow consultation between the Assessors: a Judge is entitled to have before him each Assessor's individual and independent opinion, and is not guilty of an irregularity if he refuses such consultation. [p. 1006, col. 2.]

Emperor v. Tirumal Reddi, 24 M. 523; 11 M. L. J. 241; 2 Weir 340, followed.

A Judge's omission to draw the attention of the Jury to the failure to put in evidence an Inquest Report, when that is material for the case, and his omission to mention the existence of enmity between the accused and the prosecution witnesses, when there is clear evidence to support it, are misdirections which vitiate the conviction. [p. 1006, col. 2.]

Appeal against the order of the Court of Session of the Coimbatore Division, in Case No. 124 of the Calendar for 1914

FACTS.—Twelve persons were originally charged before the Additional Sessions Judge for dacoity, house-breaking by night and dacoity with grievous hurt and dacoity with murder. The first three offences were triable by a Jury, while dacoity with murder was triable by the Judge with the aid of Assessors. The Additional Sessions Judge asked the Public Prosecutor to withdraw the other charges and proceed with the graver charges under section 396 of the Criminal Procedure Code, but this procedure was not adopted and the accused were tried on all the charges at one trial. The Additional Sessions Judge summed up the case to the Jury (five gentlemen), and at first asked their opinions as Assessors. One Assessor was not prepared to give his opinion as to which of the accused took

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part in the dacoity. The other four Assessors were equally divided in their opinion. After consultation, however, a verdict was brought in by them as Jury that three of the accused were guilty and two not guilty. The Judge convicted the accused Nos. 1, 2, 4, 9 and 11 of dacoity with murder and sentenced them to transportation for life. They appealed.

Messrs. E. R. Osborne and Narasimha-chariar, for the Appellants.

Mr. P. R. Grant, for the Government.

JUDGMENT.—The accused have been tried by a Jury for an offence punishable under section 395, Indian Penal Code, and by the Additional Sessions Judge with the aid of the Jurors as Assessors for offences punishable under sections 396 and 397. First, 2nd, 4th, 9th and 11th accused have been convicted of these offences and appeal.

Mr. Osborne on their behalf takes exception to the conduct of the trial in that they have been prejudiced by the simultaneous disposal of a charge triable by a Jury and of charges triable with the aid of Assessors and by the Judge's refusal to allow one of the Assessors to consult the others before giving his opinion as to the charges under sections 396 and 397. The Judge, no doubt, as appears from his judgment, would have preferred to hold two trials; and we may observe with reference to sections 226, 233 and 235, Code of Criminal Procedure, that he was fully competent to do so. But the course, which he followed, of trying all the offences charged together is contemplated by section 269 (3); and we must be satisfied that some further special irregularity, which occasioned a failure of justice, took place in connection with it before we can interfere.

Such an irregularity is alleged to have been committed by the Judge's refusal to allow one Assessor to consult the others before giving his opinion. Mr. Osborne relies on the possibility that the Assessor in question, who would not commit himself regarding the presence of the convicted accused among the dacoits, might have been willing to give his opinion against it as the result of consultation. But the existence of such a possibility will be

material only if it is connected with the occurrence of some irregularity in procedure. We cannot find in the Code any provision authorising or forbidding the Judge to allow consultation between the Assessors and although we are not prepared to decide that the Judge may not in his discretion do so, we follow the opinion of Bashyam Aiyangar, J., expressed in *Emperor v. Tirumal Reddi* (1), to the extent of holding that he is entitled to have before him each Assessor's individual and independent opinion. We, therefore, do not think that there was any irregularity in the trial.

Our attention has then been invited to two instances of misdirection in the charge to the Jury regarding the offence under section 395; and we think that they have been established. *Firstly*, the Judge relied on the fact that the witnesses, on whose evidence he invited the Jury to act, prosecution 1st, 2nd and 11th witnesses, named the convicted accused for the first time at the inquest on the day following the occurrence, disregarding the absence of anything in the evidence of prosecution 1st and 2nd witnesses to show that they did so and not exhibiting the Inquest Report. *Next* the defence was that the accused had been implicated owing to the existence of factions, in which they and the prosecution witnesses had taken opposite sides; but the Judge told the Jury that "there was no evidence to support that theory." It is possible that he meant only to negative the existence of direct evidence of any connection between the factions and the implication of the accused. But we doubt whether that construction of what he said would strike the Jury. There was clear evidence of enmity in the depositions of prosecution 1—6 and 9th witnesses; it should have been placed before the Jury and the Jurors should have been asked to consider whether they could draw any inference from it against the prosecution case. As we think that there was misdirection in these two material respects, we must set aside the conviction of the offence under section 395 and direct that the 1st, 2nd, 4th, 9th and 11th accused be re-tried for it.

(1) 24 N. 523; 11 M. L. J. 241; 2 Weir 340.

NILMONEY NAG v. DURGA PADO BANERJEE.

As regards the offences punishable under sections 396 and 397, for which the accused were tried by the Judge with the aid of Assessors, the decision depended on whether the accused were guilty of dacoity.

For no reason has been shown for interference with the Judge's conclusion that the aggravating facts, proof of which is necessary, were established. We understand the Judge to have found against the accused as regards their participation in the dacoity on the grounds indicated in his charge. The corroboration of evidence of the witnesses above specified by their mention of the accused at the inquest was thus of the greatest importance; and when the Inquest Report was not exhibited, we cannot deal with its contents. As we are unable on the evidence before us to concur in the Judge's decision, we set aside these convictions also and direct the re-trial of the accused on the charge of offences punishable under sections 396 and 397, Indian Penal Code.

We think it will be better that the re-trial shall be held by the Sessions Judge. It will, of course, be for him to consider whether he will deal with the charge triable by a Jury and those triable with the aid of Assessors together or not.

Appeal allowed; Re-trial ordered.

CALCUTTA HIGH COURT.

CRIMINAL REVISION NOS. 501 AND 505 OF 1915.

May 20, 1915.

Present:—Mr. Justice Chitty and Mr. Justice Beachcroft.

IN REVISION No. 501 OF 1915

NILMONEY NAG—ACCUSED—PETITIONER

IN REVISION No. 505 OF 1915

JATINDRA MOHAN PAL—ACCUSED—
PETITIONER

versus

DURGA PADO BANERJEE—COMPLAINANT

— OPPOSITE PARTY IN BOTH.

Penal Code (Act XLV of 1860), ss. 478, 486, scope of—'Trade-mark,' counterfeited—Intention to deceive—'Counterfeit,' meaning of.

The expression "trade-mark," as defined in section 478, Indian Penal Code, must not be confined to the trade-mark of the complainant as registered but must include the whole design. [p. 1008, col. 2.]

Where the express intention is to deceive and the petitioners have failed to bring themselves within

the exception to section 486, the case clearly comes within the definition of "counterfeit" in section 28, Indian Penal Code. [p. 1008, col. 2.]

FACTS of the case appear from the following judgment of the 4th Presidency Magistrate of Calcutta, dated the 26th February 1915:—

The complaint in this case was lodged by Durga Pado Banerjee, a clerk in the Office of Morgan & Co., under instructions from Mr. Mitchel, one of the Solicitors of the firm. Mr. Mitchel derives his authority to prosecute on behalf of Messrs. Calvert & Co. from a Power of Attorney sent to Morgan & Co. for the purpose of this case by Mr. Ross, who holds the head Power of Attorney from Calvert & Co. at Bombay. This Power of Attorney has been marked as Exhibit I in this case. The facts of the case are shortly these. F. C. Calvert & Co. have been selling carbolic tooth powder in tin boxes like Exhibit I since a long time in India and their boxes have a very large sale. Accused Jatindra Mohan has been selling carbolic tooth powder in boxes of similar size and design with the name of Paul & Co. in Calcutta. At Bombay his agent, Mukadam, was prosecuted and convicted for infringement of trade-mark under section 486, Indian Penal Code, in 1913. The matter went up on appeal before the Bombay High Court and the Judges there upheld the conviction (*vide* Exhibit 2 and Exhibit 3) in this case. After that on 14th February 1914, Mr. Mitchel sent for accused Jatindra Mohan and told him about the prosecution of his agent in Bombay and asked the accused to return all the boxes to him. Accused gave a half-hearted undertaking to give up all the boxes in his possession. Thereafter, some correspondence passed between the parties, accused virtually agreeing to dispose of the boxes with the letters obliterated. As a matter of fact the boxes were not delivered. So, Mr. Mitchel sent his clerk, Durga Pado, to purchase Paul & Co.'s tooth powder. In April he purchased six boxes and on 3rd August 1914 three boxes, marked Exhibit II and Exhibit III in this case, from the shop of the 2nd and 3rd accused where these boxes were for sale. The prosecution is confined to the three boxes sold on 3rd August 1914. Amongst these boxes, was one box with the label of Mukadam at the foot. This has been separately marked as Exhibit III. This Mukadam was Paul & Co.'s

NILMONEY NAG v. DURGA PADO BANERJEE.

agent at Bombay and was convicted there. The question now is whether Paul & Co.'s boxes are counterfeit trade-marks of F. C. Calvert & Co.'s. Mr. Mitchel on behalf of Calvert & Co. claims the whole of the shape, size, design, colouring and lettering on the boxes as Calvert & Co.'s trade-mark and I think that he is right in so doing. A comparison between the genuine box of Calvert & Co. with Paul & Co.'s boxes would show that the general get-up, the size, the design, the lettering, the colour of the backgrounds, the lettering on the starting portion of the two boxes closely resemble each other and the resemblance is such that one is likely to be mistaken for the other. In my opinion, it is no defence to say that the name Paul & Co. is different, that in Paul & Co.'s boxes the word "*Dantina*" occurs and that the cross mark in a circle which exists in Calvert's boxes does not exist in Paul & Co.'s boxes. With slight difference, the resemblance is so great that one is apt to be mistaken for the other and that I think is the gist of the offence. Jatindra Mohan was asked to give up the boxes and though he gave a half-hearted undertaking and was told of the conviction of his agent at Bombay, he did not give up the boxes. It appears that the boxes of Paul & Co. continued to be sold in Calcutta and were sold in April and August in the shop of the 2nd and the 3rd accused. There is no evidence that Jatindra continued to manufacture after he was warned and so I acquit him of the charge, section 483, Indian Penal Code. But taking all the circumstances into consideration, there can be no doubt that he abetted the sale of these boxes. It has been proved that these were sold at the shop of the 2nd and 3rd accused. The 2nd accused was not present at any of the sales and so I acquit him, section 258, Civil Procedure Code. As regards Nilmoney, he sold the boxes and it is for him to show that he did so innocently. He has not disclosed that onus and I find him guilty, section 486, Indian Penal Code, and sentence him to pay a fine of Rs. 100 (one hundred) or in default two months' simple imprisonment. I find accused Jatindra Mohan Paul guilty, section 486/109 Indian Penal Code, and as he is the principal man, I sentence him to pay a fine of Rs. 150 or in default three months' simple imprisonment.

On the side of the defence, several other boxes of other manufacturers were produced as sold in the market. But there is nothing to show that Calvert & Co. or their agents ever acquiesced in that, nor it appears to me a good defence to say that others have infringed complainants' trade-marke.

IN 501 OF 1915.

Babus *Manmatha Nath Mukherjee* and *Bibhuti Bhusan Saha*, for the Petitioner.

Babu *Tarakeswar Pal Chowdhury*, for the Opposite Party.

IN 505 OF 1915.

Babu *Bibhuti Bhusan Saha*, for the Petitioner.

Mr. *Gregory* and Babu *Tirakeswar Pal Chowdhury*, for the Opposite Party.

JUDGMENT.—These are two Rules issued at the instance of the two accused, Jatindra Mohan Pal and Nilmoney Nag, on the ground that the facts found do not constitute an offence under section 486, Indian Penal Code. Nilmoney Nag was charged with selling goods bearing a counterfeit trade-mark and Jatindra Mohan Pal was charged with abetment of the offence. The matter has been fully argued before us, and we are of opinion that the petitioner's acts bring them within the purview of section 486. The trade-mark said to be counterfeited is that of F. C. Calvert and Co., manufacturers of carbolic tooth powder. The expression "trade-mark" as defined in section 478 must not be confined to the trade-mark of the complainants registered in England, but must include the whole design on the top of the box and the black label pasted round the side. For the name F. C. Calvert has been substituted the name of Paul, and for the registered trade-mark, which consists of four arrows in a circle, has been substituted the word "*Dantina*". But apart from these two points of difference the imitation of the whole design is most marked and complete. It clearly comes within the definition of "counterfeit" in section 28. There is no doubt that the intention was to deceive and the petitioners have failed to bring themselves within the exceptions in section 486. The same view seems to have been taken by the Bombay High Court. The Rules are discharged.

Rules discharged.

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 — 1884—IV. See MADRAS DISTRICT MUNICIPALITIES ACT.
 — 1884—V. See MADRAS LOCAL BOARDS ACT.
 — 1886—I. See MADRAS ARKARI ACT.
 — 1888—III. See MADRAS CITY POLICE ACT.
 — 1902—I. See MADRAS COURT OF WARDS ACT.
 — 1904—III. See MADRAS CITY MUNICIPAL ACT.
 — 1905—III. See MADRAS LAND ENCROACHMENT ACT.
 — 1908—I. See MADRAS ESTATES LAND ACT.

ACTS—(LOCAL)—PUNJAB.

- Act 1887**—XVI. See PUNJAB TENANCY ACT.
 — 1887—XVII. See PUNJAB LAND REVENUE ACT.
 — 1900—XIII. See PUNJAB ALIENATION OF LAND ACT.
 — 1904—I. See PUNJAB LOANS LIMITATION ACT.
 — 1905—II. See PUNJAB PRE-EMPTION ACT.
 — 1911—III. See PUNJAB MUNICIPAL ACT.
 — 1914—III. See PUNJAB COURTS ACT.

ACTS—(LOCAL)—U. P.

- Act 1869**—I. See OUDH ESTATES ACT.
 — 1881—XII. See NORTH-WESTERN PROVINCES RENT ACT.
 — 1886—XXII. See OUDH RENT ACT.
 — 1899—III. See U. P. COURT OF WARDS ACT.
 — 1901—II. See AGRA TENANCY ACT.
 — 1901—III. See U. P. LAND REVENUE ACT.
 — 1903—II. See BUNDELKHAND LAND ALIENATION ACT.
 — 1910—IV. See U. P. EXCISE ACT.

REGULATIONS.

- Reg. 1799**—V. See BENGAL WILLS AND INTESTACY REGULATION.
 — 1819—II. See BENGAL LAND REVENUE ASSESSMENT (RESUMED LANDS) REGULATION.
 — 1886—I. See ASSAM LAND AND REVENUE REGULATION.

STATUTES.

- 24 & 25 VIC., C. 104. See CHARTER ACT.
 45 & 46 VIC., C. 61. See BILL OF EXCHANGE ACT.
 57 & 58 VIC., C. 60. See MERCHANT SHIPPING ACT.

Actionable claim. See TRANSFER OF PROPERTY ACT, s. 130.

Adoption. See HINDU LAW.

Adverse possession against female holder
 — Suit by reversioner, whether barred **991**

— Grant to Municipality —
 Adverse possession against Municipality for more than 12 years, effect of—Limitation Act (IX of 1908), s. 28, Sch. I, Art. 144 **13**

— Landlord and tenant **917**

— Lessee—Under-proprietary rights **218**

— Limitation—Plaintiff treating defendant as trespasser—Claim for rent **946**

— Limitation — Pleadings —
 Rent-free title—Adverseness to that extent.

Where the plaintiff in a suit for assessment of rent clearly proceeded upon the assumption that there was no relationship of landlord and tenant, and the same view was also advanced in the written statement, and the evidence also showed that even at the trial the case was that the defendants were in possession not as tenants but wrongfully and without any right, and it was found that the defendants had been in possession for more than 12 years on their own account, though they claimed no more than a rent-free title:

Held, that the possession in the circumstances would be adverse to that extent and would furnish an answer to the suit. **C. BIRENDRA KISORE MANIKYA v. RAM CHANDRA DEY**, 22 C. L. J. 153 **948**

— Long possession—Non-payment of rent.

Where the defendant has been in possession on his own behalf far beyond the statutory period and during all this time there has been no payment of rent by him and no receipt of rent by the plaintiff in respect of the land in suit, there are the elements that are required for a plea in bar by reason of adverse possession. **C. KADIR BUX v. BIRENDRA KISORE MANIKYA**, 22 C. L. J. 119 **914**

— Mortgage by *watan*dar —
 Adverse possession by mortgagee after mortgagor's death—Presumption **396**

— Non-payment of rent—Long possession—Payment of rent **937**

— Possession by one member on behalf of all, if can be made adverse.

Where one member of a family gets into possession of certain lands on behalf of the whole family, his possession enures for the benefit of all the members of the family and he cannot make it adverse to them. **M. HIDAYAT ALI KHAN SAHIB v. KHADAR KHAN SAHEB** **586**

— , qualified—Perpetual lease
 — Rent, uniform, rate of, payment of, effect of **276**

— Sale of property of absconder under ss. 87 and 88 of Criminal Procedure Code—Vendee, rights of—Suit by collaterals of absconder—Limitation Act (IX of 1908), Sch. I, Art. 144.

A sale under sections 87 and 88 of the Criminal Procedure Code, 1898, of the property of an absconding accused transfers only his personal rights and does not confer absolute ownership on the vendees.

Where, therefore, *H*, a village proprietor, murdered his wife in 1891 and absconded and his property was

Adverse possession—conold.

sold to the predecessors-in-interest of the defendants Nos. 2 to 7 and *H* was afterwards arrested, tried, convicted and hanged on 22nd September 1893:

Held, on a suit by his collaterals instituted on 22nd August 1903 for possession on the ground that the sale did not affect their reversionary rights, that the defendants' possession did not become adverse to the plaintiffs till after the death of *H* and the suit was, therefore, quite within time. **P. NIAMAT ALI v. SECRETARY OF STATE, 52 P. R. 1915 71**

—*Tenant in possession—Additions made without permission of landlord—Agreement to retain rent in part payment of amount spent.*
Where the father of the plaintiff came into possession of the land in dispute as a tenant and was allowed by the proprietors to build some stables thereon, and appropriated the rent towards the cost of the building in accordance with an agreement recorded in the *jamabandi*, but in making subsequent additions did not obtain the permission of the landlords:

Held, that in the circumstances of the case there was no overt act amounting to a denial of the landlords' title. **P. NAWAB BEGAM v. MUHAMMAD MIRAJ-UDDIN, 127 P. W. R. 1915 28**

—*Title to office—Performance of duties, necessity of, essential—Limitation Act (IX of 1908), Sch. I, Arts. 124, 141 962*

Agency Rules, r. 10, cl. (2), r. 16—
Divisional Assistant, power of—Agent, power of, to hear appeals from orders of Divisional Assistant.

A Divisional Assistant has, on a true construction of rule 10, clause (2), and rule 16 of the Agency Rules, power to decide cases referred to him for disposal by the Agent.

Under the rules the Agent has power to entertain and dispose of appeals preferred in such cases disposed of by the Divisional Assistant.

A decree should not be given to the plaintiff in a suit on a promissory note merely on a comparison of handwriting when he himself does not go into the witness-box or give any other evidence. **M. RAJENDRA SINGH v. MAHARAJA OF JEYPORE 76**

Agra Tenancy Act (II of 1901), ss. 4 (5), 167—*Defendant sued as trespasser—Jurisdiction of Civil or Revenue Court—Alternative relief for declaration as tenant.*

The plaintiff sued the defendants in the Civil Court for ejectment upon the allegation that whatever the defendants might once have been they were now in wrongful possession of the land as trespassers. The plaintiff further claimed as an alternative relief that if it be found that the defendants were holding as tenants, a declaration might be given to that effect:

Held, that the suit was maintainable in Civil Court and that the Civil Court had jurisdiction to give a declaration as to the existence or non-existence of tenancy but not as to the class of tenancy. **A. ALI JAFAR v. PHULMANTA KOER, 13 A. L. J. 843 546**

—**s. 10, cl. (12) 911**

—**s. 11—***Tenant's possession for over 12 years—Tenant, meaning of—Non-payment of rent for a number of years, effect of.*

Agra Tenancy Act—contd.

Occupancy rights are acquired by twelve years' possession as a tenant but the years in which there was no contract in regard to rent, will not count towards the acquisition of occupancy rights, whether he hold with or without the consent of the land-holder **U. P. B. R. JASODA KUAR v. DALAIL SINGH 798**

—**s. 21 70**

—**s. 22—***Succession—Last male occupancy tenant dying before Tenancy Act—Widow dying after Tenancy Act—Daughter's son, if collateral—Co-sharing, if necessary.*

One *R* who was the last male occupancy tenant of the holding in dispute died before the present Tenancy Act came into force and upon his death, his widow succeeded. She died after the Tenancy Act had come into force. *R*'s daughter's sons who were not born at *R*'s death claimed occupancy rights upon the death of the widow. The claim was resisted by the *zamidar* on the ground that they did not share in cultivation with *R*:

Held, that the daughter's sons were not collaterals and that under the old Act, which applied in this case, they could succeed without co-sharing in the cultivation. **U. P. B. R. SITAL PRASAD v. BISHEEN DAT 804**

—**s. 22—***Succession—Occupancy holding—Collateral—Full male owner of occupancy right died prior to Act II of 1901—Widow, death of, after enforcement of new Act—Devolution of tenancy.*

P, who was an occupancy tenant, died prior to the passing of Act II of 1901. His widow succeeded to his holding. The widow died leaving a daughter while Act II of 1901 was in force. The collaterals of *P* sued the daughter for possession of the holding and some of them alleged to have been in joint cultivation with *P*:

Held, that the plaintiffs could not succeed to the holding after the death of the widow. **A. NATHU v. GOKALIA, 13 A. L. J. 947 215**

—**ss. 25, 66—***Sub-letting from year to year extending over five years, if illegal—Failure to consider applicability of s. 66—Material irregularity—Section 66 considered but not applied, if material irregularity—Revision.*

Where the sub-letting is from year to year extending over a period exceeding five years, each sub-letting is in contravention of section 25 of the Tenancy Act.

A failure to consider whether section 66 should apply is a ground for revision but if the point was considered and the benefit of that section refused, there is no ground for revision. **U. P. B. R. RAHAT HUSAIN v. ABDUL HAFEEZ 770**

—**s. 31 811**

—**s. 32—***Suit by transferee of a portion of fixed-rate holding for possession, maintainability of.*

A transferee of a portion of a fixed-rate holding sued for possession of the portion purchased by him the tenant who was entitled to only $\frac{1}{4}$ ths of the holding but was in possession of the whole:

Held, that the suit was not barred by section 32 of the Agra Tenancy Act. **A. KEDAR v. DEO NARAIN, 13 A. L. J. 919 89**

Agra Tenancy Act—concl'd.

_____ s. 34	811
_____ s. 51— <i>Suspension of rent—Right of zemindar to recover rent Land-holder collecting suspended rent by distraint, if commits offence—Penal Code (Act XLV of 1860), s. 188.</i>	
An order suspending or remitting arrears of rent is not an order prohibiting the land-holder from receiving the same if tendered, or attempting to realize the same by lawful means.	
Therefore a land-holder endeavouring to collect suspended arrears by process of distraint is not guilty of an offence under section 183 of the Penal Code.	
Its effect is simply to deprive him of his right of suit in respect of the arrears remitted or of the suspended arrears during the period of suspension.	
A. EMPEROR v. RAM SARUP, 13 A. L. J. 619	722
_____ ss. 60, 185— <i>Notice under s. 60—Time, from when runs—Omission to state date from which time is to run—Material irregularity.</i>	
In a notice issued under section 60 of the Agra Tenancy Act the time should run from the date of the issue of the notice and the notice should plainly state this. An omission to do so is a material irregularity. U. P. B. R. BAKHTAWAR KHAN v. NIAZ-UL-NISSA	788
_____ s. 66	770
_____ s. 79	552
_____ s. 150— <i>Land held free of rent with or without landlord's consent, distinction between—Ejectment—Remedy.</i>	
Where land is held free of rent, distinction must be drawn between cases where the land is so held 1) with consent and (2) without consent of the land-holder. In the latter case Selected Decision No. 3 of 1910 will apply but not in the former case as he is not a tenant and the remedy of the landlord is to proceed by a suit under section 150, Act II of 1901. U. P. B. R. DWARKA PRASAD v. DIRGJ SINGH	789
_____ s. 164	568
_____ s. 164— <i>Suit for profits against lambardar—Burden of proof—Negligence.</i>	
In a suit for profits against a lambardar if the co-sharers give general evidence to show that the rents are greatly in arrear, that the tenants are solvent and that there are no special circumstances why the rents should not have been collected, the onus is shifted on to the defendant of showing that for some reason not connected with his own negligence or misconduct he was unable to collect the rents. A. SHIVA CHANDER SINGH v. RAM CHANDER SINGH, 13 A. L. J. 851	550
_____ s. 167	546
_____ s. 185	788
_____ s. 202, <i>applicability of—Agricultural holding—Grove.</i>	
Section 202 of the Agra Tenancy Act, II of '901, applies only to agricultural holdings and not to groves. A. NATHA MAL v. ROSHAN LALL	48
_____ Agreement with licensee to share profits—Agreement not allowed by terms of license—Agreement, if void	913

Ahmedabad Taluqdars Act (VI of 1862), s. 6**Alienation. See CUSTOM; HINDU LAW.**

_____ *Necessity—Antecedent creditor third party—Money borrowed from third person by an agriculturist for trade—Second appeal—Punjab Courts Act (III of 1914), s. 41.*

Santa Singh v. Waryam Singh, 24 Ind. Cas. 367; 19 P. R. 1915; 147 P. W. R. 1914; 207 P. L. R. 1914 has no application to a case where the antecedent creditor is a third person. A finding that the alienation was for necessity cannot be disturbed in second appeal. P. ALI MOHAMMAD v. MANURA, 98 P. W. R. 1915

Amendment of plaint—Apparal, second

_____ by Appellate Court, when allowed	387
_____ Costs for, when defendant not entitled to	379
_____ Pleadings, case inconsistent with, amendment setting up	323
_____, if allowed, to set up different title and cause of action	499
_____ Suit against dead man—Legal representative, if allowed, to be brought on record	391
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Ancestral property. See CUSTOM.**Annexation of territory—Acts of State—Municipal Courts—Jurisdiction****Anomalous burden—Sale with a condition!****mortgage. See MORTGAGE; TRANSFER OF PROPERTY ACT, s. 98.****Appeal (ivi), abatement of—Application to set aside—Insufficient cause—Neglect of appellant—Civil Procedure Code (Act V of 1908), O. XXII, rr. 4, 9—Case, if can proceed against other respondents.**

Where one of the respondents died on 10th July 1912 and on 16th October 1912 the fact was brought to the notice of the appellant's Counsel by the Chief Court office, but no further steps prior to the hearing on 21st January 1913 were taken while the parties lived at Delhi and there was no difficulty to know the respondent's death or ascertain the names of his heirs and where consequently the appeal was ordered to have abated against the deceased respondent:

Held, that the appellant's carelessness and the culpable means adopted by him for trying to conceal his neglect were sufficient for declining under Order XXII, rule 9 (2), Civil Procedure Code, 1908, to set aside the order of abatement and that the case could not proceed against other respondents. P MUHAMMAD SUBHAN BAKHSI v. ABDUL RAHMAN KHAN, 81 P. W. R. 1915; 55 P. L. R. 1915

_____ Appellant not entitled to set up in argument fresh story different from that given in the grounds of appeal.

An appellant cannot, at the time of arguing the appeal, be allowed to set up a story different from that alleged in the grounds of appeal. U P B. R. MUHAMMAD KHAN v. BECHAN KHAN, 2 O. L. J. 371

Appeal (Civil)—contd.

- Appellate Court, powers of, to make any order **159**
- Appellate Court, power of, to set aside lower Court's judgment—Mere bias or prejudice of Judge, effect of—Remedy **430**
- Appellate Court, second, power of, to arrive at finding of fact—Fact, finding of, when to be questioned in second appeal—Evidence, finding not supported by, effect of.
A second Appellate Court can arrive at a finding of fact in case the Court of first instance comes to no definite finding on the point of fact, or even if it does, it has no evidence to support it and such finding is upheld by the first Appellate Court. **U. P. B. R. BECHU SINGH v. BENI SINGH, 2 O. L. J. 377 380**
- Appellate Court, power of, to admit additional evidence—Test—"Any other substantial cause," force of—Civil Procedure Code (Act V of 1908), O. XXI, r. 27 (b) **402**
- Appellant, one surviving, appeal by, maintainability of—Death of some plaintiffs after institution of suit, effect of—Income of property, part of, spent in upkeep of temple dedicated for public worship—Dedication—Revenue Registers, entries in, weight of—Revenue Courts, partition-officer of, power of—Private property—Waqf property—Partition proceedings, binding effect of **240**
- Court-fee, amount of, payable on appeal—Redemption of usufructuary mortgage—Appeal, subject-matter of, dispute in **322**
- Ex parte* decree—Restoration of suit—Order, if can be questioned in appeal from final decree **2**
- Ground of appeal, appellant when can go out of **817**
- Guardians and Wards Act (VIII of 1900), s. 47 (g)—Order for removal till decision of a particular case—Inquiry, if necessary before removal **875**
- High Court Procedure—Bench, jurisdiction of, to set aside judgment of another Bench—Appeal, re-hearing of, application for, to be made to some Bench that heard appeal **27**
- Letters Patent, cl. 15—Rule discharged under s. 115 of Civil Procedure Code, if appealable.
Where a rule issued under section 115 of the Code of Civil Procedure, 1908, was discharged by a Bench of the High Court in accordance with the opinion of the senior Judge, the Court being divided in its opinion on the question of its jurisdiction to interfere in revision:
Held, that the order was not appealable under clause 15 of the Letters Patent. **C. BALNATH MISTRI v. JUNG BAHADUR, 24 C. L. J. 113 906**
- Order appointing Commissioner by consent of parties—Certifying payment or adjustment, mode of—Power and duty of Court to make inquiry **357**
- against order refusing application to revise decree of Small Cause Court **862**
- Order staying further trial of suit by single Judge of High Court—Appeal, maintainability of **942**

Appeal (Civil)—concld.

- Partition suit—Preliminary decree, nature of, appeal against, if competent, when—Civil Procedure Code, Act V of 1908, s. 97, scope of.
Under section 97 of the Code of Civil Procedure not only has an appellant a right to appeal against a preliminary decree, but he is bound to appeal or else he is precluded from questioning it in a subsequent proceeding.
Where no appeal is preferred against the final decree, the appeal against the preliminary decree is not incompetent.
The law gives a right to appeal against the preliminary decree and that right is not taken away because no appeal is preferred against the final decree, which is subject to the decision in the appeal in the preliminary decree. If that appeal succeeds the final decree ought to be amended in accordance with the result of the appeal. **C. ATUL CHANDRA SINGHA v. KUNJA BEHARI SINGHA, 22 C. L. J. 90 321**
- Power of Court to excuse delay in presentation of appeal—Appeal, when to be treated as revision **703**
- Practice—Service, insufficient, on appellant—Pleader informed of date of hearing—Appearance by Pleader without instructions, effect of—Dismissal of appeal in default, if legal **199**
- , presentation of, to wrong Court—*Bona fide* mistake—Sufficient cause—Saving of limitation—Proper Court, delay in filing appeal to, when excusable—Minor appellant—Counsel not engaged, effect of **211**
- Receiver—Refusal to appoint **545**
- for reduction of mortgage-money—Court-fee payable **104**
- Remand order, appeal from **894**
- Rent, suit for—Bengal Landlord and Tenant Procedure Act (VIII of 1869 B. C.), s. 102, scope of—Appeal, when maintainable—Bengal Tenancy Act (VIII of 1885), s. 153, scope of—Amount of rent payable, question as to **277**
- Res judicata*—Case decided in favour of one party—Decision, adverse, on one point not affecting ultimate favourable decision of case, effect of—Appeal, party not entitled to, effect of **502**
- Surety—Arrest **684**
- time-barred—Admitted by mistake—Issue of notice to respondent—Memorandum of objections filed by respondent—Appeal rejected—Objection, if can be heard.
A respondent who in response to a notice issued to him by mistake has appeared and filed a memorandum of objections in a time-barred appeal, is entitled to be heard on it even if the appeal is rejected as being out of time. **M. BIRUDIGADDI VENKADU v. RECEIVER N. & M. ESTATES 832**
- (Criminal). See CRIMINAL PROCEDURE CODE, s. 235; PROVINCIAL INSOLVENCY ACT, s. 47.
- against acquittal—Appellate Court, duty of **156**
- Appellate Court, when can start new case against accused **151**
- Different sentences by Sessions Judge **158**

Appeal second—Amendment of *plaint*, if allowed.

A Court of second appeal cannot order amendment of a *plaint*, specially when the plaintiff has not asked for it in both the lower Courts and such amendment, if allowed, would mean the trial of the case *de novo*. **P. MEHTAB ALI SHAH v. IMDAD ALI SHAH**, 91 P. W. R. 1915 **387**

Appellate Court not omitting to consider evidence on record—Findings of fact—Punjab Courts Act (III of 1914), s. 41.

Where an Appellate Court has not omitted to consider evidence on the record, no second appeal will lie to the Chief Court on questions which are purely those of facts. **P. SHARAF NOOR v. AHMAD**, 97 P. W. R. 1915 **505**

Evidence, weight or value of **279**

Fact, finding of, arrived at only in first appeal, binding effect of—Sufficiency of evidence—Wajib-ul-arz, entry in, as proof of custom recorded therein—Custom, proof of—Jus tertii—Third party entitled disclaiming interest, effect of—Title to property—Conveyance of property not effected by statements unless evidenced by some Act within law.

Where a Court of first instance comes to no definite finding on an issue of fact and the first Appellate Court does come to such a finding on that issue after an examination of the evidence, the second Appellate Court is concluded by the finding of the first Appellate Court.

The question whether a particular *wajib-ul-arz* is sufficient proof of a custom recorded in it is a question not of law but of fact, as it is a question regarding the weight or value to be attached to it. And it cannot be contended as a matter of law that a *wajib-ul-arz*, if un rebutted, is conclusive proof of custom.

Where the plaintiffs claimed to recover a property from the defendant on the ground that they had a better title to it than he had and the defendant pleaded that there was a third party in existence who was best entitled to the property, but the plaintiffs produced that party as a witness and he disclaimed all title to it:

Held, that the plaintiffs could not succeed simply because of the third party's statement, inasmuch as such statement alone could not, in the absence of some act within the law having the effect of transferring the property to the plaintiffs, operate as a conveyance of the property to the plaintiffs. **O. TILAK RAM v. SITARAM**, 2 O. L. J. 388 **503**

Finding of fact, when to be questioned in second appeal—Evidence, finding of fact not supported by, can be questioned in second appeal.

A second appeal from a finding of fact can be taken on the ground that it is not supported by any evidence on the record. **U. P. B. R. SARFARAZ v. BABU RAM PANDE**, 2 O. L. J. 364 **375**

Appeal to Privy Council. See PRIVY COUNCIL.

Civil Procedure Code (Act V of 1908), ss. 109, 110—Leave to appeal to Privy Council—Judgment, one in several suits—Aggregate value above Rs. 10,000—Each suit valued separately below Rs. 10,000—Appeal to Privy Council, if permitted **895**

Leave—Lower Court's decree only modified by High Court—Value above ten thousand rupees—Substantial question of law—Misconstruction of part of evidence **372**

Appellate Court, judgment of—Civil Procedure Code (Act V of 1908), O. XLI, r. 31—Evidence to be discussed in support of conclusions—Lessor's right of re-entry—Re-entry by force, not justifiable—Lease, condition as to forcible re-entry in, void—Forcible re-entry explained—Police report—Relevancy—Admissibility in evidence—Evidence Act (I of 1872), s. 11—Subordinate Court, duty of—High Court, decisions of, to be followed and not to be commented upon by Courts subordinate to it.

It is the duty of an Appellate Court to refer to the evidence produced in a case and to adduce from it reasons in support of its conclusions as required by Order XLI, rule 31, Civil Procedure Code; all the more so, when it reverses a decision of a lower Court embodied in a somewhat lengthy judgment.

A lessor cannot justify a re-entry by force under cover of a clause in the lease reserving to him a right of re-entry with or without resort to the Courts in case of breach of all or any of the conditions mentioned in the lease, inasmuch as a condition justifying an entry by force is void as being against law or public policy.

In cases where forcible re-entry by the lessor is set up by the lessee, the fact that a report complaining of the use of force or intimidation was made to the Police soon after the occurrence is a relevant fact under section 11 of the Evidence Act and admissible in evidence.

The Judge of a Subordinate Court, however brilliant and well-trained a lawyer he may be, is not entitled to refuse to follow the decision of the High Court to which his Court is subordinate; still less is he entitled to sit in judgment upon the decision of such a High Court and declare it to be erroneous. **O. HABIB ULLAH SHAH v. BAKHT BALI SINGH**, 2 O. L. J. 299 **292**

Appropriation. See CONTRACT ACT, s. 60.

Approver's testimony, corroboration of **458**

Arbitration—Contract—Party agreeing to submit to arbitration of Bengal Chamber of Commerce—Rules of Chamber, if imported into contract—Party, if bound by rules.

Where a party to a contract agrees to submit to an arbitration of the Bengal Chamber of Commerce, the rules of the Chamber are imported into the contract and that party is bound by those rules. **C. CHAITRAM RAMBILAS v. BRIDHICHAND KESRI-CHAND**, 21 C. L. J. 584; 19 C. W. N. 820 **681**

proceedings, defective—Award, invalidity of—Absence of one arbitrator at hearing, effect of—Parties not given opportunity of presenting their case, effect of—Arbitrators, improper action of, effect of.

Arbitration—concl'd.

Where the arbitrators, although prompted by the best motives, dispensed with the presence of the head arbitrator at the first sitting when some of the witnesses were examined, and the examination of the witnesses was not conducted in the presence of the parties and where the substance of the evidence was communicated to the head arbitrator and his opinion was obtained on the merits of the case without giving the parties an opportunity of presenting their respective cases before all the arbitrators:

Held, that the action of the arbitrators was improper and that the award could not be sustained.
O. LEKHA SINGH v. BODIL SINGH, 2 O. L. J. 365

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—Reference providing for appointment by Court of umpire in case of difference—Umpire, whether can make valid award without consulting arbitrators

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Arms Act (XI of 1878), ss. 19 (f), 20

—Person carrying revolver in pocket without license, offence committed by—Revolver found in pocket of one of two men sitting together—Both persons, whether guilty.

A person carrying a revolver in his pocket without a license to keep arms is guilty only under section 19 (f) of Act XI of 1878 and not under section 20 of the Act for concealing the arm.

Where an arm was found in possession of one of two men sitting together and it was proved that at one time the revolver was possessed by the other too, both are guilty of possessing the arm without a license. **P. UDHAM SINGH v. EMPEROR**, 27 P. W. R. 1915 Cr.; 16 Cr. L. J. 637

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s. 20

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Arrest. See CRIMINAL PROCEDURE CODE, s. 54.

Assam Land and Revenue Regulation (I of 1886), s. 154, cl. (f)

Unrecorded proprietor not heard in partition proceedings—Declaratory suit, whether barred—Evidence Act (I of 1872), ss. 66, 74—Document in possession of defendant—Production of document not sought—Genuineness of document not questioned—Discretion of Court—Certified copy of Letters of Administration, admissibility in evidence of—Public document.

An estate wherein the plaintiff claimed a share was the subject of partition by the Revenue Authorities. The plaintiff was not a recorded proprietor, and, consequently, his application to intervene in the partition proceedings was rejected and he was denied an opportunity to be heard. Before the completion of those proceedings the plaintiff instituted a suit seeking a declaration that the share which had been allotted to his predecessor-in-interest was his property:

Held, that the suit was not barred under the provisions of clause (f) of section 154 of the Assam Land and Revenue Regulation, and that it was open to the Civil Court, at that stage, to make a declaration of title in favour of the plaintiff.

A certified copy of an order of a Probate Court to the effect that Letters of Administration be granted to the person named with a copy of the Will annexed is a public document within the meaning of section 74 of the Indian Evidence Act and is consequently admissible in evidence. It would also be admissible

Assam Land and Revenue Regulation—concl'd.

under section 66 of the Act if the original document is in the possession of the defendant even if no steps are taken to call upon him to produce it in Court, because such steps may be waived at the discretion of the Court specially where no question of genuineness is raised. **C. HABIRAM DAS v. HEM NATH SARMA**, 19 C. W. N. 1068

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Assault—Compensation for assault—Costs incurred in prosecuting assailant, if allowable.

A plaintiff in claiming damages for a criminal assault is not entitled to include in his claim costs incurred by him in successfully prosecuting the defendant for the hurt caused to the plaintiff by the defendant. **P. JAGAN NATH v. HAKIM**, 176 P. L. R. 1915; 117 P. W. R. 1915

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Assets, rateable distribution of. See CIVIL PROCEDURE CODE, s. 73.

Attachment. See EXECUTION.

— before judgment, nature of—Attachments, two kinds of, distinguished—High Court, jurisdiction of, to interfere with erroneous order of lower Court

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Attestation of document. See PARDANASHIN LADY.

Autrefois acquit. See PUNJAB MUNICIPAL ACT, 1911, s. 219.

Award. See ARBITRATION.

—, binding effect of—British Indian Association, Oudh, powers of, as private arbitrators

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Benami purchase. See CIVIL PROCEDURE CODE, s. 66.

Benami transaction—English Law, resemblance with—Relationship—Criterion—Practice—Document, effect of non-production of—Evidence Act (I of 1872), s. 116—Estoppel between landlord and tenant.

A benami transaction is a dealing common to Hindus and Musalmans in India. It is quite unobjectionable and has a curious resemblance to the doctrine of English Law that the trust of the legal estate results to the man who pays the purchase-money, and this again follows the analogy of Common Law that where a feoffment is made without consideration the use results to the feoffor. The exception in English Law by way of advancement in favour of wife or child does not apply in India, but the relationship is a circumstance which is taken into consideration in India in determining whether the transaction is *benami* or not. The criterion in these cases in India is to consider from what source the money comes with which the purchase-money is paid.

A *taluqdar*, who had two Hindu wives and a Musalman mistress, purchased a bungalow, the sale-deed being made out and registered in the name of his mistress. The purchase-money he raised by a mortgage on his own property and he had the sole use and enjoyment of the bungalow for himself and his wives during his own life. The wives used it by his permission for a religious purpose for a month at a time, while the mistress was never in it during this period. In fact the bungalow was quite useless

Benami transaction—concl'd.

to her for any personal use, and it was wholly inappropriate as a provision for her. The sale-deed, however, was in her possession:

Held, that the purchase was a *benami* transaction and that the mistress had no title to the bungalow.

It is open to a litigant to refrain from producing any documents that he considers irrelevant; if the other litigant is dissatisfied it is for him to apply for an affidavit of documents, and he can obtain inspection and production of all that appears to him in such affidavit to be relevant and proper. If he fails to do so neither he nor the Court at his suggestion is entitled to draw any inference as to the contents of any such documents.

It is for the litigant who desires to rely on the contents of documents to put them in evidence in the usual and proper way; if he fails to do so no inference in his favour can be drawn as to the contents thereof.

A tenant who has been let into possession cannot deny his landlord's title however defective it may be as long as he has not openly restored possession by surrender to his landlord. *P. C. Musammat BILAS KUNWAR v. DESRAJ RANJIT SINGH*, 19 C. W. N. 1207; 29 M. L. J. 335; 2 L. W. 830; 18 M. L. T. 248; 13 A. L. J. 991; 17 Bom. L. R. 1006

Bengal Estates Partition Act (V of 1897), s. 4

————— **s. 99** 418, 420
Bengal Landlord and Tenant Procedure Code (VIII of 1869 B. C.), ss. 14, 18

————— **s. 102** 277

Bengal Land Revenue Assessment (Resumed Lands) Regulation (II of 1819)—Bengal Land Revenue Resumption Act (VII of 1862)—Decree ordering liability to rent, effect of.

The plaintiff sued the defendants for ejectment as mere trespassers. The suit was dismissed as barred by time. In appeal it was contended that a previous decree in what was called a resumption suit established the relationship of landlord and tenant between the parties and hence the suit was within time:

Held, that the decree could not be accepted as establishing the relationship of landlord and tenant, inasmuch as the resumption suit was one instituted under Regulation II of 1819, and subsequently transferred to the Civil Court under Bengal Act VII of 1862, and it was at least as reasonable to regard it as a suit dealing with revenue as a suit dealing with rent and, moreover, it was the predecessor of the defendant that was a party to that suit. *C. BIRENDRA KISORE MANIKYA v. BHARAT CHANDRA SINHA*, 22 C. L. J. 117

Bengal Land Revenue Resumption Act (VII of 1862)**Bengal Tenancy Act (VIII of 1885)—**

Entry in Record of Rights before amendment of 1898 disputed—Presumption—Repudiation by both parties—Burden of proof—Possession—Long possession without payment of rent and with assertion of title, effect of.

No presumption of correctness can apply to an entry made, after the decision of a dispute, in

Bengal Tenancy Act—concl'd.

a Record of Rights before the amendment of the Bengal Tenancy Act by Act III of 1898.

It is open, however, to the parties to agree that the entry is not correct, and must be repudiated, though they are not at one as to what should be substituted in its place.

Hence, where the plaintiff repudiates the entry as fraudulently obtained, and the defendants repudiate it as erroneously made, the Court should not place upon the defendant the burden of rebutting the entry upon which the plaintiff does not place reliance.

When the plaintiff comes into Court on the allegation that the defendants have never attorned to him, there is no room for the suggestion that the possession of the defendants was possession on his behalf.

Long possession of the disputed lands by the defendants and their predecessors without payment of rent and under assertion of a rent-free title justifies the inference that the defendants had the title they set up. *C. SOBHAN BAKSH v. BIRENDRA KISORE*, 22 C. L. J. 144

————— **s. 9** 944, 953

————— **ss. 20, 21, 105, 116**, scope of—Fair and equitable rent, settlement of—Non-occupancy raiyat—Tenant, status of—Lease by certificated guardian, without sanction of District Judge, if valid.

Where the plaintiff got a lease for a term of six years from the mother of the defendant in 1895 while the latter was an infant and it was contended in 1910 that this lease was not binding upon the defendant, inasmuch as his mother, though his certificated guardian, had not obtained the sanction of the District Judge.

Held, that the lease was merely voidable at the instance of the defendant but that no question could now arise as to the avoidance of the lease as the plaintiff had been allowed to hold over ever since 1910.

Where the plaintiff was allowed to hold over after the expiry of the original term of the lease and occupies the agricultural land for a period of nine years in a district to which sections 20 and 21 of the Bengal Tenancy Act were, before the grant of the lease, extended:

Held, (1) that the plaintiff acquired the status of a non-occupancy raiyat, and that this status could not be retrospectively affected by the subsequent extension to the district of section 116 of the Bengal Tenancy Act;

(2) that the plaintiff was a non-occupancy raiyat under the defendant and was entitled to have fair rent assessed under section 105 of the Bengal Tenancy Act. *C. SITANATH PANDA v. HARA NARAIN MAHA-PATRA*, 22 C. L. J. 644

————— **s. 21** 58

————— **s. 29**, applicability of—

Tenancy split up—New rent fixed, if enhancement.

Section 29 of the Bengal Tenancy Act is applicable where the holding remains constant but where the original holding is split up into a number of new tenancies no question can arise as to the effect of the section. *C. NAZIR PEYADA v. JYATINDRA NARAIN ACHARYA*, 22 C. L. J. 88

Bengal Tenancy Act—contd.

S. 29—Enhancement of rent—Rent assessed on excess land and new land taken—Consolidated rent fixed, if enhancement.

Where rent is assessed for excess land in possession of a tenant as also for new land taken by him, and one consolidated rent is assessed for all the lands in his possession, there is in essence a new holding created and no question arises as to the enhancement of rent payable by the tenant and section 29 of the Bengal Tenancy Act has no application to such a case.

Where, therefore, five *bighas* of new lands were added to the original seven *bighas* and, a consolidated rent was settled by a contract, a new holding was created by the contract and the new rental was not an enhancement of the original rental. **C. RAJ KUMAR SARKAR v. FAIZUDI TARAFDAR**, 22 C. L. J. 81

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S. 29—Kabuliyat—Enhancement of rent—Agreement in favour of some of the landlords.

A claim for recovery of arrears of rent was based on a *kabuliyat*. The *kabuliyat* recited that the tenants held an ancestral *jama* of ten *bighas* at an annual rent of Rs. 6-15 under the plaintiff, his co-sharers and a lady named Jadumonee Dasi. The tenants agreed by the *kabuliyat* that from the date thereof they would hold the land in the share of the plaintiff and his co-sharers at the rate of Rs. 14-6. The co-sharers were joined as defendants, and they did not object to the plaintiff's claim of his share only. Jadumonee was not made a party.

Held, that the agreement to pay enhanced rent was in contravention of section 29 of the Bengal Tenancy Act, and consequently unenforceable; that the *kabuliyat* might, however, be used as evidence of an agreement that the defendants would from the date thereof pay rent to the plaintiff and his co-sharers separately from Jadumonee; and

that a decree might be made in favour of the plaintiff to the extent of his share. **C. RAJ KUMAR SARKAR v. FAIZUDDI TARAFDAR**, 22 C. L. J. 86

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S. 40

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S. 86 (6)—Surrender—Encumbrance Landlord, liability of—Encumbrancer, consent of—Encumbrance, validity of, limited to tenant and encumbrancer—Landlord, right of, to enter.

The validity of the encumbrance must be limited to the position of the transferor and the transferee i. e., the tenant and the encumbrancer.

A transfer of a portion of non-transferable holding of an occupancy *raiyyat* is so far valid against the landlord as not to entitle him to enter upon the portion transferred.

Therefore, a surrender made by a transferor without the consent of his transferee is not valid and has not the effect of entitling the landlord to *khas* possession in disregard of his rights. **C. HASUNI BIBI v. SADIR MAJUD SARKAR**

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S. 87—Tenancy, splitting up of—Abandonment.

Where a tenancy in favour of several tenants has not been split up and even one of the original tenants still remains on the land though the others drop

Bengal Tenancy Act—contd.

away, there is no abandonment within the meaning of section 87 of the Bengal Tenancy Act. **C. Gopi SUNDARI DASI v. HALADHAR MAZUMDAR**

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ss. 102, 104, 106

—Bengal Tenancy (Amendment) Act (III of 1898, B. C.), s. 9—Interpretation—Competency of Settlement Officer to decide rent-free title—*Res judicata*.

The words "every settlement of rent or decision of a dispute by a Revenue Officer" in section 9 of Act III of 1898 (B. C.) are applicable only to those cases which a Revenue Officer has jurisdiction to try and are not applicable to a decision of a Settlement Officer as to the validity of a *lakheraj* title under section 104 of the Bengal Tenancy Act, 1885.

Before the amendment of the Bengal Tenancy Act in 1898, a Settlement Officer was incompetent to decide the question of rent-free title, and, therefore, such a decision given before but embodied in the record published subsequently to the enforcement of the amending Act, will not operate as *res judicata* between the parties in a suit for assessment of rent of the same lands brought afterwards in a Civil Court. **C. BIRENDRA KISORE MANIKYA v. KALITARA DEBI**, 22 C. L. J. 155

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ss. 103B, 111A,

presumption under—Ryot, status of, conditions of—Occupancy right, acquisition of—Limitation.

Where the plaintiff held 203 *bighas* of land and was *prima facie* a tenure-holder and not a *ryot*, but no document was in existence as evidence of the terms on which he held, and oral evidence proved that the tenancy in its inception was granted to the predecessors of the plaintiff for cultivating purposes, and the plaintiff and his predecessors were described in former Settlements as having the interest of *ryots* and the plaintiff had also granted rent receipts describing the tenants under him as *under-ryots*.

Held, that the presumption created by section 103 (B) of the Bengal Tenancy Act was rebutted.

That the plaintiff and his predecessors having held the land for more than 12 years had a right of occupancy in the land.

Where the Record of Rights was finally published on 14th September 1908, and on plaintiff's appeal to the Revenue Authorities against the entry in the Record of Rights affecting his status being rejected, a suit was filed on 29th June 1909:

Held, that the suit came under the proviso to section 111A and not under section 104H. **C. KUMEDA PROSONNO BHUIYA v. SECRETARY OF STATE**, 19 C. W. N. 1017

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S. 103B (3)—Bengal Tenancy (Amendment) Act (I of 1907 B. C.)—

Nature of evidence required for rebuttal of presumption—Suit for declaration of title to land and assessment of rent—Decree dismissing suit but declaring plaintiff's *zemindari* right in land—Non-payment of rent—Long possession—Adverse possession—Limitation.

In a suit for declaration of title to land and assessment of rent, the Court of first instance dismissed the suit as barred by limitation, but gave the plaintiff a declaration that he had *zemindari* right in the disputed land:

Bengal Tenancy Act—contd.

Held, that the Court by the declaration merely intended to hold that the land was situated within the ambit of the plaintiff's estate, and not that the defendants or their predecessors held, at any time, as tenants under the plaintiff.

Under sub-section 3 of section 103B of the Bengal Tenancy Act as it stands under Act I of 1907 the evidence by which the entry may be proved to be incorrect, may be evidence of facts of a date prior to that of the publication of the Record of Rights, although evidence of facts subsequent to the publication may also throw an important light upon the solution of the problem.

Where the defendants were treated by the plaintiff as trespassers in 1894 and notwithstanding the entry in the Record of Rights in 1898 to the effect that the defendants were settled *raiya*s, the defendants had since that date repudiated the theory of a possible tenancy:

Held, that the entry in the Record of Rights had been amply rebutted, in the absence of any suggestion and any evidence in support of a possible allegation that between 1894 and 1898 a tenancy was created by the plaintiff in favour of the defendant.

Where, according to the defendants, they and their ancestors have been in occupation of the disputed land from generation to generation without payment of rents, and the plaintiff has failed to prove that he or his predecessor has ever been in possession of the land by actual occupation or receipt of rent:

Held, that under the circumstances, the claim for assessment of rent, which is really a claim for possession of the land, is barred by limitation. **C. BIRENDRA KISORE MANIKYA v. KAILAS CHANDRA SARKAR**, 22 C. L. J. 140

s. 105 58, 862

ss 105, 188, scope of

- *Co-sharer landlord, tenant under, position of—Separate tenancy—Kabuliat, by tenant, to co-sharer landlord, effect of—Fair rent, settlement of.*

Section 105 of the Bengal Tenancy Act provides that a landlord or a tenant may make an application within a certain time for settlement of rent and upon such application the Settlement Officer is to settle a fair and equitable rent of the lands held by the tenants.

Where the tenant of a co-sharer landlord has executed a *kabuliat* in favour of that landlord in respect of his share of the lands in his holding and enters into a separate agreement with him for the purpose of a tenancy, such co-sharer landlord is not to be considered as joint landlord with his co-sharer in respect of the tenancy under the *kabuliat* but as a separate landlord.

A share of an undivided holding cannot be called a holding.

Section 188 of the Bengal Tenancy Act is no bar to the maintenance of an application by a co-sharer landlord, who has got from the tenant a *kabuliat* in respect of his share of the lands in his holding, to settle fair rent under section 105. **C. SAFARUDDI v. FAZAL HUQ**, 21 C. L. J. 592

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ss. 105A, 106 862

Bengal Tenancy Act—conold.

s. 106—Order of Settlement Officer in Survey and Record of Rights—Decree—Civil Procedure Code (Act XIV of 1882), s. 13—Res judicata—Bengal Tenancy (Amendment) Act (III of 1898), s. 9, effect of—Claim of rent-free—Jurisdiction of Settlement Officer.

The order of a Settlement Officer in the Survey and Record of Rights under section 106 of the Bengal Tenancy Act of 1885 as originally passed, is a decree within the terms of section 9 of Act III (B. C.) of 1898 and will operate as *res judicata* in respect of points considered and decided.

Section 9 of the amending Act III of 1898 clearly shows that the amendment of section 106 does not apply to the order of a Settlement Officer in the Survey and Record of Rights.

Where a claim of rent-free has been made before a Settlement Officer it is his duty to find whether rent at any time has been paid for the land in dispute and the mere fact that the claim has been made does not deprive him of jurisdiction. **C. NIKUNJA BEHARI CHUNDA v. RADHA KISORE MANIKYA**, 22 C. L. J. 148

ss. 107, 108 844

s. 111A 255

s. 116 58

s. 153 277

s. 157 949

Ch. XIV, s. 161 898

ss. 163, 164 (1),

165, object of—Tenure, sale of, effect of—Bid, if not sufficient to satisfy decree and costs—Sale, independent of value of bid.

The intention of the Legislature, as can be gathered from sections 163, 164 and 165 of the Bengal Tenancy Act, is to entitle a decree-holder, if he so desires, to proceed under section 165 in the event of the sale on the first notification not realising a sum sufficient to liquidate the amount of the decree and costs.

It is not obligatory upon him, however, in this contingency, to avail himself of the provisions of section 165; he may nevertheless be content with the sale under section 164 and if the sale is held under that section, the result described therein follows, *viz.*, the purchaser becomes entitled to annul all encumbrances other than registered and notified encumbrances, provided he follows the procedure prescribed in section 167.

The consequence of the sale does not depend upon the amount of the bid offered by the successful purchaser, it is independent of the value of the bid.

Section 165 was enacted solely for the benefit of the decree-holder; if the bid is not sufficient to satisfy his decree and costs, it entitles him to have the property sold, with power to annul all encumbrances, but it is not obligatory on him to adopt this extreme measure and he is not in peril if he decides not to pursue this special remedy. **C. SALIMULLAH BAHADUR v. RAHENUDDI**, 21 C. L. J. 659

ss. 164 (1), 165 68

s. 167 898

s. 188 414

Bengal Wills and Intestacy Regulation (V of 1799), s 7, *scope of—District Judge's jurisdiction—Gift, claim under, if valid.*

Section 7 of the Bengal Wills and Intestacy Regulation empowers a District Judge to assume jurisdiction only when two facts are established, (1) that the person has died intestate, and (2) that there is no claimant to the personal property left by him.

The claimant mentioned in the section does not only mean an heir of the deceased. A person who claims personal property of the deceased, under a gift from the intestate, is a claimant within the meaning of section 7 of Regulation V of 1799. **C. JOGENDRA NATH SAHA v. COLLECTOR OF FARIDPUR**, 21 C. L. J. 612 **36**

Bills of Exchange Act, 1882 (45 & 46 Vic., c. 61), s 26 **574**

Bombay City Land Revenue Act (II of 1876)—Object of the Act—Register, maps and records under Act—Statements in register and records, value of—Estoppel—Omissions, errors or mistakes of Collector, whether can affect Government's interests.

The Bombay City Land Revenue Act must be treated as defining the extent of the rights of any one who consults the Rent Rolls, i. e., maps, registers, and records kept at the office of the Collector of Bombay, and in order to ascertain these rights the Act must be read as a whole and its purpose ascertained. The Act sets up machinery only for the administration and collection of the land revenue of the Government in the city of Bombay. The object is to ascertain who is liable to pay. The Collector is a Revenue Official, and it is only in so far as the collection of revenue is concerned that he is entrusted with the duty of preparing a register and keeping records. The public are given access to these only in order to satisfy themselves that they are being properly assessed. The Act does not purport to establish a system of registration of title, which is to supersede other means of conveying or registering the title to land or to relieve purchasers or mortgagees from the ordinary obligation to see that they get what they have contracted to get. No doubt the register is of considerable use even for conveyancing purposes. But neither the language of the Statute nor the character of the Officials, who have the duty of keeping it, is such as to indicate an invitation to the public to rely on statements in the records as to title which may have to be made incidentally, but which are not expressed and do not purport to be decisive either of the rights of the Government or of those of the individual as to matters which go beyond liability to contribute to land revenue.

Where, therefore, a person, relying on certain wrong statements in certified extracts from the Rent Rolls of Quit and Ground Rent Land, kept in the office of the Collector of Bombay, and on certain notices and bills issued by the Collector, took a piece of land situate in the city of Bombay as the land of quit and ground rent and not of *sanadi* tenure which was resumable by the Government on giving six months' notice and providing compensation for buildings and other improvements, and advanced a big sum of money on mortgage of the land:

Held, that the Secretary of State for India was not estopped by the Collector's action from denying

Bombay City Land Revenue Act—
conold.

that the land was of quit rent as distinguished from *sanadi* tenure. **P. C. MERWANJI MUNCHEEJI OAMA v. SECRETARY OF STATE**, 19 C. W. N. 1056; (1915) M. W. N. 536; 2 L. W. 701; 29 M. L. J. 299; 13 A. L. J. 1026 **539**

Bombay District Municipalities Act (III of 1901), ss. 46, 167—Duty and power to dismiss officers and servants of Municipality Dismissal of Secretary—Act done "in pursuance of" the Act—Suit for damages for wrongful dismissal barred if instituted more than six months after dismissal.

As section 46 of the Bombay District Municipalities Act and the statutory rules made thereunder impose the duty and confer the power upon a Municipality to dismiss its officers and servants in proper cases, a dismissal of its Secretary by a Municipality is an act done in pursuance of the Act within the meaning of section 67 and a suit claiming damages for such dismissal on the footing of its being a wrongful dismissal is barred if instituted more than six months after the date of dismissal. **B. MUNICIPALITY OF RATNAGIRI v. VASUDEV BALKRISHNA LOTLIKAR**, 17 Bom. L. R. 652; 39 B. 600 **390**

s. 167

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Bombay Hereditary Offices Act (III of 1874), s 5—Mortgage by watandar—Adverse possession by mortgagee after mortgagor's death Presumption—Dekkhan Agriculturists' Relief Act (XVII of 1879), s. 13—Redemption suit—Mesne profits after date of suit—Resumption.

Held, in a suit for redemption, under the Dekkhan Agriculturists' Relief Act, in respect of certain *watan* property, (1) that the mortgagee remains a mortgagee for the purpose of redemption, even assuming that he has been in possession for more than 12 years since the death of the original mortgagor;

(2) that mesne profits, that is, the net receipts from the property, cannot be decreed against the mortgagee from the date of the suit.

The presumption is that unless there is some definite indication on the part of the person in possession that he will, from a certain date, claim as absolute owner and not as mortgagee, he can only acquire by adverse possession the limited interest to which he was entitled at the mortgagor's death, namely that of a mortgagee.

The Dekkhan Agriculturists' Relief Act makes no provision with reference to profits after the date of the institution of a redemption suit, and no presumption arises that the mortgagee is, apart from the provisions of the Act, not entitled to retain possession after the date of the institution of the suit. **B. RAMCHANDRA VENKAJI NAIK v. KALLO DEVJI DESHPANDE**, 17 Bom. L. R. 630; 39 B. 557 **396**

s. 36

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Bombay Hereditary Offices Act (III of 1910), s. 36 **925**

Bombay High Court Original Side Rules, r. 62 **560**

Bombay Land Revenue Code (Act V of 1879), ss. 68, 73 **303**

Bombay Prevention of Gambling Act (IV of 1887), ss. 4, 5—*Telegrams announcing certain events, whether instruments of gaming Papers used by brokers for recording transactions.*

A telegram announcing the happening or not happening of an event upon which wagers have previously been made cannot possibly be an instrument of gaming within the meaning of the Bombay Prevention of Gambling Act. Nor can such pieces of paper as brokers may carry with them for the purpose of recording a transaction between their clients be brought within the definition of instruments of gaming or wagering. **B. JESANG MOTILAL v. EMPEROR**, 17 Bom. L. R. 600; 16 Cr. L. J. 572

s. 5

Bombay Public Conveyances Act (VI of 1863), s. 2—*Conveyance licensed for labour, whether can be used for passengers.*

A person who has his conveyance licensed for labour only cannot use it for passengers, and is liable under section 2 of the Bombay Public Conveyances Act if he does so. **B. EMPEROR v. BARKYA TIKU**, 17 Bom. L. R. 607; 16 Cr. L. J. 581

British Indian Association, rules of—*Financial Commissioner and British Indian Association, powers of, as private arbitrators—Awards, binding effect of—Construction of decree.*

The rules of the British Indian Association, obscure as they were in some respects, did not exhaust powers of the Association and the Financial Commissioner as private arbitrators to settle disputes about property between the members of a family. Therefore, awards made by them irrespective of those rules were obligatory upon the parties to the submissions and upon those whose interests they represented, to the same extent as those made under the rules or filed and enforced in the manner provided by section 33 of the Oudh Estates Act. **O. ABDUL RAHMAN KHAN v. AMIR ALI KHAN**, 2 O. L. J. 269

Buddhist Law—Buddhist monk's arrest in execution of decree—Presumption as to power of disposal—Civil Procedure Code (Act V of 1908), O. XXV, r. 1.

Under the Buddhist Law a man's interest in his property ceases when he is ordained as a Buddhist monk, though according to certain texts he may receive gifts after ordination.

There is a strong presumption that a Buddhist monk has no property over which he has rights of disposal.

Expediency of supplementing Order XXV, rule 1, Civil Procedure Code, so as to include cases in which a Buddhist monk is the sole plaintiff recommended. **L. B. U WILATHA v. U THIRI**

Childless widow, right of, to succeed to her husband's property—Sale of joint ancestral property by brother, validity of—Pre-emption.

A childless widow of a man who has died after his parents' death, succeeds to his share of the ancestral property whether it has or has not been divided, provided always that the property in question is not held on some feudal tenure or is not appurtenant to some hereditary office.

Buddhist Law—cont'd.

A sale by a surviving brother of the whole property is invalid and having regard to the law of pre-emption is also invalid as regards his own share. **L. B. MA TON PAT v. MA THAN**, 8 Bur. L. T. 155

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Chinese—Custom of marriage—Elopement—Subsequent consent of bride's parents, effect of.

Among Chinese Buddhists, elopement of the girl and the subsequent consent of the girl's parents are, in the cases of inferior marriages, sufficient to constitute a valid marriage without any ceremony. **L. B. SAW MOUNG GYI v. MA THU KHA**, 8 Bur. L. T. 198

715

Inheritance—Husband and wife dying without issue simultaneously or within short interval of one another—Joint property—Parents, right of—Manu Kye Book X, ss. 32, 56—Kin Wun Mingyi's Digest, ss. 108, 347—Analogous case of married couple dying leaving brothers and sisters.

Where a husband and wife die childless simultaneously or within a short interval of one another, their property is to be regarded as retaining its joint character and is to be divided accordingly, i.e., the respective party's parents would take the separate or ancestral property of husband or wife and would share equally the jointly acquired property of the husband and wife.

Obiter dictum:—If there are no parents surviving but the husband and wife leave brothers and sisters it would seem reasonable to deal with the estate by analogy as a joint estate. **L. B. MA EIN v. TIN NGA**, 8 Bur. L. T. 145

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Inheritance—Orasa son—Limitation within which he should assert his claim to one-fourth—Right, if lapses if not asserted without unreasonable delay

Under the Burmese Buddhist Law it is necessary in the interests of the family that the eldest son should promptly decide whether he is to claim one-fourth share of the estate of his parents and if the option is not exercised without unreasonable delay, it should be regarded as having lapsed altogether. **L. B. MA THIT v. MAUNG TUN THA**, 8 Bur. L. T. 138

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Inheritance—Orasa son—Mother not marrying again—Manu Kye, Book X, s. 5—Kin Wun Mingyi's Digest, s. 30—Atta Sankheppa s. 155.

Under the Burmese Buddhist Law whether the mother re-marries after the death of the father or not, the orasa is entitled to get one-fourth share and the mother and younger children three-fourths. **L. B. MAUNG KYI HLAING v. MA HTU**, 8 Bur. L. T. 154

640

Inheritance—Succession to nephew—Division between paternal and maternal aunts per capita and not per stirpes—Equality of division.

Under the Burmese Buddhist Law the paternal and maternal aunts succeed to their nephew's estate per capita and not per stirpes. Equality of division is the rule usually adopted in the division of property among persons of the same degree. **L. B. MA ON BWIN v. MA TU**, 8 Bur. L. T. 141

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Shinbyu gifts, validity of—Manu Kye Book X.

Questions as to the validity of shinbyu gifts are questions regarding a religious usage and have, therefore, to be decided according to Buddhist Law under section 13 of the Burma Laws Act of 1898.

Buddhist Law—conold.

A gift of property made publicly by both parents or by the surviving parent, if one is dead at the time of the *shinbyu* ceremony constitutes as between the donee and his co-heirs a valid gift although possession of the property was not given but such property remains absolutely at the disposal of the parents or the survivor of them for their life-time or his or her life-time.

Where in such a case the donee dies leaving either of the donors surviving, the gift has no effect and the donee's heirs cannot take benefit of the exception regarding possession obtaining in *shinbyu* gifts. **L B. MA PAN NYUN v MA HLA SEIN, 8 BUR. L. T. 149 665**

Widow's right of disposal of joint property of herself and her husband.

Subject to any claim by the eldest son to a certain specified property, such as his father's elephant, pony betel box, etc., and to a quarter share of the joint property as *orasa* son, a Burmese Buddhist widow has an absolute right of disposal over the whole of the joint property of herself and her late husband as against the children of their marriage. **L B. MA SEIN TON v. MA SON 588**

Bundelkhand Land Alienation Act (II of 1903), s. 3 949

ss 3, 14. applicability of—Collector's sanction—Sale after mortgage—Pre-emption—Right of subsequent purchaser—Redemption

Certain property situate in Bundelkhand was sold. The defendant brought a pre-emption suit and obtained a decree, but the sale was not sanctioned by the Collector as required by Act II of 1903 and the name of the pre-emptor was recorded as a usufructuary mortgagee for 20 years under section 14 of the Act. The mortgagors then sold the property to the plaintiff who sued to redeem it from the defendant who was in possession as a mortgagee:

Held, that the plaintiff was entitled to redeem the property.

Section 3 of the Bundelkhand Land Alienation Act applies to all "permanent alienations" even though the alienation is brought about by the exercise of a right of pre-emption.

The policy of the Bundelkhand Land Alienation Act is to prevent persons, who are not members of an agricultural tribe, acquiring property. **A. RAM NATH v. HARAIN, 13 A. L. J. 662; 37 A. 467 404**

s. 14 404

Burden of proof—Alienation by widow not for necessity 101

Eviction from land 416

Existence of circumstances bringing case within exception to section 300, Indian Penal Code 113

Full knowledge 161

Legitimacy 220

Minority—Oudh Estates Act (I of 1849), s. 6—Redemption—Estoppel—Compromise, binding effect of—Minor, when bound by compromise entered into by his father.

The burden of proving minority lies on the person alleging it.

Burden of proof—conold.

A mortgage-deed executed in 1835 provided that redemption would take place in the 25th year when the land was clear of both the crops or in any subsequent year afterwards whenever the mortgage-money was paid to the mortgagee. On a suit for redemption brought by the heirs of the original mortgagor it was contended that the suit did not lie as the mortgage was irredeemable under the provisions of section 6 of the Oudh Estates Act:

Held, that the suit was not barred inasmuch as there was a distinct term fixed for redemption of the mortgage and as that term had not expired before the 13th day of February 1856 the date of annexation of Oudh.

A person is bound by the terms of a compromise, entered into by his father during his minority and which he had no power to enter into, if he himself has derived benefit from it, and if he has taken no steps to have it set aside for a long time after attaining majority. **O. RAJA v. SANT RAIN DAS, 2 O. L. J. 223; 18 O. C. 95 193**

Mortgage—Balance due—Payment alleged, proof of 32

Pardanashin lady, deed executed by—Protection afforded by law—Proof, matters of—Independent advice—Attestation of document—Document, execution of, inside *parda*—Attesting witnesses, what to ascertain before attestation 269

Possession—Long possession without payment of rent and with assertion of title, effect of 939

Suit under O. 21, r. 63, Civil Procedure Code, 1908—Not merely ostensible but real title to be proved 855

Suit for profits against *lam-bardar*—Negligence 550

Tenant in possession of *abadi* land—Title to land, proof of 782

Burmese Buddhist Law. See BUDDHIST LAW.**Calcutta Municipal Act (III of 1899 ss. 63 (3), 102, 341 643**

ss. 589, 341, 102, 63 (3)—Notices issued on behalf of General Committee, whether to be signed and if so, by whom—Special rule of evidence contained in s. 589, applicability of—Proceedings of Committee how to be proved when not signed by Chairman Irregularity—Evidence Act (I of 1872), s. 78.

There being no express provision in the Calcutta Municipal Act requiring that notices issued under the Act on behalf of the General Committee should be signed at all, section 589 of the Act does not stand in the way of the Secretary to the Corporation, who is also the Secretary to the General Committee, signing such notices. But unless a notice purports to have been signed by the Chairman of the Corporation, the special rule of evidence contained in the section would not apply. That is to say, if a notice purports to have been signed by the Chairman, it would not have to be proved that a meeting was held or that it was regularly held. Where, however, the special rule contained in section 589 cannot apply

Calcutta Municipal Act—conold.

proceedings of the General Committee can be proved under the general law of evidence.

But printed proceedings themselves would not be sufficient legal proof unless they answer the description of a printed book purported to be published by the authority of the Committee as required by section 78 of the Evidence Act.

The mere fact that the Secretary has signed a notice instead of the Chairman does not affect the merits, inasmuch as it is a defect or irregularity which is cured by section 102 of the Municipal Act. **C. CORPORATION OF CALCUTTA v. PROMOTHO NATH MULLICK** 643

Cause of action, accrual of 207

Decree for possession—Possession given by judgment-debtor—Fresh dispossession 606

Suit for profits dismissed in default—Second suit for profits of other years including previous profits, maintainability of—Agra Tenancy Act (II of 1901), s. 164 5-8

Whole claim to be included—Causes of action distinct—Suit, if barred 607

Central Provinces Land Revenue Act (XVIII of 1881), ss. 63, 72, 83, 120, 152 (b), scope of—Record of Rights, entry made in correctness of—Civil Court, jurisdiction of—Limitation Act (IX of 1908), Sch. I, Arts. 14, 120, applicability of—Deputy Commissioner, power of, to give effect to decree.

A suit under section 83 of the Central Provinces Land Revenue Act is governed by Article 120, and not by Article 14, of the Schedule to the Limitation Act, 1908.

Where a dispute related to an entry made by a Settlement Officer in a Record of Rights prepared under Chapter VI of the Central Provinces Land Revenue Act and the appellants were described as *shikmi gaontias* or permanent tenants under the plaintiffs, who were the *gaontias* of the village, and a suit was instituted by the plaintiffs under section 83 of the Land Revenue Act to have the entry amended so that the appellants might be described as mortgagees and not as permanent tenants:

Held, that the Settlement Officer acted either under section 68 or section 72 of the Act in deciding the question between the parties or in making the disputed entry in the Record of Rights, and that under section 83, the Civil Court had jurisdiction to review his decision or the entry.

The provision of section 120 shows that a suit under section 83 is in the nature of a declaratory suit and that in spite of the express provisions of the section, a Civil Court can only declare that an entry is erroneous and how it should be amended, but it cannot execute its decree by bringing the Record of Rights into Court and altering it. The decree has to be taken to the Deputy Commissioner. This conclusion is confirmed by section 152, clause (b), which deprives the Civil Court of jurisdiction over certain matters including correction of entries or revision of records under sections 120, 121 and 122. **C. NABOGHAN BAHAI v. RAGHU NATH BABU**, 21 C. L. J. 646; 19 C. W. N. 1303 61

ss. 72, 83, 120, 152 (b) 61

Charge, omission in—Failure of justice—Unlawful assembly—Liability of all for offence committed by some 737

Charge to Jury—Misdirection 439

Misdirection—Jury not misled.

In a case of theft the Judge in his charge to the Jury said "the accused may be presumed to be the thief if there is no evidence to the contrary" instead of the words "unless he can account for his possession". But there were passages in the charge which showed that the Judge did not mean and the Jury did not understand him to mean that they should pay no attention to any explanation which the accused might put forward in the absence of evidence to support it:

Held, that the passage in question did not amount to a misdirection. **M. CHINNU, In re**, 16 C. L. J. 618 442

Charter Act (24 & 25 Vic., C. 104), ss. 2, 9, 13, 15—Letters Patent (Bombay), cls. 1, 36—Original Side Rules, r. 62—Appellate Side Rules, r. 1—Civil Procedure Code (Act V of 1908), s. 151—Jurisdiction—Power of single Judge sitting on original side to stay suit pending in Subordinate Judge's Court in mofussil—Consolidation of suits—Court's inherent power to consolidate.

It is not competent to a single Judge of the High Court, exercising the Ordinary Civil Jurisdiction of the Court, to stay the hearing of a suit pending for trial in a Subordinate Judge's Court in the mofussil unless authorised so to do by rule.

Per Macleod, J.—A single Judge sitting on the Original Side of the High Court is not competent to make an order for a stay of proceedings at the instance of a party to a suit in a Subordinate Judge's Court nor is he competent at the instance of a party in a suit pending before him to issue a prohibition to a Subordinate Judge against proceeding with a suit between the same parties; but he is competent, under section 151, Civil Procedure Code, to restrain the parties in a suit before him from proceeding with a suit in a Subordinate Judge's Court in the mofussil, and so in effect stay proceedings.

Obiter.—There is no provision in the Civil Procedure Code for the consolidation of suits, but a Court has inherent jurisdiction under section 151 to consolidate two or more suits pending before it. The High Court, however, has no jurisdiction to entertain an original application for the consolidation of suits pending before a District Court, and the case is still stronger when the suits are pending in different Courts. **B. NARAYAN VITHAL v. JANKIBAI SITARAM**, 17 Bom. L. R. 655; 39 B. 604 560

ss. 9, 13 560

s. 15 453, 560, 703

Cheating. See PENAL CODE, s. 415.

Chinese Buddhist Law. See BUDDHIST LAW.

Chota Nagpur Encumbered Estates Act (VI of 1876), s. 17, as amended by Act (V of 1884), and r. 16 of the rules framed thereunder—Putni lease, grant of, by manager—Sanction by Commissioner—Final lease not sanctioned by Commissioner—Validity of lease—Time in sanction order that money should be advanced

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before particular date Breach, if invalidates transaction—Successors of debtor, if can assail transaction on ground of non-observance of condition—Sanction of putni to one person—Putni granted to another—Difference in persona, if affects validity.

Section 17 of the Chota Nagpur Encumbered Estates Act, VI of 1876, as amended by Act V of 1884 and rule 16 of the rules framed thereunder, which require the sanction of the Commissioner as regards leases of immovable property belonging to owners incapacitated thereunder for terms over four years, do not lay down that in cases in which it is affirmatively established that a transaction itself in all its essential particulars has obtained the sanction of the Commissioner and in which it is requisite that the transaction be carried into effect by the preparation of the appropriate deeds, the document ultimately prepared should again be submitted for sanction.

Quære:—Whether a sanction given to the grant of a putni in favour of R. W. and Company could validate a grant in pursuance thereof in favour of R. W. and Company Ltd., as being to a different persona and whether a change in the lessee or putnidar ought to be treated as a change in essentials? P. C. RAMKANAI SINGH v. MATHEWSON, 19 C. W. N. 585; 17 M. L. T. 377; 13 A. L. J. 534; 21 C. L. J. 448; 17 Bom. L. R. 449; 2 L. W. 55; 29 M. L. J. 80 55

Civil Procedure Code (Act XIV of 1882), s. 13

————— **s. 276** 787
 ————— **s. 315** 827
 ————— **s. 317** 212

————— **s. 317—Mortgage-decree obtained by two joint mortgagees—Decree executed by only one mortgagee subject to rights of other mortgagee—Mortgaged property purchased in execution sale by executing mortgagee—Purchase whether for benefit of both mortgagees—Hindu Law—Mitakshara—Whole blood's preference to half blood—Preference applies to sapindas of same degree Paternal uncle of half blood, whether preferable to cousin of whole blood.**

Two joint mortgagees of a property sued on their mortgage and obtained a mortgage-decree. Only one of them applied for execution of the decree expressly praying that it may be executed subject to the rights of the other mortgagee. The mortgaged property was accordingly put up to sale and purchased by the executing mortgagee:

Held, (1) that the purchase by the executing mortgagee was not exclusively for himself but for the benefit of both mortgagees, and that, therefore, the other mortgagee was entitled to recover his share of the property;

(2) that the provisions of section 317, Civil Procedure Code, 1882, had no application to the case, inasmuch as they were designed to create some check on the practice of making what were called *benami* purchases at execution sales for the benefit of judgment-debtors, and in no way affected the title of persons otherwise beneficially interested in the purchase.

Under the Law of *Mitakshara* the preference of the whole blood to the half blood is confined to

Civil Procedure Code—(1882)—concl'd.

members of the same class, that is to say, to sapindas of the same degree of descent from the common ancestor, and does not extend to persons of different degrees. Therefore a paternal uncle of the half blood excludes from inheritance the cousins although they are the sons of an uncle of the whole blood. P. C. GANGA SAHAI v. KESRI, 19 C. W. N. 117; 18 M. L. T. 203; 29 M. L. J. 329; 2 L. W. 837; 13 A. L. J. 999; 17 Bom. L. R. 998 265

Civil Procedure Code (Act V of 1908), s. 10, O. XLI, r. 32—Appeal in previously instituted suit pending—Subsequent suit, if to be stayed.

Where an appeal against a decree passed in a previously instituted suit is pending, the Court should under section 10 of the Code of Civil Procedure stay proceedings in the subsequently instituted suit, dealing with the same subject-matter, until that appeal is decided. M. CHINNAKARUPAN CHETTY v. MEYAPPAN CHETTY, 18 M. L. T. 400 753

————— s. 11 658

————— **s. 11—Res judicata between co-defendants—Conflict of interests between defendants—Judgment defining rights and obligations inter se**

Where an adjudication between co-defendants is necessary to give the appropriate relief to the plaintiff, the adjudication will be *res judicata* between the co-defendants as well as between the plaintiff and the defendants provided there was a conflict of interests between the defendants and the judgment defines the rights and obligations of the defendants *inter se*. L. B. SHWE THA U v. HLA RHI, 8 Bur. L. T. 160 604

————— **s. 11—Res judicata—Suit for execution of lease and recovery of rent decided by Munsif on Regular Side—Munsif incompetent to entertain suit for arrears alone—Munsif's decision relating to rent, whether operates as res judicata.**

In a suit for the execution of a deed of lease and for arrears of rent a Munsif raised and decided on the Regular Side an issue relating to rent. Had the suit been solely for recovery of the rent it would have been beyond the jurisdiction of the Munsif. In a subsequent suit for arrears of rent filed in the Small Cause Court:

Held, that the decision of the Munsif operated as *res judicata*, although he was not competent to entertain a suit brought to recover rent alone. M. SELLAM IYENGAR v. VEERAPPA CHETTI, 18 M. L. T. 171 522

————— **s. 11, Exp. (4) 523**

————— **s. 33 868**

————— **ss. 42, 47 684**

————— **s. 47—Execution of decree—Representative—Decree against ostensible representative—Execution against executor—Remedies of decree-holder—Suit upon domestic judgment.**

On the 16th September 1911 A instituted a suit against M for the recovery of a large sum of money. During the pendency of the suit A died on the 27th November 1911. On the application of A, the three sons of the deceased, who were ostensibly his

Civil Procedure Code—(1908)—contd.

heirs and representatives, were brought on the record in his place. They did not object to the adoption of this course. The case was tried on the merits and on the 8th May 1912, a decree was made, with the usual direction that the judgment-debt be realised out of the estate of the deceased in the hands of the substituted defendants. On the 9th June 1913, the decree-holder applied for execution of the decree, and notices were duly issued. Thereupon the wives of the three sons of the deceased intervened and stated that execution could not proceed as M had made a testamentary disposition of his properties on the 18th May 1911, whereby they had been appointed executrices:

Held, that the decree as it stood could not be executed against the estate in the hands of the executrices;

that the remedy of the decree-holder was, either to have the decree vacated, the suit restored, the executrices brought on the record and a new decree made against them, or, to institute a suit on the judgment and to obtain a decree thereon against the executrices.

An action on what may be called a domestic act distinguished from a foreign judgment is permissible only where the judgment cannot be enforced in some other way. **C. KALI CHARAN NATH v. SUKHADA SUNDARI DEBI**, 22 C. L. J. 272; 20 C. W. N. 58 **824**

S. 47—Suit, dismissal of, on ground that proper remedy was by execution, if legal—Court trying suit incompetent to determine matter in execution, whether sufficient reason for not treating suit as application—Specific Relief Act (I of 1877), s. 23—Specific performance, stranger to contract, whether entitled to—Practice—Costs—Negligent conduct of case in lower Court—Case not properly set out and proper evidence not produced Success in appeal—Right to costs.

In the face of section 47 of the Civil Procedure Code, which permits suits to be treated as proceedings, the dismissal of a suit on the ground that the plaintiff must have applied for executing a decree and not have sued to enforce specific performance of a contract is bad in law. The mere fact that the Court which decided the suit would have had no jurisdiction to determine the matter in execution is not a sound reason for not treating the suit as an application in execution.

A stranger to a contract is not entitled to enforce specific performance of the same.

An appellant, who, in second appeal, gains an advantage which he had lost by his negligence in the Courts below in not setting out his case properly and by not supporting it, in the first Court, by proper evidence, is not only not entitled to his costs of appeal but must pay the costs of the respondent. **M. LAKSHUMANAN CHETTY v. MUTHIAH CHETTY**, 2 L. W. 785; 18 M. L. T. 247 **785**

S. 48 521

S. 48—Decree-holder prevented from executing decree by fraud or force of one judgment-debtor—Decree time-barred—Extension of time, if against all judgment-debtors—Construction of Statute.

Where a decree-holder is prevented from executing his decree by the fraud or force of one of several

Civil Procedure Code—(1908)—contd.

judgment-debtors within limitation, he can get an extension of the 12 years' period provided for execution of the decree by section 48 of the Civil Procedure Code, 1908, only as against that judgment-debtor but not as against other judgment-debtors who have not been guilty of fraud or force.

When there is on one side what is said to be the general policy of an Act and, on the other, the express words of a section dealing with a specific matter, the express words ought to prevail. **M. ABDUL KHADIR v. AHAMMAD SHAIWA**, 38 M. 419 **423**

S. 52 256
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S. 60 (m)—Reversionary interest, whether liable to attachment 101
S. 4, O XXI, r 62

—Transfer of Property Act (IV of 1882), ss. 52, 53—Attachment—Mortgage, property sold subject to—Purchaser, not to question validity of mortgage—Sale of encumbered property subject to no encumbrance—Auction-purchaser, liability of.

Where a property is sold subject to a mortgage, as provided for in Order XXI, rule 62, Civil Procedure Code, only the judgment-debtor's right of redemption is sold, so that the purchaser does not acquire any greater rights than those of redeeming the mortgage, and the purchaser cannot question the validity of such a mortgage.

Where a property, although encumbered, is sold subject to no encumbrance, the purchaser is nevertheless liable to discharge the encumbrance. Neither the provisions of sections 52 and 53 of the Transfer of Property Act nor those of section 64, Civil Procedure Code, help him to escape the liability. **O. GUR CHARAN PRASAD v. BACHNI**, 2 O. L. J. 225 **238**

S. 66—Court sale, property purchased at—Joint Hindu family, one member of, property purchased by—Benami purchase—Second appeal—Evidence, weight or value of.

A property purchased at a Court-sale by one member of a joint Hindu family in his own name can be established to be the joint family property purchased with joint funds, for section 66, Civil Procedure Code, does not apply to such a case but only to ordinary benami purchases.

The weight or value of evidence is not a subject for discussion in second appeal. **O. MANKARAN SINGH v. BAIJNATH SINGH**, 2 O. L. J. 283 **279**

S. 65, scope of—Infant, manager of, buying property on infant's behalf, position of—Conduct, fraudulent, effect of—Civil Procedure Code (Act XIV of 1882), s. 317.

Where the manager of an infant used the money of the infant for the purpose of buying property on the infant's behalf at an execution sale, and admitted that the infant was the real purchaser, but maintained that he was able to deprive the infant of the property because of section 317 of the Civil Procedure Code of 1882 (section 66 of the Code of 1908) and the manager's conduct was found to be fraudulent:

Held, that if the manager's contention were the true view, then section 317 of the old Code would be the occasion of a grave fraud, and that section 317 did not furnish any answer to the plaintiff's claim. **C. NONI GOPAL BASU v. TARESH CHANDRA GHOSH**, **212**

Civil Procedure Code—(1908)—contd.

s. 73, scope of—Rateable distribution—Two decree-holders against one judgment-debtor—Restitution—High Court, power of, to direct restitution of money withdrawn by decree-holder.

A, a decree-holder against C, the judgment-debtor, sought to satisfy his dues by the sale of an occupancy holding of C. C objected that the holding was not transferable and could not be sold in execution of a decree for money. The objection was overruled and the execution was allowed. B another decree-holder against C applied for execution of his decree by sale of the same holding, and in the alternative prayed for rateable distribution if the holding was sold in execution of A's decree. C again objected that the holding was not transferable and this time his objection was allowed. The holding, however, was sold in A's decree.

Held, that B was entitled to rateable distribution of the sale-proceeds.

No valid claim for rateable distribution can be laid under section 73 of the Code of Civil Procedure if, in an application for execution of the decree, it has been held that the decree has been satisfied, or is barred by limitation, or if such application has been dismissed.

If pursuant to an erroneous order of a Subordinate Court money has been paid out to a litigant, it is competent to the High Court to direct that person to bring back the money into Court when such erroneous order is set aside. The Court has inherent power to direct such restitution to enable it to do effective and complete justice between the parties.

To bring a case under section 73, it is necessary to establish that more persons than one have made an application to the Court for execution of decrees for payment of money passed against the same judgment-debtor and have not obtained satisfaction thereof, before the receipt of the assets in respect whereof rateable distribution is claimed. **C. GOPAL CHANDRA BOSE v. HARI MOHAN DUTT**, 21 C. L. J. 624

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ss. 73 (1), 151—Assets, rateable distribution of—Execution, application for, when assets realised—Court, inherent powers of, in face of express provision—Attachment before judgment, nature of—Attachments, two kinds of, distinguished—High Court, jurisdiction of, to interfere with erroneous order of lower Court.

An order for rateable distribution cannot be made, under sub-section (1) of section 73 of the Code of Civil Procedure, in favour of a person who has not obtained his decree but only an order for attachment before judgment and who is thus incompetent to apply for execution at the time when the assets are realised.

It is only where an application for execution has been made before the realization of assets that section 73 of the Code of Civil Procedure applies.

The doctrine of inherent powers of a Court, recognised by section 151 of the Civil Procedure Code, has no application where there is an express provision of law which covers a case.

Attachment before judgment does not, by itself, create any interest in the property attached.

There is a difference between an attachment effected in execution of a decree and an attachment

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before judgment, and a person obtaining an attachment before judgment cannot restrict the rights of an attaching creditor who has previously obtained his decree.

A High Court is competent to interfere with an erroneous order of a Subordinate Court when as a result of that order, though erroneous in law, that Court has assumed a jurisdiction which it did not possess or has declined a jurisdiction which was vested in it by law. **C. MADHU SUDAN PATITUNDA v. RASHI MOHAN SEN PODDAR**, 21 C. L. J. 614

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s. 80—Act done by Police Officer under power conferred on him by Criminal Procedure Code, 1898—Suit for damages in respect of such act—Two months' notice, necessity of—Police Act (V of 1861), s. 42.

Where a suit is brought against a Police Officer for acts done by him in the exercise of the powers granted to him by the Criminal Procedure Code, section 42 of the Police Act does not apply. The plaintiff must give to such officer two months' notice as provided in section 80 of the Civil Procedure Code. **A. BACHICHA SINGH v. JAFAR BEG**, 13 A. L. J. 788

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s. 86—Suit against Ruling Chief—Consent of Governor-General.

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s. 86—Ruling Chief, suit against—Consent of Governor-General, when necessary—Defendant pleading privilege and also on merits—Waiver—Jurisdiction—Mere objection to jurisdiction, whether sufficient to show submission.

The plaintiff, a temple servant, alleged that the defendant, a Ruling Chief, having usurped the position of the trustee of the temple, had used that power in wrongfully dismissing the plaintiff from service.

Held, that the suit as framed was not against the diety of the temple, as represented by the Ruling Chief, but was against the Ruling Chief himself and that, therefore, it was not maintainable without the consent of the Governor-General in Council, under section 86 of the Code of Civil Procedure.

The privilege of not being liable to be sued without the consent of the Governor-General in Council is not waived if, after pleading it, the defendant pleads also on the merits of the case.

Per *Sadasiva Aiyar, J.*—Merely to object to the jurisdiction of a Court is enough to show that the defendant did not voluntarily submit to its jurisdiction. **M. KUTHALEDATH NARAYANA v. COCHIN SIRCAR**, 2 L. W. 637; (1915) M. W. N. 534; 29 M. L. J. 667

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s. 92—Appeal by one surviving appellant, maintainability of—Death of some plaintiffs after institution of suit, effect of—Income of property, part of, spent in upkeep of temple dedicated for public worship—Dedication—Revenue Registers, entries in, weight of—Revenue Courts, partition-officer of, power of—Private property—Waqf property—Partition proceedings, binding effect of.

The necessity for the co-operation of two or more persons in a suit brought under section 92, Civil Procedure Code, is restricted only to the institution of the suit, so that a surviving plaintiff-appellant alone in such a case is competent to carry on the appeal,

Civil Procedure Code—(1908)—contd.

The mere fact that the founder of a temple intended for public worship is spending a portion of his income derived from a certain property to the upkeep of the temple is insufficient to establish that the corpus of the property is dedicated to the use of the temple.

An entry made in a Revenue Register without any explanation as to how it originated or was brought into existence is, if inconsistent with other known facts, not entitled to any weight.

It is not open to a partition-officer of the Revenue Courts to convert private property into *wagf* property by giving it a particular designation, and his proceedings in regard to the distribution of and title to the land, are not conclusive as between a party to the partition and strangers. **O. PARMESHWRI DAS v. GIRDHARI LAL**, 2 O. L. J. 259 **240**

S. 92, suit under, compromised—Trustee appointed declared insolvent—Application to remove trustee if in continuation of suit—Remedy.

In a suit under section 92 of the Civil Procedure Code a compromise was effected by which one G was appointed manager of a temple. Subsequently G was declared insolvent and an application was made to the District Judge to remove him:

Held, that the suit having been decided and a decree made the application could not be in continuation of the suit and was, therefore, not entertainable.

Held, further, that the remedy was a further suit under section 92 of the Civil Procedure Code. **A. RAM CHAND v. GAYA DIN** **482**

S. 92—Suit to administer *inam*, when maintainable—*Inam* to benefit grantees not temple, effect of.

No suit lies under section 92 of the Code of Civil Procedure to administer an *inam* granted to certain persons for the performance of the service of Acharyapurushain a temple when no part of the *inam* was applicable to the temple but the whole of it was intended to benefit the grantees alone. **M. SRIRANGA CHARIAR v. PRANATHARTHIHARA CHARIAR**, 2 L. W. 632; 18 M. L. T. 122 **74**

S. 92—Suit regarding public charity—Collector's consent, conditional, effect of.

Where on an application to the Collector for consent under section 92 of the Civil Procedure Code, the Collector, while doubting whether the section applied to the case, declared his consent only if the Court thought that the section applied, and the suit was dismissed on the ground that there was no proper consent:

Held, that inasmuch as the Collector had not even come to a conclusion that the suit was one which should have been filed, his consent was no consent and the District Judge was right in dismissing it on that ground.

The provisions of section 92 of the Civil Procedure Code must be regarded as imperative. **B. SULEMAN HAJI USMAN v. SHAIKH ISMAIL SHAIKH OOSMAN**, 17 BOM. L. R. 625; 39 B. 580 **17**

S. 96 (3), O. XXI, rr. 2, 11 (e)—Order appointing Commissioner by consent of parties—Appeal—Certifying payment or

Civil Procedure Code—(1908)—contd.

adjustment, mode of Power and duty of Court. make inquiry—Evidence Act (I of 1872), s. 115—Doctrine of 'no estoppel against law'—Public policy—Agreement to account for certain payments in execution of decree—Estoppel—Decree, construction of—Duty of Court—Madras Court of Wards Act (I of 1902), ss. 43 (5), 32, 55—Calculation—Payment.

Section 96 (3) of the Civil Procedure Code does not apply to an order directing the appointment of a Commissioner with the consent of parties.

Section 43 (5) of Madras Act I of 1902 does not provide for any payment but a reference to sections 32 and 55 of the Act shows that the calculation mentioned in that section will determine the net income which the Court of Wards having management will be in a position to set apart for payment.

There is no authority or principle which binds a Court to construe a decree in the mode in which the parties intended it to operate however incompatible such a construction may be with the plain language of the decree. The duty of the Court is to execute the decree as it finds it and not as understood by the parties. If a particular construction has been placed by the Court upon a decree, and if it has been enforced by the process of the Court, the parties may be estopped, with certain limitations, from claiming that the decree should be construed differently.

Rule 2 of Order XXI, Civil Procedure Code, should be so construed as not to defeat justice.

Where a decree-holder certifies a payment or adjustment to the Court under Order XXI, rule 2, the Court is bound to inquire into the truth or correctness of the statement made and to ascertain the exact amount for which credit should be given to the judgment-debtor. The Court is not confined to merely entering the figures supplied by the decree-holder.

No particular words are necessary for the purpose of certifying a payment or adjustment to the Court under Order XXI, rule 2. A mere intimation in an execution application that a certain amount had been received from the judgment-debtor but that it had been appropriated towards another liability amounts to certifying within the meaning of the rule.

The doctrine that there can be no estoppel against a plain provision of the law should not be pushed too far. The principle is that parties should not be permitted by an arrangement between themselves to commit an illegality. The right should not be extended to cases which have the effect of enabling parties to make a law for themselves in violation of the law of the land. But where such a result will not follow, there is nothing to prevent the application of the provisions of section 115 of the Evidence Act to agreements between the parties.

There is nothing opposed to public policy or illegal in parties stipulating that a certain sum of money which is recoverable as between themselves in a regular suit should be adjusted in execution proceedings. Therefore, where a decree-holder certifies and informs the Court of an adjustment, he is not entitled to say that payments received by him are accountable by him only in a regular suit. **M. LOBB GOVINDA DOSS v. RAJAH of KARVETNAGAR**, 29 M. L. J. 219 **357**

Civil Procedure Code—(1908)—contd.

s. 97 321

s. 102, O. XLI, r. 23, O. XLIII, r. 1 (u)—*Remand, appeal from order of.*

An appeal does not lie against an order of remand in a suit of the nature cognisable by a Court of Small Causes and valued at less than Rs. 500, because a second appeal is not allowed against the decree of the lower Appellate Court in such a suit. **C. HARADEB DAS AGARWALA v. ANANDA SHEIK**, 22 C. L. J. 97 **894**

ss. 104 (h), 42,

145, 47—*Surety—Arrest—Appeal.*

A decree of a Small Cause Court was sent for execution to the Court of a Munsif. In execution of that decree the judgment-debtor was arrested and detained in the civil prison, but he was released on the petitioner standing his surety. On his failure, however, to satisfy the condition of his release, the petitioner, his surety, was arrested in execution of the decree and directed to be detained in the civil prison. The petitioner's appeal was rejected by the District Judge as forbidden by section 104, clause (h), Civil Procedure Code.

Held, that although an order directing the arrest of a person in execution was excepted from appeal by clause (h) of section 104, Civil Procedure Code, sections 42, 47 and 145 of the Code gave the petitioner a right of appeal. **C. ADHAR CHANDAR GOPE v. PULIN CHANDAR SHAHA**, 19 C. W. N. 1085 **684**

ss. 109, 110—*Leave*

to appeal to Privy Council—Judgment, one in several suits—Aggregate value above Rs. 10,000 Each suit valued separately below Rs. 10,000—Appeal to Privy Council, if permitted.

Where a number of suits are tried together and one common judgment is pronounced in all of them, the fact that the aggregate value of all the suits is above Rs. 10,000 while the value of the subject-matter of each suit is below Rs. 10,000, does not give right of appeal to the Privy Council. **M. KAKARLAPUDI RAMACHANDRA v. CHEEPURAPALLI APPAYYA**, 2 L. W. 916 **495**

s. 110 895
s. 110, O. XLV, r.

3 (1)—*Appeal to Privy Council—Leave—Lower Court's decree only modified by High Court—Value above ten thousand rupees—Substantial question of law—Misconstruction of part of evidence.*

Where, as regards the subject-matter of a proposed appeal to Privy Council, a High Court has affirmed the decree of the Court of first instance (though it has made some modifications in the decree as regards another portion of the claim), it is essential for the grant of a certificate of leave to appeal to the Privy Council (even if the value of the subject-matter of the proposed appeal is above ten thousand rupees) that the appeal must involve some substantial question of law.

Misconstruction of a portion of the evidence relating to particular facts cannot be treated as a "substantial question of law" within the meaning of section 10, Civil Procedure Code. **M. MULRAJU LAKSHMI VENKAYAMMA RAO v. VENKATADRI APPA RAO** **372**

Civil Procedure Code—(1908)—contd.s. 115—*Appeal against*

order refusing application to revise decree of Small Cause Court.

No appeal lies either under the Code of Civil Procedure or the Letters Patent from an order of a single Judge of the High Court refusing an application under section 115 of the Code to revise a decree of the Calcutta Small Cause Court. **C. PEARY LALL DAW v. MANAMALI DEY**, 22 C. L. J. 47 **862**

s. 115—*High Court's*

powers of interference—Pleadings—New plea set up at close of case—Amendment of plaint—Procedure.

The power of superintendence and the powers given by section 115 of the Civil Procedure Code are intended to give the High Court power to see that the proceedings before lower Courts are properly conducted and the High Court should not refuse to set right matters if by doing so, it would save unnecessary expense or delay or a multiplicity of proceedings.

Where, therefore, in a suit brought to enforce the terms of an agreement entered into by the defendants with the plaintiff's husband, the plaint proceeded upon the footing that it was a valid, subsisting and enforceable contract, and at the close of the arguments the plaintiff's Vakil in reply suggested that even if the contract was void, section 65 of the Contract Act applied, and the Court thinking that the contention was raised in the pleadings directed the defendants to file an additional written statement:

Held, (1) that the Court had no jurisdiction to direct the defendants to file an additional written statement to meet allegations not contained in the plaint and which could, by no stretch of imagination, be held to be covered by the allegations in the plaint;

(2) that the proper course for the Court to adopt was to direct the plaintiff to amend the plaint, then to decide whether the amendments should be allowed, and if allowed to direct the defendants to file written statements, settle proper issues and then proceed to decide the case. **M. POOSAPATHI RAMACHANDRA v. VENKATA SUBBAYAMMA**, 29 M. L. J. 53 **41**

s. 115—*Limitation Act*

(IX of 1908), s. 15, Sch. I, Art. 182—*Decision of question of limitation under s. 15, if decision of jurisdiction—Objection taken for first time in revision—High Court, power of, to entertain.*

The decision of a question of limitation under section 15 of the Indian Limitation Act is not one of jurisdiction and the High Court will not interfere in revision with it.

An objection that a suit for a declaration has been wrong from beginning to end and that proceedings should have been taken thereunder and not under some other decree, cannot be taken for the first time in revision. **M. THOMAS PILLAI v. MUTHURAMAN CHETTY**, 2 L. W. 609 **264**

s. 115—*Presidency Small*

Cause Court, decision of, if subject to revision by High Court—Jurisdiction—Presidency Small Cause Courts Act (XV of 1882), ss. 19A, 38—Right to apply for new trial, whether in nature of appeal—Order return.

Civil Procedure Code—(1908)—contd.

ing plaint for presentation to proper Court—Application for new trial not made—Revision to High Court, if competent.

A High Court can exercise revisionary jurisdiction over a Presidency Small Cause Court.

The jurisdiction under section 38 of the Presidency Small Cause Courts Act is not of an appellate nature and a person against whom an order is made (in this case one returning a plaint for presentation to the proper Court) is not bound to appeal to the Full Bench of the Presidency Small Cause Court before invoking the revisional jurisdiction of the High Court. **M. NAGOOR MEERA SAHIB v. SOOKULAL SOWCAR**, 2 L. W. 719; 18 M. L. T. 254 **488**

s. 115—Revisional jurisdiction of High Court—Presidency Small Cause Court's decision—Wrong decision on a question of law—Provincial Small Cause Courts Act (IX of 1887) s. 25.

Under section 115 of the Code of Civil Procedure a High Court can revise a decision of the Presidency Court of Small Causes.

But its powers under section 115 (a) and (b) are not co-extensive with its powers in appeal, it cannot, therefore, go into facts nor can it interfere on the ground of mere mistake in fact or law.

Oldfield, J.—A wrong decision of a question with which a Court is competent to deal cannot affect its jurisdiction to pass a decree based on that decision though a Court cannot confer jurisdiction on itself by the wrong determination of a question.

Per *Sadasiva Aiyar, J.*—Even in the case of revision under section 25 of the Provincial Small Cause Courts Act, the High Court has a discretion to interfere or not and where substantial justice has been done in the lower Court, it is not advisable to use revisional powers on purely technical grounds.

Much less is it advisable to interfere when the High Court's powers of revision are invoked under section 115 of the Civil Procedure Code. **M. VENKATARAMANJULU NAIDU v. RAMASWAMI NAIDU**, 2 L. W. 709; 18 M. L. T. 164; 29 M. L. J. 353 **353**

s. 141, O. II, r. 2, O XX, r. 12—Execution—Decree for possession and mesne profits—Separate execution for possession and mesne profits; if allowable.

A person who holds a decree for possession of immoveable property and mesne profits can execute it first for possession only and then afterwards for mesne profits. **M. VEERARAGHAVA ROW v. MALAPRAGADA GURUNADHA ROW**, 2 L. W. 688 **246**

s. 144—Restitution—Costs and mesne profits—Restitution, application for, nature of.

An application under section 144 of the Code of Civil Procedure (Act V of 1908), for restitution is not in the nature of an application to execute any decree and, therefore, Article 81 of Schedule I of the Limitation Act applies to such an application. **L. B. ASHA BIBI v. NURUDDIN**, 8 BUR. L. T. 165 **650**

s. 145 684

s. 151 38, 230

s. 151—Consolidation of suits—Court's inherent power to consolidate.

There is no provision in the Civil Procedure

Civil Procedure Code—(1908)—contd.

Code for the consolidation of suits, but a Court has inherent jurisdiction under section 151 to consolidate two or more suits pending before it. The High Court, however, has no jurisdiction to entertain an original application for the consolidation of suits pending before a District Court, and the case is still stronger when the suits are pending in different Courts. **B. NARAYAN VITHAL v. JANKIBAI SITARAM** 17 Bom. L. R. 655; 39 B. 604 **560**

O. I, r. 10 795

O. 2, r. 2 246,

317, 705

O. 2, r. 2—Plaintiff

deliberately omitting to sue for right relief Subsequent suit for right relief, if barred.

Where the plaintiff knew perfectly well what relief he was entitled to and he deliberately omitted to claim the right relief, his subsequent suit in respect of the same cause of action for the right relief is barred by the provisions of Order II, rule 2, of the Civil Procedure Code. **A. ABDUL HAKIM KHAN v. KARAN SINGH**, 13 A. L. J. 929 **951**

O. 2, r. 2, O. 34,

rr. 1, 14—Transfer of Property Act IV of 1882, ss. 61, 85, 99—Same person holding several mortgages on the same property, whether entitled to sue on one mortgage reserving his rights under a prior mortgage—Mortgages, consolidation of—Several mortgages—Separate causes of action.

It is open to a mortgagee holding more than one mortgage on the same property to bring a suit for the recovery of his debt due only under one of the mortgages and to sell the property under the decree in that suit subject to his rights under a prior mortgage.

A mortgagee having several mortgages on the same property is entitled to treat them as separate causes of action and is not bound to bring one suit on all mortgages. **M. SUBRAMANIA AIYAR v. B. L. SUBRAMANIA AIYAR**, 29 M. L. J. 195 **317**

O. 2, r. 2, clis (1),

(2)—Whole of claim to be included by every suit—Causes of action distinct—Suit, if barred.

Order II, Rule 2, of the Code of Civil Procedure, 1908, does not compel the plaintiff, who has several causes of action to lump them together under the penalty of having subsequent suits barred. The section does not say that every suit shall include every cause of action or every claim which the party has, but only that every suit shall include the whole of the claim arising out of the cause of action, meaning the cause of action for which the suit is brought.

Where the causes of action are distinct, a subsequent suit is not barred. **C. SUMEKA DASI v. BAIKUNTHA CHANDRA DAS** **607**

O. 5, r. 17, scope of—

Summons, service of, upon purdanashin lady, how effected—Court, power of, to direct service otherwise—Registered notice.

Under the provisions of rule 17 of Order V of the Code of Civil Procedure, a valid service is effected when the serving officer affixes a copy of the summons on the outer door or some other conspicuous part of the house in which a lady ordinarily resides, in case she is a purdanashin lady and is not

Civil Procedure Code—(1908)—contd.

able to accept service personally, and has no agent empowered to accept service on her behalf and has also no adult male member in her family upon whom service may be effected.

Where, either by reason of the custom of the country or for any other reason, it is impossible for the serving officer to obtain access to the person to be served, the case may, without undue stretch of language, be held to be covered by the description, "where the defendant cannot be found by the serving officer."

It is open to a Court, even where there has been a technical compliance with the provisions of rule 17 to order service in another mode, if the Court thinks fit to do so, in the interests of justice. The Court may, in a case of this description, direct the issue of summons to *purdanashin* ladies by means of notice sent by registered post, so that the cover may, in due course, reach the lady herself. **C. KHIRODA SUNDARI DAS v. NABIN CHANDRA SAHA**, 21 C. L. J. 653; 19 C. W. N. 1274 **64**

O. 6, r. 17 379**O. 9, r. 9—Cause of**

action—Suit for profits dismissed in default—Second suit for profits of other years including previous profits, maintainability of—Agra Tenancy Act (II of 1901), s. 164.

A co-sharer brought a suit for profits of the years 1313, 1314, 1315 *faslis* against the *lambardar*. The suit was dismissed for default of appearance. Subsequently another suit was brought by the same co-sharer for the profits of the year 1316, 1317, 1318 *faslis*. In this suit the plaintiff included also sums recovered during the years in suit in respect of the years 1313, 1314, 1315:

Held, that the suit was not barred by Order IX, rule 9, of the Civil Procedure Code, inasmuch as the causes of actions of the two suits were different. **A. RAJ BARADUR v. SHYAM LAL** **568**

O. 9, r. 13 247**O. 11, r. 21—Plaintiff**

keeping back documents which he ought to have produced, effect of—Evidence Act (I of 1872), s. 114, ill. (g)—Adverse inference—Dismissal of suit.

Where there is a strong ground for suspecting that a plaintiff is keeping back books and documents which he ought to have produced, the Court is entitled to draw adverse inferences against the plaintiff but it cannot dismiss his suit under Order XI, rule 21, unless an order for "discovery" or "inspection" has been made and disobeyed by him. **A. KISHAN LAL v. SULTAN SINGH**, 13 A. L. J. 831 **525**

O. 18, r. 13—Pro-

vincial Small Cause Court—Abstract of evidence incomplete—Judgment based on such abstract, whether legal.

In a suit tried by a Provincial Small Cause Court, the note appended to the judgment showed that five witnesses had been examined for the plaintiff and one for the defendant. The record, however, of the memorandum of evidence prepared under Order XVIII, rule 13, Civil Procedure Code, and found on the record, was incomplete and contained only the evidence of the witnesses Nos. 1 to 4 and the words 'I

Civil Procedure Code—(1908)—contd.

am' in the evidence of the 5th witness for the plaintiff and the evidence of the defendants' witness was not at all found:

Held, that the judgment based upon such evidence was illegal and ought to be set aside. **M. RATNA PATHAN v. PARA SUNDARAM**, 2 L. W. 803 **634**

O. 20, r. 12 246**O. 20, r. 18 209****O. 21, r. 2 51, 357****O. 21, r. 2 (3) 45****O. 21, r. 11 (e) 357****O. 21, r. 19, scope**

of—Claim of party entitled to larger sum barred—Party entitled to smaller sum, if can take out execution.

Order XXI, rule 19, of the Civil Procedure Code, 1908, contemplates that a decree under which two parties are entitled to recover sums of money from each other should be regarded as a single indivisible order of the Court enforceable only for the balance, that is, the difference between the two sums awarded, and that balance becomes awardable by the Court without the intervention of the parties as soon as the amount of the balance is determined.

Therefore, though the party entitled to the larger sum would be barred by limitation from recovering the larger sum awarded to him under the decree, that does not entitle the party claiming the smaller sum to take out execution. **B. MADAPPA GANAPA HEGDE v. JAKI GHOSAL GABRI GHOSAL**, 17 Bom. L. R. 689 **893**

O. 21, r. 31 840**O. 21, r. 46—Execu-**

tion of decree—Jurisdiction of execution Court to issue prohibitory order to person outside its territorial jurisdiction.

A decree passed by a Court at Jubbulpur was transferred for execution to a Court at Ambala. The latter Court issued a prohibitory order to the Examiner of Accounts, Lahore, and to the Executive Engineer, Saharanpur, directing them not to make any payments to the judgment-debtor, a contractor to whom money was due on contracts on account of work done under the Executive Engineer, Saharanpur. It was contended for the judgment-debtor that the Ambala Court had no jurisdiction to issue the prohibitory orders:

Held, that the contention was valid, for there was nothing to show that the judgment-debtor could have claimed payment at Ambala and that the mere fact that the judgment-debtor resided at Ambala and the work done by him was done partly in the Ambala District and his claims had first to be passed by the Examiner of Accounts at Lahore did not confer jurisdiction on the Ambala Court. **P. GREGORY v. THOMSON**, 177 P. L. R. 1915; 116 P. W. R. 1915 **487**

O. 21, r. 53 587**O. 21, r. 57 787****O. 21, r. 62 238**

Civil Procedure Code—(1908)—contd.

O. 21, r. 63, suit
under—*Method of obtaining review—Burden of proof*
—*Not merely ostensible but real title to be proved.*

A plaintiff who is calling in question in a suit contemplated by Order XXI, rule 63 of the Civil Procedure Code an adverse decision of a Court, has to show affirmatively that not only the ostensible but the real title also is in him. He cannot discharge the burden of proof cast on him by merely pointing to the innocent appearance of the instruments under which he claims, he must show that they are as good as they look.

Such a suit is to alter or set aside a summary decision or order of the Court, and it is a method of obtaining review. **C. JAMAHAR KUMARI BIBI V. ASKARAN BOID, 22 C. L. J. 27 855**

O. 21, r. 84, s. 151—Deposit of one-fourth purchase-money, time for, extension of—Sale officer—Court-sale vitiated by failure to deposit one-fourth purchase-money—Confirmation of sale, order for, when bad—Transferee from bidder—Auction-purchaser—Court, power of, to set aside its own order—Limitation.

An officer conducting a Court-sale has no authority to extend the time in which the purchaser can under Order XXI, rule 84, Civil Procedure Code, deposit 25 per cent. of the purchase-money, which has to be deposited immediately.

A failure to deposit anything out of 25 per cent. of the purchase-money under Order XXI, rule 84 Civil Procedure Code, vitiates the sale *ab initio*.

An order confirming a Court sale in favour of a transferee from the bidder, who himself alleges not to be the actual purchaser, is erroneous, as the transferee is not the auction-purchaser. And a Court making such order has every right to set it aside under the provisions of section 151, Civil Procedure Code, when the error comes to its notice, and no question of limitation arises in such a case.

O. ALI MUHAMMAD V. ALIA KHANUM, 2 O. L. J. 216 230

O. 21, r. 89 Application to deposit money made in time—Money tendered to Treasury Officer shortly before 3 p. m., not accepted, effect of—Money deposited next day beyond 30 days, effect of.

A judgment-debtor applied to set aside a sale on the last day of limitation and tendered the money to the Treasury Officer shortly before 3 p. m., the hour at which the Treasury is closed to the public. The Treasury Officer refused to take the money as it was too late to count it. He, however, observed that the money could be paid at any time within three days of the tender. The judgment-debtor, consequently paid the money next day after 30 days had expired.

Held, that the judgment-debtor having done all that was possible for him to do to pay the money into the Treasury within time, must be taken to have paid the money in accordance with law. **A. MUNNA LAL V. RADHA KISHAN, 13 A. L. J. 793 146**

O. 21, r. 93—Civil Procedure Code (Act XIV of 1882), s. 315—Execution sale set aside—Purchaser, suit by, against decree-holder for poundage deducted from purchase-money as well as for interest on amount of purchase-money deposited, maintainability of—Poundage, what is.

Civil Procedure Code—(1908)—contd.

A third party purchaser at an execution sale, which was subsequently set aside owing to the irregularities in the conduct thereof for which the decree-holder was responsible, is entitled to sue and recover from the decree-holder the amount of poundage which was deducted from the purchase-money deposited by him into Court as well as interest on such deposit. There is nothing in Order XXI, rule 93, Civil Procedure Code, which debars such a suit.

The nature of poundage fees pointed out. **M. PARVATHI AMMAL V. GOVINDASAMI PILLAI, 2 L. W. 861; 29 M. L. J. 467 827**

O. 22, r. 4 717
O. 22, r. 4 (2)—
Defence open to legal representative as such—Alienation of family property by co-parcener—Suit for possession by alienee Necessity.

It is open to the legal representative of a deceased defendant to raise a plea which could have been raised by the defendant himself, even though he had omitted to raise it specifically.

The plaintiff-respondent sued for possession of property sold to her by the appellant's father and it was contended that the alienation was for family purposes the money being required to defend criminal case against the alienor.

Held, (1) that this by itself did not establish legal necessity, the evidence must also have shown that there was no other property by means of which he could have defended himself;

(2) that the Court should see whether at the time the suit was brought, if a partition of the property had been made between the members of the family, the plaintiff properties could have been allotted to the alienor without injustice to the other co-parceners or whether there was other sufficient property to be allotted to him equal in value to the property in suit and which could, therefore, be allotted to the plaintiff. **M. SENCHURAMA NAIDU V. ANNAPURANI AMMAL 79**

O. 22, r. 9 717
O. 22, r. 9 (2)—

Abatement set aside by one Division Bench—Order passed ex parte—Another Bench, if can re-open the same—Practice—Procedure—Jurisdiction—Community, property belonging to—Some members allowed to act as trustees—Gift by such persons in favour of third person—Possession of third person, whether permissive or adverse—Declaratory suit based on denial of title—Cause of action, when arises—Knowledge of some members, if affects rights of others.

An order made by a Division Bench of the High Court setting aside the abatement of a second appeal under Order XXII, rule 9 (2), Civil Procedure Code, cannot be questioned by a different Bench, even though the order may be *ex parte* as the order does not require the issue of a notice. The only proper way of setting it aside is by way of review.

If persons purporting to act as trustees on behalf of a community and allowed so to act by it, give possession of a land belonging to the community to a third person, the possession of the latter is at its inception only permissive and not adverse to the community.

The cause of action for a declaratory suit, based on denial of title, does not arise until the plaintiff has knowledge of the denial.

Civil Procedure Code—(1908)—contd.

In such a case knowledge on the part of some of the members of the community does not affect the right of the others. **M. MURUGA CHETTY v. RAJASWAMY**, 2 L. W. 813; 18 M. L. T. 327; 29 M. L. J. 574

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O. 23, r. 1—With-

drawal of suit with liberty to bring fresh suit—Pedigree filed with plaint, wrong—Formal defect.

Where a pedigree filed with the plaint turned out to be wrong according to the statement of one of the plaintiffs:

Held, that the above circumstance was not a sufficient ground to permit withdrawal of suit with liberty to bring a fresh one. **O. GULAB DEVI v. PATAN DIN**, 2 O. L. J. 461

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O. 24, r. 1 710**O. 24, rr. 3, 6 719****O. 24, r. 14 707****O. 25, r. 1 112****O. 25, rr. 13, 14—**

Application to work out shares under a compromise decree, whether an application for execution or a step in the suit—Limitation—Mistake as to the character of a proceeding or suit—Appeal in erroneous character, whether competent.

Per *Oldfield, J.*—An application for the appointment of a Commissioner to work out the shares recoverable under a compromise decree for partition is not an application for execution, but a step in the suit and is not barred by any limitation.

Per *Sadasiva Aiyar, J.*—The character of a suit or proceeding is not altered by the mode in which the Court exercises its jurisdiction, and if the suit or proceeding is of such a character that no appeal lies from the decree or order passed in it, an appeal would not be entertained.

Therefore, if a Court erroneously treats a petition as a petition in execution, an appeal would not lie from its order as if it was an order passed on an execution petition. **M. SRINIVASA MUDALI v. RAMASAMY MUDALI**, 2 L. W. 693; 18 M. L. T. 145

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O. 34, rr. 1, 14 317**O. 34, r. 3 492****O. 34, rr. 4, 5—Ap-**

plication for decree absolute—Limitation—Computation of period of limitation—Limitation Act (IX of 1908), Sch. I, Art. 181—Mortgage suit—Preliminary decree—Appeal—Decree affirmed by Appellate Courts—Application made three years after expiration of period allowed for payment by first Court, if maintainable.

An application for an order absolute for sale under Order XXXIV, rule 5, of the Civil Procedure Code, is governed by Article 181 of Schedule I of the Limitation Act, 1908, and the period of limitation should be computed from the time when the right to apply first accrued.

A preliminary decree under Order XXXIV, rule 4, of the Civil Procedure Code, was made on the 27th of February 1909. The decree allowed a period of six months to the judgment-debtor to pay the amount of the decree and that period expired on the 20th of

Civil Procedure Code—(1908)—contd.

August 1909. Meanwhile the judgment-debtor appealed. The decree was affirmed by the lower Appellate Court on the 25th of January 1911 and by the High Court on the 25th of January 1912. The decree-holder applied on the 25th of April 1913 under Order XXXIV, rule 5, for a decree absolute:

Held, that the application, having been made beyond three years from the date of the expiration of the period for payment, was barred by time under Article 181 of Schedule I to the Limitation Act, 1908.

Held, further, that the subsequent decrees by the Appellate Courts only affirmed the right given by the Court of first instance and did not give rise to a fresh right unless the decree of the Court of first instance was in any respect varied by the Appellate Courts. **A. MADHO RAM v. NIHAL SINGH**, 13 A. L. J. 985

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O. 34, rr. 4, (1), 5,

6, Appendix D, Forms 4, 11—Mortgage-decree—Costs—Declaration of personal liability, whether can be made against any person other than the mortgagor—"Defendant" in rule 6, meaning of.

The word "defendant" in rule 6 of Order XXXIV, Civil Procedure Code, means only the mortgagor. Therefore a declaration of personal liability for the costs of the decree-holder in case the sale-proceeds were not sufficient to pay them as well as the mortgage-money, cannot be made against the purchaser of the mortgaged property after the mortgage, though it can be made against the mortgagor. **M. VENUGOPALACHARIAR v. PADMANABHA ROW**, 29 M. L. J. 120

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O. 34, r. 5 188,

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O. 34, r. 6 188,

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O. 34, r. 14 317**O. 34, r. 14—Transfer**

of Property Act (IV of 1882), s. 99—Mortgage—Mortgagee purchasing property in execution of his money decree unconnected with mortgage.

Order XXXIV, rule 14 of the Code of Civil Procedure has repealed section 99 of the Transfer of Property Act and under the present rule a mortgagee is competent to have his mortgaged property sold in satisfaction of any claim which he may have against the mortgagor unconnected with the mortgage. **C. TARAK NATH ADHIKARI v. BHUBANESHWAR MITRA**, 42 C. 780

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O. 40, r. 1, cl. (d)

—Receiver, what powers may be conferred on—Partition—Sale—Receiver, if can be authorised to convey properties.

Under Order XL, rule 1, clause (d), of the Civil Procedure Code, 1908, the Court may confer on a Receiver all such powers for the realization of properties and the execution of documents as the owner has.

Therefore, in a partition action in which a Receiver is authorized to sell properties he may be directed to convey the properties. **C. BASIR ALI v. NAZIR ALI**, 19 C. W. N. 817

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O. 40, r. 1—Receivers

—Powers, specification of.

Civil Procedure Code—(1908)—contd.

Where Receivers were appointed but no mention of the powers conferred upon them was made in the order of appointment:

Held, that it could not be assumed by implication that they were appointed with all the powers allowed by Order XL, rule 1. **L. B. HOE HIN v. BALTHAZAR**, 8 BUR. L. T. 164 **678**

O. 40, r. 1, O. 43, r. 1, cl (5)—Receiver—Refusal to appoint—Appeal—Interpretation of Statute—Old provisions re-enacted—Presumption as to decisions on old provisions.

An order refusing to appoint a Receiver is appealable.

Where the provisions of an old Code upon a certain matter are re-enacted without any substantial variation or verbal change, it must be presumed that the decisions of the High Courts on the provisions of the old Code have received the sanction and approval of the Legislature. **B. CURSETJI DINSHAW BOLTON v. GANGARAM LIMBAJI GAIKWAD**, 17 BOM. L. R. 680 **545**

O. 40, r. 4—Misappropriation by deceased—Receiver—Property in hands of his legal representatives, liability of—Execution—Procedure—Supreme Court Rules, O. L, rr. 15 (a) to 24.

Under Order XL, rule 4, of the Civil Procedure Code the proper procedure to bring to sale the properties of a deceased Receiver in the hands of his legal representatives is by way of execution and not by a separate suit.

The word "property" in Order XL, rule 4, and in the other clauses of the section is synonymous with estate and covers income from the property.

Order XL, rule 4, is a residuary provision intended to deal with all cases of loss to the estate not specially provided for and, therefore, applies to a case of misappropriation also. **M. MULLAPALI TARAVATHIL v. GOPALA MENON**, 18 M. L. T. 127 **383**

O. 41, r. 1, O. 47, r. 4—Review, application for, when not granted—Notice, necessity of—Appeal filed without copy of decree, if duly preferred.

An application for review cannot be granted without previous notice to the other party and a non-compliance with rule 4 of Order XLVII renders the granting of an application for review, which is prejudicial to the other party, a nullity.

Under Order XLI, rule 1, an appeal cannot be said to have been preferred until the decree appealed against is filed. **C. ABDUL HAKIM v. HEM CHANDRA DAS**, 42 C. 433 **165**

O. 41, rr. 4, 33—Powers of Appellate Court—Succession Act (X of 1865), ss. 82, 121—Will by Hindu in favour of grandson by daughter—Condition of residence with testator, interpretation of.

To justify the application of rule 4 of Order XLI of the Code of Civil Procedure it is essential that the appeal should have been preferred against the whole decree.

For the application of rule 33 of Order XLI of the Code, it is not essential that the appeal should be directed against the entire decree, nor need the order be made in favour of persons who are

Civil Procedure Code—(1908)—contd.

parties to the appeal or have filed objections in the Court below.

Where property is bequeathed to any person he is entitled to the whole interest of the testator therein unless it appears from the Will that only a restricted interest was intended for him.

Where according to the Will the devisee was to have an interest so long as he resided in the house of the testator his maternal grandfather.

Held, that the restriction was imposed as a condition, and not as an indication that the interest created was a life-estate;

that the condition was perfectly legal under section 121 of the Indian Succession Act.

The presumption that a Hindu does not desire that any portion of his property should pass beyond his own family is not an inflexible guiding principle of universal application. **C. AMBIKA CHARAN v. SASI-TARA DEBI**, 22 C. L. J. 61 **868**

O. 41, rr. 11, 12, O. 47, r. 4—Review—Notice to opposite party, necessity of—"Opposite party", meaning of—Bench of High Court reviewing order of dismissal—Power of another Bench to consider propriety of order of review—Review, whether re-opens the whole case—Lessor—Sub-lessee—Sub-lease—Bengal Tenancy Act (VIII of 1885), Ch. XIV, ss. 16, 167—Stranger purchasing holding in execution of decree for arrears of rent—Annulment of sub-lease.

As a general rule, no order of review can be made without previous notice to the person in possession of the decree which is to be reviewed.

But an application for review of an order of dismissal under rule 11, Order XLI, of the Code of Civil Procedure, 1908, can be granted without the issue of any notice to the respondent.

The expression "opposite party" in the proviso to rule 4 of Order XLVII may be taken to mean the party interested to support the order sought to be vacated or modified upon the application for review.

The propriety of an order granting a review of the order of dismissal of an appeal under rule 11 of Order XLI of the Code of Civil Procedure, 1908, can be considered only by the Bench granting the review, and it is that Bench alone which can either maintain or vacate the original order of dismissal.

Whether the entire case is or is not re-opened when a review has been granted, must depend upon the circumstances of each individual case.

When an appeal is admitted under rule 12, Order XLI, of the Civil Procedure Code, 1908, the appeal cannot be restricted to one or more grounds specified in the memorandum of appeal, the whole appeal is before the Court when the case is taken up for final disposal.

The principle that, when a person has granted a lease on the allegation that he had such interest as entitled him to create a valid lease in favour of the grantee, the doctrine of estoppel operates between the grantor and the grantee, does not apply to the case of a purchaser of a holding at a sale in execution of a decree for arrears of rent suing to eject the defendant as a trespasser.

Civil Procedure Code—(1908)—contd.

The rights of a stranger who has purchased at a sale held in execution of a decree under Chapter XIV of the Bengal Tenancy Act are regulated by the provisions of that Chapter, which authorise the purchaser to annul all encumbrances—including sub-tenancies—mentioned in section 161 of the Act. He can take the requisite steps under section 167 to annul a sub-tenancy. **C. JANAKI-NATH HORE V. PRABHASINI DAS, 22 C. L. J. 99; 19 O. W. N. 1077 898**

————— **O. 41, r. 12 898**

————— **O. 41, r. 17—Appearance—Illness of Pleader—Party present asking for postponement—Appeal dismissed without hearing.**

On the date fixed for the hearing of an appeal, the appellant's Pleader was ill and did not appear in Court. The appellant happened to be present in Court and, on the case having been called on, he asked for time to get his Pleader. This was disallowed and the appeal was dismissed without hearing.

Held, that the Court apparently acted under Order XLI, rule 17;

that under the circumstances the appeal should be re-admitted; and

that the mere presence of the appellant in the Court-room on the day of hearing and his having asked the Court for time to get his Pleader did not constitute appearance of the appellant within the meaning of the Civil Procedure Code. **C. NANDA KUMAR BARUA V. NABIN CHANDRA, 22 C. L. J. 72 878**

————— **O. 41, r. 22—Memorandum of objections—Time of one month, how to be calculated—Principle.**

The principle applicable to the calculation of the time of one month allowed by Order XLI, rule 22, Civil Procedure Code, is that it shall be taken to extend upto and including the day before the corresponding date of the next month and there is no authority for any special rule as regards February—March.

Therefore, a memorandum of objections presented on the 16th March, the plaintiff having been served with notice on the 13th February, was presented out of time, although the 15th March was Sunday. **M. CHENNAMA SHETTITHI V. KRISHNAYYA SETTI, 29 M. L. J. 182 832**

————— **O. 41, r. 23 894**

————— **O. 41, r. 27 (b)—Appellate Court, power of, to admit additional evidence—Test—"Any other substantial cause," force of.**

The test laid down in clause (b) rule 27 of Order XLI of the Civil Procedure Code to enable an Appellate Court to admit additional evidence is not, whether any tribunal would be unable to pronounce any judgment without the production of the additional evidence in question; but, whether the mind of the Appellate Judge is in such a condition on the evidence on record that he requires any document to be produced or any witness to be examined to enable him to pronounce judgment.

Where an Appellate Court states explicitly that the additional evidence was required in order to enable the Court to pronounce its opinion on the merits of the contest between the parties:

Civil Procedure Code—(1908)—contd.

Held, that the evidence was admissible under rule 27 of Order XLI of the Civil Procedure Code, 1908, inasmuch as a wide discretion is given to the trying Judge, when he feels a difficulty himself or when he considers it proper in the interests of justice, to admit evidence which as a matter of discipline between party and party might be rejected.

The words "any other substantial cause" in rule 27, Order XLI, of the Civil Procedure Code, give a wide, discretion to the Appellate Court to admit additional evidence when the ends of justice require it to be done. **M. AMBUJA AMMAL V. APPADURAI MUDALI, 38 M. 414 402**

————— **O. 41, r. 31 292**

————— **O. 41, r. 32 753**

————— **O. 41, r. 33 379**

————— **O. 43, r. 1, (d)—**

Appeal against order dismissing for default application to set aside ex parte decree, maintainability of.

Under clause (d) of rule 1 of Order XLIII of the Code of Civil Procedure an appeal is competent against an order of summary dismissal for default of an application to set aside an *ex parte* decree. **C. KUMUD KUMAR BOSE V. HARI MOHAN SAMADAR, 21 C. L. J. 628 45**

————— **O. 43, r. 1 (5) 545**

————— **O. 43, r. 1 (u) 894**

————— **O. 44, r. 1—Panper, leave to appeal as, when open to revision 86**

————— **O. 45, r. 3 (1) 372**

————— **O. 45, r. 5 204**

————— **O. 45, r. 15—Order of**

Privy Council—"Execution," meaning of—Application for restoration of possession—Jurisdiction—Printed judgment of Privy Council, if action can be taken, on without order in Council.

The word "execution" in Order XLV, rule 15, of the Code of Civil Procedure, is intended to cover execution of any kind, that is to say, it covers the case of restitution as well as the case of enforcement of a decree for possession or the like passed for the first time in the case on an appeal to His Majesty in Council and a person who desires to obtain execution of any kind, whether by way of restitution or otherwise, must apply, in the first instance, to the Court indicated by rule 15.

No action can be taken only on the printed copy of a judgment of their Lordships of the Privy Council without proof that an order in Council has followed thereon. **A. DAMODAR DAS V. BIRJ LAL, 13 A. L. J. 769 77**

————— **O. 47, r. 4 165**

————— **O. 47, r. 4 898**

————— **Sch. II, cls. 4, 6—**

Arbitration—Reference providing for appointment by Court of umpire in case of difference—Umpire, whether can make valid award without consulting arbitrators.

A suit for redemption of a *lekha mukhi* mortgage on payment of whatever sum might be found due was referred to arbitration, it being provided that in case of disagreement the Court should appoint an umpire whose decision would be final. The arbitrators having disagreed an umpi

Civil Procedure Code—(1908)—concl'd.

was appointed and he gave an award without consulting the arbitrators and differing from both of them:

Held, that the umpire was entitled to settle the matter in any way he thought proper. **P. JUMMA V. MUBARIK KHAN**, 55 P. R. 1915 **87**

Common carrier—Action for non-delivery

—Prayer for goods consigned or else their value—No allegation of possession of carrier—No suit for specific property lost—Suit for compensation for non-delivery—Limitation Act (IX of 1908), Sch. I, Arts. 31, 49, 115—Civil Procedure Code (Act V of 1908), O. XXI, r. 31—Specific Relief Act (I of 1877), s. 11.

Where in an action against a common carrier for non-delivery of a plank consigned to him for carriage, the prayer in the plaint asked for plank and damages for its detention or in the alternative its value together with interest thereon and there was no allegation in the plaint that the defendant was in possession of the plank in question:

Held, that the suit could not be treated as one for the return of specific moveable property lost, under section 11 of the Specific Relief Act, but only as one for compensation for non-delivery of goods.

Article 31 of the Limitation Act, 1908, applies to a claim by a consignor against a carrier for compensation for non-delivery of goods consigned.

In order to entitle a person to obtain delivery of specific moveable property by suit and to enforce the decrees obtained by the stringent methods provided in Order XXI, rule 31, Civil Procedure Code, it is necessary that he should allege and prove facts which entitle him to compel the delivery of the specific moveable under the provisions of section 11 of the Specific Relief Act.

The effect of the amendment of Article 31 of the Limitation Act, 1877, is to make it applicable to a claim against a carrier for compensation for non-delivery of goods irrespective of the question whether the suit was laid in contract or in tort. **M. JALDU VENKATASUBHA RAO V. ASIATIC STEAM NAVIGATION CO.**, 29 M. L. J. 342; 2 L. W. 805; 18 M. L. T. 236 **840**

Companies Act (VI of 1882), s. 68—

Charge in favour of officer of Company—Registration necessary. Company—Debenture—Floating charge—Default made by Company but business carried on—Charge created after default, validity of—Crystallisation of floating charge, when takes place.

A debenture deed after charging all the assets of a Company by way of a floating charge and providing that notwithstanding such charge the Company shall have power to carry on business and deal with the assets of the Company until default shall have been made for six calendar months in the payment of the principal amount, provided that from and after the happening of such default the liberty and authority hereinbefore given (to carry on business) shall forthwith cease and determine and the charge created by this debenture shall and may be immediately enforceable: Default in payment of the principal amount was made but the Company carried on business and created certain charges after the date of default:

Held, (1) that the Company's right to carry on business did not come to an end automatically on the happening of the default but continued until

Companies Act—(1882)—concl'd.

the debenture holder intervened to show his desire that it should cease, as by applying for a Receiver;

(2) that the charges created by the Company after default were not void;

(3) that the floating security remained dormant and could not become fixed or crystallised until the Company ceased to be a going concern or until the debenture-holder intervened.

A charge created in favour of the officers of a Company cannot be availed of if it is not registered as required by section 68 of the Indian Companies Act (VI of 1882). **M. NALLAPERUMAL PILLAI V. KRISHNA AYYANGAR**, 29 M. L. J. 110 **286**

s. 203—Scheme, sanction of.

Under section 203 of the Indian Companies Act (VI of 1882) the Court can sanction only a *bona fide* and workable scheme. **M. SOUTH INDIAN MILLS CO., LTD. V. BURN & CO., LTD.** **386**

Companies Act (VII of 1913), s. 215

—Winding-up—Proceedings in Courts against Company in liquidation, when may be stayed.

The passing of resolutions for a voluntary winding-up does not, like an order for winding-up by or under the supervision of the Court, stay any proceedings or invalidate executions or distresses, or prevent actions or other proceedings being brought or continued against the Company without the leave of the Court. However, on an application being made the Court has jurisdiction to stay any action, proceeding, attachment, distress or execution against the Company, or its estate or effects upon such terms as it thinks fit. Until a stay is granted a creditor may commence or continue any action or proceedings or put in force any attachment, distress, execution or analogous proceeding and, therefore, a Liquidator may obtain a supervision order to protect him against actions which are threatened and so save the expense of applying for the stay or restraint of proceedings against the Company. **P. LIQUIDATORS OF THE MARWAR BANK, LTD. V. KANSI NATH**, 182 P. L. R. 195; 124 P. W. R. 1915 **657**

Company—Documents, inspection of—Report of Company's agent for the express purpose of laying it before Company's Solicitor, whether privileged.

A letter written by an agent of a Company giving details of a claim, in pursuance of an order of the Company to submit reports in all cases of claim of a serious nature not merely as an ordinary duty but expressly to be laid before the Company's Solicitor, is privileged and its inspection cannot be granted in a suit for that claim if there is nothing to show that the letter was sent for any other purpose. **L. B. YANG TSZE INSURANCE ASSOCIATION, LTD. V. B. I. S. N. CO., LTD.**, 8 BCR. L. T. 167 **974**

—Manager or Managing Director, power of, to purchase liability of stranger or partner.

The Manager or Managing Director of a Mill Company has no implied authority to purchase on behalf of his Mill the liability of a stranger and still less that of its own Manager or Manager's partner in a private transaction of his own. **P. C. MOTILAL SHIVLAL V. BOMBAY COTTON MANUFACTURING CO., LTD.**, 19 C. W. N. 621; 28 M. L. J. 596; 17 M. L. T. 443; 2 C. L. J. 524; 17 BOM. L. R. 484; 2 L. W. 560 **59**

Compensation. See LAND ACQUISITION ACT, s. 36.

_____, reasonable, assessment of—
Interest, penal rate of 323

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ments, when allowed 517

Compound Interest, what is 517

Compromise—Compoundable offence, whether
can be compounded by heirs of deceased 138

_____, Discharge—Revival of case—Case
really one of civil nature—Criminal proceedings
initiated—Abuse of process of Criminal Courts—
Criminal Procedure Code (Act V of 1898), s. 435.

Once a criminal case is compromised and the
accused are discharged in accordance with the com-
promise, the complainant is not entitled to have the
case revived on the ground that some of the accused
have gone back upon the compromise.

Where the complainant in a case declines to pro-
duce any evidence and the Court discharges the
accused, the order of discharge is neither perverse
nor foolish, and, therefore, is not liable to be set aside.

To initiate criminal proceedings in a case which
is really one of a civil nature, with the object of
keeping those proceedings hanging till the civil dispute
is settled to the satisfaction of the complainant is an
abuse of the Criminal Courts. *P. SURAT SINGH v.*
AHMAD BEG, 19 P. W. R. 1915 CR. 646

_____, decree—Defence that con-
sent to it was obtained by misrepresentation and
fraud, if can be set up—Suit to set aside compro-
mise, necessity of 639

_____, penal clause in, if can be
relieved against.

The power of the Court to grant relief against the
enforcement of a penal clause is not confined to
contracts between landlord and tenant but extends
to compromise decrees also. *M. RAMAYANAM*
JOGAMMA v. ENAMANDRA RAMALAKSHMI, 2 L. W. 635

_____, Terms of razineamah re-pro-
duced in decree—Specific provision in decree that
terms so far as relate to suit only executable—Exe-
cutability of decree as regards terms outside scope of
suit.

Where a compromise decree, while incorporating
in extenso the terms of a compromise petition, adopts
them and makes them executable only so far as they
relate to the suit and where the terms not so
adopted do not relate to the suit either directly or
indirectly as indicating a *quid pro quo* on which the
settlement of the plaint claim was based:

Held, that the terms so omitted to be adopted are
not executable with the decree. *M. SUBBANARA-
YANA AIYAR v. MAYA THEVAN*, 2 L. W. 608 263

Confession, retracted—Identification of dead
body on articles of clothing—Criminal Procedure
Code (Act V of 1898), s. 238—Transfer of statements,
value of.

A confession made by an accused before the Com-
mitting Magistrate, which he retracts both before and
after commitment, is of no value as a piece of evi-
dence against him.

A conviction cannot be based upon statements
of witnesses transferred to the record of the Sessions

Confession—concl'd.

Court under section 288, Criminal Procedure Code,
1898, when they came forward after the accused
confessed and gave only circumstantial evidence
insufficient to connect the accused with the commis-
sion of the crime.

It is not safe to rely upon the articles of clothing
when the body itself is not identifiable on account
of being in an advanced stage of decomposition.
P. GHANWARA v. EMPEROR, 15 P. W. R. 1915 CR.; 16
CR. L. J. 612 436

Consideration—Bond in favour of mortgagee
non-agriculturist by agriculturist in lieu of mort-
gage-bond 509

Consolidation of suits. See CIVIL PRO-
CEDURE CODE, 1908, s. 151.

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_____, See MORTGAGE-DEED.

_____, Gift for charitable purpose. 225

_____, Mortgage-deed, interpreta-
tion of 323

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_____, General policy of Act—Ex-
press words of section—Preference 423

_____, of Will 915

Contempt of Court. See PENAL CODE,
s. 228.

_____, by committing breach of
injunction—Injunction on firm—Assistant, liability
of, under what conditions.

Where an injunction is issued by a Court restrain-
ing the defendant firm from disposing, selling or
dealing in any manner with the goods referred to in
the plaint, but where the injunction makes no men-
tion of X an assistant in the firm or of servants and
agents:

Held, that X not being named in the order cannot
be punished for contempt of Court for disobeying
the injunction. *C. JOHN INNES MARSHALL v.*
GRANDHI VENKATA, 21 C. L. J. 578 4

Contract Act (IX of 1872), ss. 2 (d).

37 III. (a), 40 III. (a)—Consideration—Past
services—Suit by beneficiary, not party to contract—
Trust, creation of—Transfer of Property Act (IV of
1882 ss. 101, 124, 126.

The mere fact that at the desire of the promisor the
promisee has already done something prior to any
agreement is not sufficient to make any subsequent
agreement a contract, nor will such agreement
amount to a contract if it was no more than a promise
to make a gift at the mere will of the promisor.

A promisee cannot, by any act of his own, oblige
the promisor to fulfil his promise, nor can there be a
legal obligation to do anything, unless a liability to
perform the promise, not depending on the mere will
of the promisor, is imposed by the promisor upon
himself by an agreement; and unless such liability is
made to rest upon the services already rendered by
the promisee.

Contract Act—contd.

In order to determine whether or not the promisor intended to impose upon himself a legal liability, the following points have to be considered, *viz.*, the nature of the services rendered, whether at the time the promise was made there was any outstanding liability on the part of the promisor to remunerate the promisee, whether the services were of a nature for which no compensation was expected and whether they had already been fully compensated for. If there was an outstanding liability, the subsequent promise will be almost conclusive evidence of the value which the parties intended to put upon the liability.

A mere direction in a document to which the plaintiff is not a party, to pay a certain sum to the plaintiff, is not enough to create a trust in his favour.

Where A contracts with B to pay a sum of money to C, the latter cannot sue A merely on the basis of such a contract. In order to enable C to sue, the contract must be intended to secure a benefit to him so that he may be entitled to say that he has a beneficial interest as *cestui que trust*. It is not possible to lay down categorically and exhaustively the circumstances which have to be considered in order to determine whether or not a contract is intended to secure such a benefit.

In consideration of great services rendered to him by the plaintiff and his father, the husband of the defendant (a *zemindar*) had agreed to pay the plaintiff a salary of Rs. 20 a month during the life-time of the plaintiff. This agreement was adverted to in a deed whereunder the *zemindar* usufructually mortgaged his estate in favour of his wife, the latter being asked to pay the salary to the plaintiff. This arrangement was acted upon by the defendant till some time after her husband's death, when she refused to continue the payment. The plaintiff thereupon sued for the recovery of the salary.

Held, that there was an enforceable contract between the plaintiff and the defendant's husband, and that the clause in the mortgage-deed constituted a trust in favour of the plaintiff. **M. INUGANTI KASTURAMMA v. CHALIKANI VENKATASURATYA**, 2 L. W. 920; 18 M. L. T. 353; 29 M. L. J. 538 **879**

S. 11—Minor, sale to, validity of—Transfer by sale.

A transfer by sale to a minor is not void by reason of his minority. **O. RAGHUNATH BAKSHI v. MUHAMMAD BAKSHI**, 2 O. L. J. 200; 18 O. C. 115 **200**

S. 23—Agreement with licensee to share profits—Agreement not allowed by terms of license—Agreement, if void.

As there is nothing in the Forest Act which makes it obligatory upon a licensee from a Forest Officer to observe the conditions of his license, an agreement to share profits with the licensee is not void. **B. NAZARALLI SAYAD IMAM v. BABAMIYA DUREYATIMSHA**, 17 Bom. L. R. 701 **913**

S. 23—Bond, slavery—Overwhelming interest—Public policy.

A bond which binds down the executant to daily attendance and manual labour until a certain sum is re-paid in a certain month and penalises default with overwhelming interest is opposed to public policy and is not enforceable. **C. RAM SARUP v. BANSI MANDAR**, 42 C. 742; 19 C. W. N. 1118 **955**

Contract Act—contd.

S. 25—Gift—Revocation, power, exercise of—Pleadings—Fraud should always be specifically pleaded.

If the donor has the power of revocation, an exercise of that power cannot be inferred from the mere fact that he conveyed the property to a stranger; an express act of revocation would at least be necessary.

The explanation to section 25, Contract Act, provides that nothing in the section shall affect the validity, as between a donor and donee, of any gift actually made. The same rule applies as between a donee and the persons claiming through the donor.

A plea of fraud will not be heard unless it is expressly and specifically advanced in the pleadings.

L. B. LAL MOHAMED v. MRA THA AUNG **20**
S. 37 III. (a) **878**
ss. 38, 45 **371**
S. 55 **365**

ss. 60, 61—Appropriation—No appropriation of payment either by debtor or creditor—Appropriation to earliest debt.

Where there is no appropriation of payment either by debtor or creditor, the payment must be applied to the earliest debt due by the defendant to the plaintiff. **A. KUNDAN LAL v. JAGAN NATH**, 13 A. L. J. 908 **92**

S. 61 **92**
S. 62—Balance of account—Agreement to pay at different rate of interest, effect of—Limitation Act (IX of 1908), Sch. I, Art. 64 as amended by Punjab Loans Limitation Act (I of 1904).

A balance of account signed by the defendant and stating as payable a rate of interest different from that usually charged in the previous accounts is a new contract upon which a suit may be based and the period of limitation for such suit is 6 years under Article 64 of the Limitation Act, as altered in the Punjab Loans Limitation Act. **P. MAKHAN LAL v. GANESHI LAL**, 42 P. R. 1915; 130 P. W. R. 1915 **84**

ss. 64, 65, 68 **513**
S. 70 **178, 513**

S. 70—Contract, alleged, not proved—Compensation, reasonable, for work done—Court, right of, to grant relief.

Where the plaintiff alleged a contract under which the defendant had employed him to negotiate a loan on a promise to pay him a certain commission, and it was found that he had really done the work for the defendant but he failed to prove the alleged contract:

Held, that having regard to the provisions of section 70 of the Contract Act, the plaintiff was nevertheless entitled to a reasonable compensation for the work done by him. **O. JAWALA PRASAD v. BACHCHA RAM**, 2 O. L. J. 332 **223**

S. 74—Contract of sale—Breach of conditions—Penalty imposed by contract to be enforced—Damages not agreed in contract, if allowable.

The defendant purchased a site from the plaintiff at an auction under the following conditions:—

"Purchaser shall immediately after the sale pay into the Municipal Office...a deposit of 10 per cent, of the

Contract Act—contd.

purchase-money and shall sign an agreement...and shall pay the residue of the purchase money to the vendors within a period of nine months from the date of the sale and on payment of the said amount the purchase shall be completed. If the purchaser fail to comply with any of these conditions his deposit shall be forfeited and the vendors shall be at liberty to re-sell the lot either by public auction or by private contract." The defendant made a deposit of Rs. 1 only at the time of the auction-sale and failed to comply with the rest of the conditions:

Held, that the plaintiff was entitled to recover only 10 per cent. of the purchase-money which the purchaser was bound to deposit and not the loss which might accrue to the plaintiff on re-sale of the site.

A. ALLAHABAD IMPROVEMENT TRUST v. TIKANDRA JANG BAHADUR, 13 A. L. J. 1079 **584**

s. 74—Discretion of Court—*Post diem* interest—Court, power of, to fix interest from date for payment till date of realisation—Circumstances of each case to be examined **323**

s. 135 **637**

s. 141 **35**

s. 151—Provincial Small Cause Courts Act (IX of 1887), s. 25—Proper caution and care—Question of fact—Finding—High Court's interference.

The standard of caution and care prescribed in section 151 of the Contract Act is a question of fact, and where a subordinate Court has given a definite finding on it, a High Court cannot in the exercise of its powers of revision, under section 25 of the Provincial Small Cause Courts Act, reverse that finding. **M. KAYAROHANA CHETTIAR v. NAGALINGA CHETTIAR**, 2 L. W. 628; 18 M. L. T. 119; (1915) M. W. N. 533 **493**

ss. 201, 209 **697**

s. 247 **813**

ss. 251, 263—Partnership—

Dissolution—One partner authorised to collect outstandings and pay debts—Extent of authority, whether includes power to acknowledge debts—Acknowledgment.

In the absence of express evidence of authority, an acknowledgment of a partnership debt by an ex-partner, after the dissolution of partnership, is not binding on any ex-partner other than the one making it. Where, however, an ex-partner is authorised to collect the outstandings and pay all the debts of the partnership, such authority includes the lesser power of acknowledging debts. **M. MUTHUSWAMI NADAN v. SANKARALINGAM CHETTY**, 2 L. W. 823; 18 M. L. T. 273 **675**

s. 253 **697**

s. 263 **675**

s. 264—“Persons dealing with,”

meaning of—Dissolution of partnership—Public notice not given, effect of—Partners, who are—Question of fact—Court, power of.

The words “persons dealing with a firm” in section 264 of the Contract Act mean “persons who have been in the habit of dealing with and at the time of the dissolution were contemplating further dealing with the firm, on the faith of the firm remaining the same as that with which their dealings commenced.”

Therefore persons dealing with a firm cannot be affected by any dissolution of which public notice had not been given unless they have had actual notice.

Contract Act—concl.

It is always a question of fact, who were or were not partners at the time the persons dealing with the firm commenced and carried on their dealings. The Courts are authorized to adjudge their claims against the firm which seeks to evade them on the ground that the only solvent partner ceased to be a partner during the continuance of the dealings, as though such partners had not been secretly withdrawn. **B. GIOVANI GORIO v. VALLABHDAS KALIANJI**, 17 Bom. L. R. 762 **864**

Conviction—First report—Story told in Court—Striking discrepancies, effect of.

Where there are striking discrepancies between the first report and the story told by prosecution witnesses in Court, a conviction cannot be maintained. **P. MOHABBI v. EMPEROR**, 188 P. L. R. 1915; 34 P. W. R. 1915 Cr. **747**

Copyright Act (XX of 1847) **480**

s. 3—Copyright Act (III of 1914), s. 24 cl. (a)—Entry in Copyright Register Book—Evidence of proprietorship—Repeal of Act, effect of—Evidence Act (I of 1872), s. 114.

An entry in the Copyright Register Book under section 3 of the previous Copyright Act, is *prima facie* evidence of the proprietorship of the person mentioned therein, but the absence of that provision from the new Copyright Act does not make it nontheless evidence when the new Act grants to the owners of existing copyright rights at least as valuable as the rights given under the repealed Act. Section 114 of the Indian Evidence Act can, therefore, be invoked in aid to make such evidence admissible.

A High Court can in such a case interfere under section 15 of the Charter Act. **M. CHELLAPPASWAMY v. K. P. SINGARAVELU MUDALIAR** **721**

Copyright Act (III of 1914), s. 7 (a)—

Copyright—Translation by author, right in—Copyright Act (XX of 1847).

Under the old copyright Act “copyright” did not include the exclusive right of translation, but the author of a book who made a translation of it was entitled to a copyright in it as if it were an original work. **A. HIRA LAL v. SARASWATI**, 13 A. L. J. 636; 16 Cr. L. J. 656 **480**

s. 24, cl. (a) **721**

Costs. See MORTGAGE.

—, when defendant not entitled to—Amend-

ment of plaint **323**

Counsel, defending, duty of **113**

—, for the prosecution, duty of **128**

Court, local inspection by **128**

Court-fee See MORTGAGE.

—, amount of, payable on appeal—Redemption of usufructuary mortgage—Appeal, subject-matter of dispute in.

Where in a suit for redemption of a usufructuary mortgage the mortgagor seeks on appeal to establish that he is not liable to pay the money which has been adjudged by the Court below to be due to the mortgagee, he is liable to pay a Court-fee on that amount of the money which is the subject-matter in dispute in the appeal and not on the amount of the principal sum secured by the mortgage. **O. MARDAN SINGH v. SHEORAJ NARAIN SINGH**, 2 O. L. J. 257 **22**

—, insufficiency of, plea as to—Plaint, allegations in, value of—Court, duty of.

Court fee—concl'd.

Where a plea is taken to the effect that the plaint is insufficiently stamped, all that a Court has to do is to see whether the Court-fee as paid is sufficient according to the various allegations contained in the plaint, and in doing so it does not decide that those allegations are true. **O. LALTA PRASAD v. BARMHA DIN** 73

Court Fees Act (VII of 1870)—Ad valorem fee—Appeal against final decree—Civil Procedure Code (Act V of 1908), O. XXXIV, r. 3, stamp necessary for appeal from decree under.

If any proceedings, which have terminated in a final decree under Order XXXIV, rule 3, are made the subject of an appeal, the appeal must be treated as an appeal from the decree and must be stamped accordingly and an *ad valorem* fee should be paid. **O. RAM DHANI v. MAQBUL AHMAD KHAN**, 18 O. C. 114 492

s. 4—Ad valorem fee—Civil Procedure Code (Act V of 1908), O. XXXIV, r. 6, appeals against decrees under.

An *ad valorem* fee is payable on appeals against decrees passed under Order XXXIV, rule 6, of the Code of Civil Procedure. **O. WASI ALI v. JANG BAHADUR SINGH**, 18 O. C. 121 497

s. 7, cl. V (a), (b), (c) and (e)—Plot of land with cocoanut trees, whether a "garden" within the meaning of cl. V (e)—Question of fact—Revision—Case open to appeal—High Court, power of, to interfere.

In ascertaining the value of a piece of land on which cocoanut trees have been planted for the purpose of determining the jurisdiction of a Court, the question whether it came under clause V (c) or clause V (e) of section 7 of the Court Fees Act is a question of fact to be determined on the evidence as to whether having regard to the position of the land and the number of trees thereon the plot of land can be said to be a garden.

Assessment is not the criterion in determining the question whether a land is garden or not. Assessed or unassessed it will fall under clause V (e) if it can be defined as a "garden".

A few isolated trees on a piece of land will not make it a garden, but where a number of trees are planted on a particular piece of land which is well-defined and can be marked off from the rest of the land, that particular plot may be treated as a garden if the land is used for the cultivation of flowers, fruits or vegetables.

While the High Court will not generally interfere in revision where an equally efficacious remedy is open to the party by way of appeal it will do so where it would not be possible to put the parties in the same position in appeal as they would have been if the irregularities had been set right in the lower Court by timely interference. **M. ABDUL RAHIM SAHIB v. KULLAPPA GOWNDEN**, 18 M. L. T. 243 845

s. 7, sub-s. (4), cl. (c) —Suit to set aside decree—Court-fee to be paid on what amount—Valuation of suit.

In a suit to set aside a decree as bad the plaintiffs should pay Court-fees upon the amount at which they value their loss and not on the whole decretal amount. **C. GANESH BHAGAT v. SARADA PRASAD**, 42 C. 370; 19 C. W. N. 895 !!!

Court Fees Act—cont'd.

s. 17, construction of—Distinct causes of action—Civil Procedure Code Act V of 1908), O. II, r. 2—One debt guaranteed by different guarantors—Single suit against debtor and guarantors—Court-fee payable on amount of debt guaranteed or on different amounts guaranteed.

Where the plaintiff sues the principal debtor on a cash credit account and also in the same suit seeks decrees against the several persons who have guaranteed that account for the full amounts to which they have guaranteed it, by separate pro-notes or mortgages, the plaint is chargeable under section 17 of the Court Fees Act with the aggregate amount of fees due on the amounts claimed from each and all the guarantors separately. **L. B. BANK OF BENGAL v. MUTHIA CHETTY** 705

s. 19-i 394

ss. 19C, 19-i—Probate—Succession-duty—"Full fees chargeable under the Act," meaning of—No further fee in second grant—English Law—No new devolution of property, no new succession-duty—Legislature, intention of—Probate and Administration Act (V of 1881), s. 86—Appeal.

Once a Probate has been granted on payment of succession-duty in accordance with the scale of Court-fee then in force, no further Court-fee can be levied for granting a second Probate in respect of the same estate, if the scale of Court-fee has, in the meantime, been revised and raised.

Section 19-I of the Court Fees Act requires the fee chargeable upon a Probate to be paid before the order for grant of Probate is made; and so what constitutes "the full fee chargeable under this Act" must be determined by reference to the point of time when the grant of Probate is made.

The full fee chargeable must not be determined with reference to the point of time when the second grant is sought.

The expressions "under the Act" and "under the same Act" refer to the Court Fees Act and not the subsequent Acts amending the Court Fees Act.

It is the intention of the Legislature that when the full fee chargeable under the Court Fees Act on a Probate, at the time it is granted, has been paid, no further fee shall be chargeable when a second grant is made in respect of that property as comprised in that estate.

In England all second and subsequent grants of Probate and Administration in respect of property on which the full duty has been already paid upon a previous grant, are exempted from further stamp duty by section 3 of 41 Geo. III, c. 86.

When an executor to whom Probate has been granted dies, leaving a part of the testator's estate unadministered and a new representative is appointed for the purpose of completing the administration, there is no new succession, no new devolution of the estate and no fresh succession duty should be levied.

An order refusing to issue a Probate till a sum of money, which is not legitimately leviable under the law, is paid as succession-duty, refuses in effect the application for Probate and is, therefore, appealable under section 86 of the Probate and Administration Act. **C. SWARNAMOYI DEBI v. SECRETARY OF STATE**, 22 C. L. J. 370 394

Court Fees Act—conold.

S. 22—Suit for declaration—
Correction of rent entry in Settlement Record—Rent payable by defendants varying according to their castes and occupations—Power of Revenue Officer in revision to direct payment of Court-fee—Bengal Tenancy Act (VIII of 1885), ss. 105, 105 A, 106, 107, 108.

Under section 108 of the Bengal Tenancy Act, a Revenue Officer specially empowered by the Local Government in this behalf has the power of revising any order or decision passed under sections 105, 105A, 106 or 107 made by himself or any other Revenue Officer. This power is not restricted to revision of the decision or order on the merits.

In a suit for correction of an entry as to rent in a *furd revaz* where the defendants belonged to different castes and followed different occupations and the rents payable by them varied accordingly:

Held, that as the *furd revaz*, if the plaintiff's prayer were granted, would show different rents payable by different classes of tenants, one suit with a Court-fee of ten rupees might be instituted against such of the tenants only as belonged to the same caste or followed the same occupation, and with respect to each class of tenants a separate suit ought to be instituted.

A Revenue Officer has the power under section 28 of the Court Fees Act to direct the payment of Court-fee in revision when no objection has been raised as to the same in the Court of first instance.

C. DHAKESHWAR PRASAD NARAIN SINGH v. ISWAR-DHARI SINGH, 22 C. L. J. 57 **862**

Sch. I, Art. 11—"Amount or value of the property," meaning of.

For the purposes of Article 11 of the first Schedule to the Court Fees Act, the expression "the amount or value of the property" signifies what is described as the net total in Annexure A in Schedule III, obtained by the deduction of the amount shown in Annexure B as not subject to duty from the gross valuation of the moveable and immoveable property left by the deceased. **C. G. A. QUININGBOROUGH**, *In the goods of*, 22 C. L. J. 160 **958**

Covenant against alienation, invalidity of **289**

Criminal case, abatement of—Death of complainant—Another complaint on the same facts, maintainability of **1001**

Criminal Law Amendment Act (XIV of 1908), s. 9—Special Bench of High Court—

Powers—Penal Code (Act XLV of 1860), ss. 34, 302—Charge—Trial—Counsel for the prosecution, duty of—Criminal Procedure Code (Act V of 1898), s. 342—Local inspection by Court—Benefit of the doubt—Guilt—Innocence—Acquittal.

An accused can be charged, in the same trial, with an offence under section 302 as also an offence under section 302 read with section 34.

It is the duty of the Counsel for the Crown to assist the Court in arriving at the truth and not to secure a conviction.

In a trial before the Special Bench an accused may be given an opportunity of explaining the circumstances appearing against him and a truthful explanation coming from the accused cannot injure him, innocent as he is presumed to be.

For the correct understanding of a case, the Court may visit the place of occurrence.

Criminal Law Amendment Act—conold.

Where it is not shown that the guilt of the accused is so probable that a prudent man ought to act upon the supposition that he is guilty, the accused should not be given merely the benefit of the doubt but must be acquitted as absolutely innocent. **C. EMPEROR v. NOGENDRA NATH SEN GUPTA**, 21 C. L. J. 396; 19 C. W. N. 923; 16 Cr. L. J. 676 **128**

Criminal Procedure Code (Act V of 1898), s. 35 **435**

s. 35—Sentence for offence, directed to take effect after expiry of sentence for default to find security for good behaviour, legality of.

A Magistrate acts illegally if he directs that a sentence of imprisonment for an offence should take effect after the expiry of the sentence which the accused may be undergoing for default to find security for good behaviour. **M. PICHARI ANTHI**, *In re*, 16 Cr. L. J. 622 **446**

s. 54 **154**

ss. 57, 88 **71**

s. 106 **435, 748**

ss. 107-110—Good

behaviour, security for—'Residing' imputation of the term—S. 110, application of—Findings—Fit case.

In none of the sections 107 to 110, Criminal Procedure Code, does the word "residing" occur, and to read it into those sections would involve a complete alteration of their scope and effect.

Where there is evidence of no less than 14 burglaries in respect of which suspicion has fallen upon the accused and their reputation as thieves is firmly established by the evidence of a number of witnesses including those called for the defence:

Held, that it would be difficult to imagine a case in which the application of section 110 is more necessary or proper. **C. EMPEROR v. DURGA HATWAI**, 19 C. W. N. 1022; 16 Cr. L. J. 618 **442**

ss. 109, 110—Security

for good behaviour under both sections, if legal.

A person cannot be bound over to be of good behaviour under both the sections 109 and 110 of the Criminal Procedure Code. **M. KOSA KUMARAN, Re**, 38 M. 556 note; 16 Cr. L. J. 626 **450**

M. RANGASAMI PILLAI, *In re*, 38 M. 555; 16 Cr. L. J. 631 **455**

s. 110 **442, 450, 455**

s. 110—Security for

good behaviour, period for—Security for good behaviour for two years, if legal—Magistrate, duty of.

Security for good behaviour can, at the longest, be demanded for only one year except in very bad cases. Security for two years cannot be demanded, even if the accused is guilty of different offences in different places.

In such cases, a Magistrate should direct detention in prison, and not commit the accused to prison until the orders of the High Court are obtained. **M. SHAKOOR SAIT**, *In re*, 18 M. L. T. 103; 16 Cr. L. J. 614 **438**

s. 110 (f)—Evidence—

Being nuisance to neighbours and making indecent overtures to passers-by, if sufficient for proceedings under s. 110.

Where the evidence produced against a person amounts to no more than this that he is a nuisance

Criminal Procedure Code—contd.

to his neighbours, refuses to pay his debts, abuses people who sell goods to him and makes indecent overtures to school boys who pass by his shop, it does not justify proceedings against him under section 110 of the Criminal Procedure Code. **A. MUHAMMAD ASGHAR KHAN v. EMPEROR**, 16 Cr. L. J. 582

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S. 144, second order under—Magistrate, jurisdiction of—Sub-Magistrate, powers of—High Court, power of, to interfere—Charter Act (24 & 25 Vict. c. 104), s. 15.

A Sub-Magistrate while he ought to give due and very great respect to the advice of his District Magistrate, ought to use his own judicial mind and come to his own conclusion whether a temporary and emergent order under section 144, Criminal Procedure Code, ought to be passed. The general "instructions" of a District Magistrate are not legally binding on the Sub-Magistrate in particular cases.

Where a second order under section 144, Criminal Procedure Code, did not state that there was again a temporary emergency and a continuing or existing insufficiency of the Police force to protect the petitioners in the exercise of their right:

Held, that the presumption was very strong that the order was passed merely in order to evade the provisions of section 44 of the Criminal Procedure Code and that the Magistracy were attempting to give themselves a much more extended jurisdiction than covered by section 144 of the Code and that the High Court had jurisdiction under section 15 of the Charter Act to interfere with such an order. **M. GOVINDA CHETTI v. PERUMAL CHETTI**, 38 M. 489; 16 Cr. L. J. 629

453

S. 144—Too often resort to the provisions of—Recourse to section 107, or Chapter XII, of the Code—When time fixed in the order expires.

A Magistrate should not have repeated recourse to the provisions of section 144 of the Code of Criminal Procedure in the same dispute. He must take steps under the provisions of Chapter XII or section 107 of the Code of Criminal Procedure or apply to Government under clause (5) of section 144 of the Code when the period of two months fixed in the order expires. **M. SWAMINATHA MUDALIAR v. GOPALAKRISHNA**, 16 Cr. L. J. 592

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Ch. XII, ss. 145,

522—Magistrate's power to dispossess a person and place another in possession—Revision.

There is no provision in Chapter XII of the Criminal Procedure Code which gives a first Class Magistrate power to oust one person and to place another person in possession. The only provision of the Code which entitles a Magistrate to dispossess a person of property and re-place him by another person who is entitled, is section 522 of the Code, and for the purpose of exercising powers therein granted, it is necessary that there should have been a conviction of an offence.

An order of a District Magistrate declining to carry out such an order passed by a first Class Magistrate is not open to revision. **A. TULSHI RAM v. ABRAR AHMAD**, 13 Cr. L. J. 932

1002

S. 145

1002

Criminal Procedure Code—contd.**S. 145, applicability of**

--Dispute regarding some out of a number of plots—Rent half share of produce, question of—No question of share as between parties.

Where in proceedings under section 145, Criminal Procedure Code, it is found that out of a few plots of land there is no dispute regarding some of them as to what tenants are in possession and there is a dispute as to the remaining plots, and it is declared by the Magistrate that each party should remain in possession of the plots of which they have been respectively receiving the rents:

Held, that with regard to these remaining plots of land the Magistrate ought not to have passed any order in these proceedings in the absence of the tenants, because they might be very seriously prejudiced by an order in favour of one or other of the parties to these proceedings.

Where it is a question of dividing a hitherto undivided share, section 145 of the Criminal Procedure Code may not apply, but where it is a question of rent and it so appears that the rent is half the share of the produce, but there is no question of shares as between the two parties to the proceeding, section 145 applies. The question of the division of the produce only arises where the tenant comes to pay his rent. **C. HARI DAS SAMANTA v. ABDUL MATLEB MALLIK**, 19 C. W. N. 959; 16 Cr. L. J. 590

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ss. 145, 439—Revi-

sion—Criminal cases—Failure to observe prescribed procedure, effect of.

Where before passing an order under section 145 of the Criminal Procedure Code the Magistrate failed to observe the procedure prescribed by law, *viz.*, no preliminary order in writing was made by the Magistrate, nor was a copy of such order served upon the parties, or published in the manner laid down in the section:

Held, that the order was *ultra vires*. **P. BUDHAN v. RAM RAKHA MAL**, 169 P. L. R. 1915; 32 P. W. R. 1915 Cr.; 16 Cr. L. J. 628

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ss. 165, 168 141**ss. 193 (1), 226,**

227—Sessions Court, power of, to add charges for offences different from those specified by Committing Magistrate—'Charge', meaning of.

The word 'charge' in the Criminal Procedure Code means a whole series of counts or heads of charge for various offences.

Although under section 193 (1), Criminal Procedure Code, a Court of Session cannot take cognizance of any offence as a Court of original jurisdiction, regard must be had to the exception contained in the words "except as otherwise expressly provided in this Code."

Sections 226 and 227 of the Code give the Court of Session power to add a charge for any offence different from that specified by the Committing Magistrate disclosed in the evidence recorded before the Magistrate or at the trial by itself, subject only to the consideration of prejudice to the accused. **S. DODO v. EMPEROR**, 9 S. L. R. 37; 16 Cr. L. J. 573

125

S. 195

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Criminal Procedure Code—contd.

s. 195—Sanction to prosecute—Private grudge.

A person cannot obtain sanction to prosecute in pursuance of a private grudge. **O. PATAN DIN v. BHAGWAN DIN**, 16 Cr. L. J. 624 **448**

s. 195—Transfer of Deputy Magistrate—Successor-in-office.

Where there are many Deputy Magistrates and one of them is transferred, the Deputy Magistrate who comes to fill the gap is not the successor-in-office of the Deputy Magistrate who has been transferred, and is not, therefore, the proper officer to grant sanction for prosecution in respect of the use of a forged document in the proceedings under section 107 of the Criminal Procedure Code before the Deputy Magistrate transferred. **C. GIRISH CHANDRA RAY v. SABAT CHANDRA SINGH**, 42 C. 66; 16 Cr. L. J. 695 **743**

s. 195, sub-s. (1), cl. (b)—Subordinate Magistrate transferred after disposing of a case and acquitting accused—Application for sanction to prosecute complainant—Sanction given by District Magistrate—Legality of sanction—Subordinate Magistrate, whether subordinate to District Magistrate.

After the accused in a case had been acquitted and the first Class Deputy Magistrate, who had disposed of the case, transferred from the District, one of the acquitted persons applied for sanction to prosecute the complainant under section 211, Indian Penal Code. The application was made to and granted by the District Magistrate:

Held, that although the cases pending in the Court of the transferred Deputy Magistrate on the date of his transfer were placed before the District Magistrate, either for disposal by himself or for re-distribution among his subordinate Magistrates, he never became the presiding Judge in the Deputy Magistrate's Court and, therefore, was not competent to grant sanction as he did.

Held, further, that for the purposes of section 195 of the Code of Criminal Procedure, the Court of the Subordinate Magistrate was not subordinate to the District Magistrate but to the Sessions Judge. **C. MOFIZUDDIN AHMED v. BASANTA KUMAR GHOSE**, 16 Cr. L. J. 640 **464**

ss. 203, 204, 439

—Criminal case, abatement of—Death of complainant—Another complaint on the same facts, maintainability of.

As there is no abatement of a criminal case on the death of the complainant, a fresh complaint on the same facts will not lie but the old complaint must be treated as pending and proceeded with to its disposal. **M. RAMASAMIER, In re**, 16 Cr. L. J. 713 **1001**

s. 204 **1001**

ss. 220, 233, 235, 269 (3), 299—Accused charged with different offences—Some triable by Jury others by Assessors—Joint trial, if illegal—Assessors, individual opinion of—Consultation between Assessors, if allowed—Misdirection in charge to Jury.

In cases triable by a Judge with the aid of Jurors and of Assessors respectively, a joint trial for different offences is not illegal under section 269 (3) of the Code.

Criminal Procedure Code—contd.

There is nothing in the Code of Criminal Procedure authorising or forbidding a Judge to allow consultation between the Assessors: a Judge is entitled to have before him each Assessor's individual and independent opinion, and is not guilty of an irregularity if he refuses such consultation.

A Judge's omission to draw the attention of the Jury to the failure to put in evidence an Inquest Report, when that is material for the case, and his omission to mention the existence of enmity between the accused and the prosecution witnesses, when there is clear evidence to support it, are misdirections which vitiate the conviction. **M. SEN-NIMALAI GOUNDAN, In re**, 2 L. W. 933; 16 Cr. L. J. 717 **1005**

ss. 226, 227 **125**

s. 233 **1005**

ss. 233, 537—Object

of s. 233—'Distinct offences', meaning of—Hurt caused to two persons—Separate charges—Illegality 'Irregularity', meaning of—Subramania Iyer's case, what decided—Words "subject to the provisions herein before contained" in s. 537, whether refer to the entire preceding Code—English decisions, force of—Privy Council judgment—General observations, force of—Pleader's consent—Trial.

Per Sharfuddin and Beauchroft, JJ.—The joinder in one charge of two distinct offences of causing hurt to two distinct individuals is not an illegality which vitiates the trial but is an irregularity which is cured by section 537, Criminal Procedure Code.

The qualifying words "subject to the provisions, hereinbefore contained" in section 537, Criminal Procedure Code, do not refer to the entire Code that precedes that section but only to sections 529 to 536 of Chapter XLV where the section occurs.

Per Sharfuddin, J.—The first portion of section 233, Criminal Procedure Code, is not so imperative as to render a trial null and void if the direction enjoined therein is disobeyed. In other words, a disobedience of the first portion of section 233 is not an illegality which vitiates a trial but is a mere irregularity curable by section 537 of the Code.

Section 233 of the Code contains the general law, and the reason of it is that the mind of the Court might not be prejudiced against the prisoner, if he were tried in one trial upon different charges resting upon different evidence.

A charge is a first notice, to the prisoner, of the matter whereof he is accused, and it must convey to him with sufficient clearness and certainty that which the prosecution intended to prove against him and of which he will have to clear himself.

What their Lordships of the Privy Council have decided in the case of *Subramania Iyer*, 25 M. 61, is that if law expressly provides a particular mode of trial, a disobedience of that law vitiates the whole trial. It is doubtful if the framing of charges is a mode of trial but joint trial of charges as to distinct offences would be a mode of trial.

When two offences have been committed and either of them has no connection with the other they are distinct offences.

Although illustrations have no force of law they go a great way to explain the intention of the Legislature.

Criminal Procedure Code—contd.

Per *Beachcroft, J.*—In the case of *Subramania Iyer*, 25 M. 61, the Privy Council did not decide that a defect under section 233, Criminal Procedure Code, was fatal to the trial. They in effect decided that a disregard of the second part of the section, by joining charges beyond the limits specified in section 234, vitiated the trial. The general observation "their Lordships are unable to regard the disobedience to an express provision as to a mode of trial as a mere irregularity" must be read with the sentence immediately following it which limits its application to the case where charges are tried together which the law expressly says shall not be tried in the same trial. The words "mode of trial" in the general observation cannot have reference to the formal defect of drawing up one charge instead of two. The drawing up of the charge is part of the trial, but the words "mode of trial" have reference to the constitution of the trial.

The object of section 233 is two-fold: in the first place, to give an accused person notice of the charges which he has to meet, in the second, to see that he is not embarrassed by having to meet charges in no way connected with one another. Where the offences form part of the same transaction the law allows them to be tried together; in such a case the accused is not likely to be embarrassed or the Court confused. The first part of the section is designed to give the accused notice of the charges against him. The object is that he shall not be convicted of an offence of which he has not been charged. This object is not frustrated, and the accused is not prejudiced if the accusations against him are written in one sentence or on one sheet of paper, instead of in two sentences or on two sheets of paper.

It is open to question whether consent of Pleaders can validate a trial which is illegally constituted.

Where a thing is directed to be done and that thing is in effect done, but in the wrong way, the error amounts only to an irregularity and not an illegality.

Though a decision even of the Privy Council is an authority only for what it decides, the general remarks of their Lordships are ordinarily considered to have binding force in this country.

Reliance on cases decided under the Criminal Law of England is liable to mislead though such cases may sometimes be useful as illustrating principles.

Per *Fletcher, J.*, (dissenting).—The causing of hurt to two different persons are two distinct offences for each of which there ought to be a separate charge. A failure to frame two separate charges is not a curable irregularity but an illegality which vitiates the trial.

The whole of the section 537, Criminal Procedure Code, is governed by the words "subject to the provisions, hereinbefore contained." Therefore a neglect of the provisions of section 233, Criminal Procedure Code, is not cured by that section and renders the trial illegal. *C. RAM SUBHAG SINGH V. EMPEROR*, 19 C. W. N. 972; 16 Cr. L. J. 641 465

ss. 234, 235

1005

ss. 235, 421, 537

—Presentation of appeals—Rules of Practice of Madras High Court, Rule 1 (1) (f)—Presentation to

Criminal Procedure Code—contd.

Division Bench, whether proper—Evidence on different charges recorded at one trial, illegality of—Defective trial.

No special method is enjoined in the Code of Criminal Procedure for presentation of appeals. The question is one of administrative convenience; so long as there is an actual presentation to an officer of the Court, a Bench Clerk or one of the Judges, the presentation is not invalid.

Rule 1 (1) (f) of the Rules of Practice of the Madras High Court which lays down that application for the admission of appeals should be made before a single Judge, does not in terms, and is not intended to, deprive the Divisional Courts constituted for the disposal of criminal business of the right to exercise their powers in special cases.

The rule providing for the disposal of all applications by the Admission Judge is not intended to restrict the powers of the Benches constituted under clause 14 of the Charter Act. Such Benches have jurisdiction to hear applications and appeals in criminal matters.

Section 233 of the Criminal Procedure Code must be strictly construed. Failure to conform to the section at any stage of the trial renders the proceeding illegal.

Clause (a) of section 537, which speaks of "errors in proceeding before or during trial", does not cover cases where the trial itself is defective.

Where a Magistrate frames different charges, but allows the evidence on each charge to be recorded at one trial, and does not discriminate between that which is relevant on each of the charges it is not a mere irregularity cured by section 537 of the Code of Criminal Procedure, but an illegality which vitiates the trial in its entirety.

Where no action was taken against the accused for over three years for an offence which he was alleged to have committed and when the trial did take place, it was conducted in an illegal manner:

Held, that having regard to the circumstances, a re-trial could not be ordered as the accused would labour under great disabilities. *M. PUBLIC PROSECUTOR V. KOTTAPARAMBATH*, 29 M. L. J. 101; 18 M. L. T. 95; (1915) M. W. N. 504; 16 Cr. L. J. 593 145

ss. 236, 239 1005

s. 263 (h)—Summary

trial—Conviction, reasons for, what to show.

In cases tried summarily under section 260, Criminal Procedure Code, the statement of reasons for a conviction which the Magistrate is bound to record under section 263 clause (h), should present a clear statement of the facts constituting the offence and should show also that each of the ingredients for a conviction has been considered and held proved by the Magistrate. *S. RAM HARAKH V. EMPEROR*, 9 S. L. R. 89; 16 Cr. L. J. 713 1001

s. 269 (3) 1005

s. 288 439, 436

s. 297 113

s. 299 1005

s. 303 724

s. 305 113, 724

Criminal Procedure Code—contd.

s. 307 (1)—*Jury, trial by—Disagreement of Judge with verdict—Reference to High Court—Duty of Judge before making reference.*

Where in a trial by Jury, a brief verdict of 'not guilty' is given and the Sessions Judge disagrees, he should before making a reference under section 307, Criminal Procedure Code, put such further questions to the Jury as may bring out their meaning more precisely. **P. EMPEROR v. WALTER TURNER**, 16 Cr. L. J. 587; 35 P. W. R. 1915 Cr. **139**

ss. 337, 338—*Pardon—Penal statutes, interpretation of.*

All that sections 337 and 338, Criminal Procedure Code, require is that there should be an offence that is triable exclusively by the Court of Session under inquiry or trial. The fact that there may be other offences alleged or charged which are not so triable will not invalidate the grant of any pardon.

The paramount object, in construing penal as well as other Statute, is to ascertain the Legislative intent, and the strict rule of construction is not violated by permitting the words to have their full meaning, or the more extensive of two meanings, when best effectuating the intention. **S. HARUMAL PARMANAND v. EMPEROR**, 9 S. L. R. 43; 16 Cr. L. J. 632 **456**

s. 338 **456**

s. 342—*Accused, no evidence given against—Magistrate, right of, to question accused—Statement made by accused under circumstances, whether admissible in subsequent trial.*

Section 342 of the Code of Criminal Procedure gives the Magistrate only the right to question the accused for the purpose of enabling him to explain any circumstance appearing in evidence against him. Where no evidence has been given implicating the accused, the Magistrate has no right under the Statute to put questions to him or invite him to make a statement. A statement, therefore, made by the accused under these circumstances is not admissible evidence against him on his subsequent trial. **M. ABIBULLA ROWTHAN, In re**, (1915) M. W. N. 413; 2 L. W. 939; 16 Cr. L. J. 623 **447**

s. 344—*Remand, when ordered—Practice.*

A remand to custody should not ordinarily be ordered under section 344, Criminal Procedure Code, without first recording some evidence, where such evidence is available, to show that good ground exists for believing the accused person to have committed a non-bailable offence.

Where after one remand the accused is again brought up, some direct evidence of the guilt of the accused should be required to justify the refusal of bail and with each remand the necessity for producing such evidence increases. **N. AHMADALI v. EMPEROR**, 11 N. L. R. 162; 16 Cr. L. J. 705 **993**

s. 345—*Compoundable offence, whether can be compounded by heirs of deceased—Penal Code (Act XLV of 1860), s. 325.*

An offence punishable under section 325 of the Penal Code is compoundable with the permission of the Court, but it is compoundable by the person to whom the hurt was caused. In a case where

Criminal Procedure Code—contd.

the person to whom the hurt was caused is dead the case cannot be compound by his heir. **A. EMPEROR v. RAHMAT**, 13 A. L. J. 630; 37 A. 419; 16 Cr. L. J. 536 **138**

s. 403—*Accused acquitted of offences under ss. 366, 368, 376, Penal Code—Re-trial on husband's complaint under s. 498, Penal Code—Previous acquittal, whether bar to subsequent trial.*

The accused was tried under sections 366, 368, 376, Indian Penal Code, and was acquitted. On complaint of the husband of the woman the accused was re-tried and convicted on the same facts under section 498, Indian Penal Code:

Held, that, as the earlier Court was incompetent to try the accused under section 498 in the absence of a complaint by the husband, the later trial of him under that section upon such complaint did not violate the provisions of section 403, Criminal Procedure Code. **B. TIKARAM v. EMPEROR**, 17 Bom. L. R. 678; 16 Cr. L. J. 637 **641**

s. 408 (b)—*Different sentences by Assistant Sessions Judge—Appeal.*

Where an Assistant Sessions Judge sentences one of the several accused in a case to rigorous imprisonment for more than four years and others to a term of four years each, an appeal lies to the High Court, although the accused sentenced to the higher term of imprisonment does not appeal. **A. HAE DAYAL v. EMPEROR**, 13 A. L. J. 719; 16 Cr. L. J. 606; 37 A. 471 **158**

s. 417—*Appeal against acquittal—Erroneous view of evidence by lower Court—Appellate Court, duty of.*

The Criminal Procedure Code makes no distinction between an appeal from a conviction and an appeal from an acquittal. Consequently if in an appeal from an acquittal, the Appellate Court thinks that the lower Court has taken an erroneous view of the evidence it has no jurisdiction to refuse to convict. **S. EMPEROR v. KADIR BUX**, 9 S. L. R. 17; 16 Cr. L. J. 604 **156**

s. 421 **145**

s. 423 **654**

s. 423—*Appellate Court, when can start new case against accused.*

The powers conferred by the Code of Criminal Procedure upon a Court of Appeal are not intended to be used in such a way as to spring up a new case on the accused without giving him any notice of the charge which he has to meet. **A. DEBI SINGH v. EMPEROR**, 16 Cr. L. J. 598 **151**

s. 423 (b)—*Alteration of sentence of 3 months' rigorous imprisonment into one month's imprisonment and a fine—Payment of fine—Alteration, whether amounts to enhancement.*

Where a District Magistrate on appeal altered the sentence of three months' rigorous imprisonment to one month's rigorous imprisonment and a fine of Rs. 100 or in default one month's further rigorous imprisonment and the fine was paid and the appellant did not wish to have the original sentence restored:

Held, that in the circumstances of the case the alteration did not amount to an enhancement. **P. KIRPA RAM v. EMPEROR**, 7 P. R. 19.5 Cr.; 16 Cr. L. J. 608 **155**

Criminal Procedure Code—contd.

ss. 423 (d), 522—
Appellate Court, powers of, to make any order.
 Under section 423 (d) of the Code of Criminal Procedure an Appellate Court has power to set aside an order under section 522, Criminal Procedure Code, as the section authorises the Appellate Court in an appeal to make any incidental order. **C. UJIR SHEIKH v. SYID ALI SHEIKH**, 19 C. W. N. 990; 16 Cr. L. J. 607 **159**

s. 427 654

s. 435 646

ss. 435, 439—Acquittal, order of—High Court, power of, to interfere—Jurisdiction, revisional, exercise of—Notice of appeal, failure to serve on District Magistrate—Irregularity, effect of.

A High Court should not interfere with an order of acquittal where the question is as to the appreciation of evidence or where there is no patent error or defect in the order of acquittal which has resulted in grave injustice.

The mere fact that a High Court, if it were sitting as a Court of Appeal, would have come to a different conclusion on facts, is no ground for exercising revisional jurisdiction in petitions against orders of acquittal.

An omission to serve notice of appeal on the District Magistrate is an irregularity but the proceedings are not *ab initio* void. **M. VELLAYANAMBALAM v. SOLAI SERVAT**, 28 M. L. J. 692; (1915) M. W. N. 540; 16 Cr. L. J. 600 **152**

s. 435—Revision—Records called for by Sessions Judge on his own motion and returned without interference—Subsequent application by complainant to re-open the case—Duty of Sessions Judge.

A Sessions Judge, who himself calls for the records of a case in which the accused has been discharged and returns the same with the remark that in his opinion there is no cause for interference, is not precluded but on the other hand is bound to entertain an application for re-opening the case, presented by the complainant. He cannot reject such application on the ground of his previous non-interference on his own motion. **L. B. MG. TUN MYAING v. NGA KAU SAN**, 16 Cr. L. J. 711 **999**

s. 437—Further inquiry

—Notice.

Where a man has been discharged after full inquiry by a competent Court, a Revisional Court will exercise proper discretion in allowing him an opportunity of showing cause before ordering a further inquiry or before directing a re-opening of the case, it being a principle of British Criminal Law that an order to a man's prejudice should not be made without due notice to him.

Where a Court is given a discretion, it is bound to exercise it judicially and fairly. **L. B. VAIDYANATH IYER v. EMPEROR**, 8 Bur. L. T. 133; 16 Cr. L. J. 697 **744**

s. 439 152, 452, 654, 1001

s. 439 (3)—High Court's power to enhance sentence beyond power of trying Magistrate—Practice.

Criminal Procedure Code—contd.

In cases of convictions by second or third class Magistrates, the High Court has power to enhance the sentence beyond the power of the trying Magistrate.

The power of enhancement of sentence conferred upon the High Court by section 439, Criminal Procedure Code, is limited only by clause (3) of that section which clause does not regard the difference in the powers of the trying Magistrates under section 32 of the same Code but lays down the general rule that in cases of sentences passed by Magistrates not empowered under section 34, the limit of enhancement shall be the sentence that may be inflicted by a Presidency or a first Class Magistrate.

The practice of this Court to accept the conviction as conclusive and to consider the question of enhancement of sentence on the basis of the facts found by the lower Court, would not be followed when it is proposed to enhance a sentence beyond the powers of the trying Magistrate. In such cases both the conviction and the sentence are open to revision. **S. EMPEROR v. KAMAL**, 9 S. L. R. 82; 16 Cr. L. J. 712 **1000**

ss. 454 (2), 534—

Omission to ask accused if he is an European British subject—Revision.

An omission to ask an accused whether he is an European British subject, is merely an irregularity and is not a sufficient ground for interference in revision. **M. VICTOR D. SOUZA, In re**, 16 Cr. L. J. 616 **440**

s. 471 (1) 654

ss. 488, 490—Main-

tenance—Jurisdiction of Civil and Criminal Courts—Illegitimate child—Decree of Civil Court on question of marital or filial relationship supersedes Magistrate's previous maintenance order—High Court, revisionary power of Revision, power exercisable in.

A Magistrate's jurisdiction to settle maintenance under section 488, Criminal Procedure Code, is only auxiliary to that of the Civil Courts.

Therefore, a Civil Court decree, declaring that A is not an illegitimate child of B supersedes a Magistrate's previous order for A's maintenance and the Magistrate is justified under section 490, Criminal Procedure Code, in refusing to enforce the Criminal Court order after the Civil Court decree is passed. And a High Court can set aside in revision the previous Criminal Court order in view of the subsequent Civil Court decree. **O. RAGHUBAR v. EMPEROR**, 2 O. L. J. 251; 16 Cr. L. J. 609 **433**

s. 490 433

s. 498—Maintenance of

children living with mother—Father's liability.

A father cannot refuse to maintain his children on the ground that they are living with their mother, if they are unable to maintain themselves. If he wants to have them in his custody, he must enforce his rights, if any, in a Civil Court. **L. B. MURGESAN MUDALIAR v. SODIAMMA**, 8 Bur. L. T. 134; 16 Cr. L. J. 656 **480**

s. 522 159, 1002

Criminal Procedure Code—conold

— **s. 523**—*Transfer of criminal case—Reasons to be recorded.*

An order of transfer of a criminal case, even for the ends of justice, must be for recorded reasons. **M.**

VENKATACHALAM CHETTY v. CHAIRMAN, MUNICIPAL COUNCIL, 16 CR. L. J. 626 **450**

— **s. 534** **440**

— **s. 537** **145, 465, 737**

— **s. 537**—*Irregularity in procedure—Sufficient cause to set aside conviction—Accumulative sentences, legality of.*

A complaint was made before a Magistrate. The Magistrate without at once examining the complainant, sent for the papers of the Police investigation and summoned the accused and fixed a date asking the complainant to proceed with the case independently on that date. On the date so fixed, the accused appeared, but the complainant did not. The Magistrate discharged the accused. Subsequently on the same date the complainant appeared and explained the cause of his delay. The Magistrate again without examining the complainant fixed another date giving the complainant opportunity to examine his witnesses. On the date so fixed the complainant and his witnesses were examined and a process was issued against the accused. Subsequently the accused were convicted of the offences complained of:

Held, that there was no sufficient cause to set aside the conviction on the ground of irregularity.

Where different persons are injured, grievous hurt is caused in one case and simple hurt in others, the Magistrate is competent to pass accumulative sentences. **A. BATESHAR v. EMPEROR, 13 A. L. J. 840; 16 CR. L. J. 669** **653**

Criminal proceedings, stay of, pending disposal of civil proceedings.

Where a document presented for registration was impugned as a forgery, and on the refusal of the Registration Officer to register it, one party appealed to the District Registrar and filed a suit to compel registration while the other party rushed into a Criminal Court with a charge of forgery against the attesting witnesses and the obligee:

Held, that this was a fit case in which criminal proceedings ought to be stayed until the disposal of the civil suit

In all such cases, the test is whether the accused would be prejudiced if the criminal proceedings are not stayed until the disposal of the civil suit, and in this respect there is no distinction between proceedings instituted in pursuance of sanction granted by a Court and those instituted by a party himself where no such sanction is necessary. **M. MAHOMAD IBRAHIM v. KATTAYAN, 16 CR. L. J. 637** **461**

Custom. See **HINDU LAW; LANDLORD AND TENANT; PRE-EMPTION.**

— **Alienation—Ancestral property—Childless proprietor—Awans of Mauza Marir Hasan, Tahsil Rawalpindi.**

A childless Awan proprietor of Mauza Marir Hasan Tahsil Rawalpindi, has power by custom to alienate ancestral property in the presence of a first cousin even without necessity. **P. NUR AHMAD v. GHULAM HUSAIN, 56 P. R. 1915; 135 P. W. R. 1915** **90**

Custom—conold.

— **Succession—Labbais—Hindu converts—Muhammadan Law; applicability of—Custom to exclude females from succession, applicability of.**

In the matter of succession Labbais or Tamil-speaking converts to Muhammadanism in the district of Coimbatore adhere to the Hindu Law which excludes females from the right of succession. **M. IBRAHIM ROWTHER v. MUHAMMAD IBRAHIM ROWTHER, 29 M. L. J. 763** **806**

— **Self-acquired property—Statements in riwaj-i-am opposed to general custom, effect of—Gaur Brahmins of Palwal Tahsil of Gurgaon district—Collaterals and daughter—Pleadings.**

It is a well-established general custom in the Punjab that as regards self-acquired property, *i. e.*, property which has not descended from the common ancestor a daughter or her son succeeds in preference to collaterals.

Statements in the *riwaj-i-am* when opposed to the general custom can carry very little weight unless supported by instances.

Among *Gaur Brahmins* of Tahsil Palwal, District Gurgaon, collaterals do not exclude a daughter and her sons from self-acquired property.

An appellant cannot argue a point not raised in his memorandum of appeal. **P. CHUTTAN v. HAZARI LAL, 129 P. W. R. 1915** **22**

— **Wajib-ul-arz, entry in proof** **503**

— **statement in, of one interested party, if sufficient proof of custom—Resumption, right of.**

A *wajib-ul-arz* which merely contains a statement of a *mukhtar* of a *zemindar* that he has the power to take away all *muafis* is not sufficient evidence of custom of resumption as it contains merely the statement of one interested party and is not prepared after such inquiry as is contemplated by the law. **U. P. B. R. ALA RUX v. RADHAY LAL** **805**

Cypres, doctrine of **225**

Dahyak, right to. See **UNDER-PROPRIETARY RIGHTS.**

Dakhlanama. See **EVIDENCE.**

Damages—Slander—Malice—Burden of proof—Privileged occasion.

The law applicable to a suit for damages for slander in India is the same as the English Law. If the occasion is privileged, the onus is on the plaintiff to show actual malice in the defendant and if the defendant make a statement honestly he is not liable for the slander even though there is no reasonable ground for his belief.

Refusal to apologise before suit may be evidence of malice, but it may equally be consistent with the defendant honestly adhering to his opinion. **L. B. ROBERTSON v. MURRAY** **930**

Debt. See **HINDU LAW.**

Decisions—English decisions, force of—Privy Council judgment—General observations, force of **465**

Declaration that defendants are not proprietors or under-proprietors, suit for—Cause of action, accrual of—Revenue Court cancelling notice of ejectment on ground that plaintiff is under-proprietor, effect of—Jurisdiction of Civil and Revenue Courts—Perpetual lease, plea as to—Tenancy, nature of, determination of—U. P. Land Revenue Act (III of 1901), s. 233 (i)—Civil Court, power of—Estoppel—Relief claimed on many grounds—Abandonment of grounds of relief before decision of case, right of party as to.

Although the order of a Revenue Court, passed in a suit to contest a notice of ejectment, to the effect that A is an under-proprietor, is not warranted by the pleadings in the case, yet it gives a sufficient cause of action to the landlord to go to the Civil Court and seek a declaration that A has no superior or inferior proprietary rights.

The plaintiff sued the defendants in the Civil Court for a declaration that the latter had no right, either superior or inferior, in the village, and the defendants admitted that they had no such right but pleaded that they were perpetual *thekadars* in the village. The Court found that the defendants held the land under certain *qubuliats* executed by their ancestors in favour of the predecessor-in-title of the plaintiff and were estopped from setting up a perpetual tenancy.

Held, that in view of the defendants' own admission and the provisions of section 233, clause (i), of the U.P. Land Revenue Act, the Civil Court ought to have passed merely a decree for a declaration that the defendants had no superior or inferior proprietary rights, but was precluded from going into the question as to the nature of the tenancy.

Held, further, that the finding of the Civil Court on the question of estoppel was also erroneous.

It is open to a party, who claims a relief on more grounds than one, to give up any of the grounds at any time he likes before the case is decided. **O.** **HIRDE v. MUHAMMAD ABDUL HASAN KHAN**, 2 O. L. J. 335 **207**

Decree, execution of—Civil Procedure Code (Act V of 1908), O. XXI, r. 2, cl. (3)—Payment or adjustment, recognized, when certified or recorded—Judgment-debtor not to suffer for Court's negligence in making record.

It is plain from clause (3) of rule 2, Order XXI of the Code of Civil Procedure, that a payment or adjustment shall not be recognized by any Court executing the decree, unless it has been either certified or recorded. This does not require that the payment or adjustment must be both certified and recorded.

In clause (3) of rule 2 of Order XXI, the term 'certified' refers to clause (1) and the term 'recorded' to clause (2).

A judgment-debtor does not lose his protection, merely because the Court fails to perform the duty cast upon it, viz., to make a record that the payment or adjustment has been certified by the decree-holder. **C. TABAK NATH SARKAR v. NATABAR MONDAL**, 21 C. L. J. 632 **45**

—, interpretation of—Pleadings—Landlord and tenant—Adverse possession.

The plaintiff alleged that he was the owner of a large estate, that the defendant, a tenant of some land within the estate, had taken possession of the land in suit without any right. The plaintiff

Decree—conold.

prayed for a decree for rent. The defendant asserted that he and his predecessors had held the land adversely to the knowledge of the plaintiff for more than 50 years. The Court found that the suit land was situated within the ambit of the *mal* land of the estate of the plaintiff, but that the defendant had been in adverse possession of it for more than 12 years. The decree directed that the suit be decreed in part and that the plaintiff's alleged title to the property in dispute be hereby declared and that his claim for assessment of rent and for *wasilat* do stand dismissed.

Held, that the decree was self-contradictory, that the Court did not and never intended to find anything to the effect that the relationship of landlord and tenant existed between the parties, that in face of the pleadings of the parties there was no room for any possible finding to that effect. **C. BIRENDRA KISORE BAHADUR v. NAZIR MAHOMMAD**, 22 C. L. J. 122 **917**

—, preliminary See APPEAL.

—, suit to set aside, maintainability of—Jurisdiction, method of exercise of, challenge of—Denial of jurisdiction—Fraud.

It is not open to suitors, who have exhausted the remedies competent to them, and after final decree has been obtained against them, to institute a fresh suit, or series of suits, the object of which is to declare that a decree, competently and with adequate jurisdiction obtained therein, is not applicable to them, although they are named in that decree.

A challenge of the method of the exercise of the jurisdiction of a Court can never in law justify a denial of the existence of such jurisdiction.

A suit for the rescission and destruction of a former decree of a competent Court can be obtained on the ground of fraud "practised on the Courts," but where fraud has been eliminated, the suit is a mere colour for a fresh suit on matters already competently settled by law. **P. C. RAJWANT PRASAD PANDE v. RAM RATAN GIR**, 13 A. L. J. 937; 29 M. L. J. 165; 2 L. W. 671; 18 M. L. T. 173; 17 Bom. L. R. 754; 37 A. 485; 20 C. W. N. 35 **849**

Dekkhan Agriculturists' Relief Act (XVII of 1879), s. 13 **396**

Deposit. See CIVIL PROCEDURE CODE, 1908, O. XXI, r. 89; TRANSFER OF PROPERTY ACT, s. 84.

— of insurance policy—Effect of mere deposit at time of execution of pro-note—Lender if can rank as secured creditor in distribution of promisor's estate.

A deposit of an insurance policy with the payee of a pro-note by way of collateral security is neither a transfer nor an assignment of the policy and creates no security in favour of the payee and he cannot, therefore, be regarded as a secured creditor in the distribution of the estate of the promisor who subsequently becomes insolvent. **L. B. OFFICIAL ASSIGNEE v. THOMPSON**, 8 B. L. T. 157 **602**

Divorce Act (IV of 1869), ss. 19, 57

—Divorce—Decree absolute, marriage within six months of, if valid—Previous marriage how long in force—Jurisdiction to declare marriage null and void.

Divorce Act—concl'd.

Section 57 of the Indian Divorce Act does not completely dissolve the tie of marriage until the lapse of six months after the decree absolute.

Where, therefore, a new marriage was solemnized within six months of a decree absolute for divorce of a party:

Held, that the marriage was not only void on the date when it was solemnized but also that the previous marriage was still in force within the meaning of section 19 (4) of the Divorce Act so as to give jurisdiction to a Court under section 19 of the Act to pronounce a decree of nullity. **M. BATTIE v. BROWN**, 38 M. 452 **413**

s. 19 (1)—Impotence—Proof.

In order to support a suit for nullity of marriage under section 19 (1) of the Indian Divorce Act impotence must be proved or there must be facts from which impotence, that is, physical unfitness for consummation, may be inferred. **M. EDWARD CHARLES DAWSON v. MATTY DAWSON**, 29 M. L. J. 183 **565**

s. 57

Dower. See MUHAMMADAN LAW.

Easement—Right to flow water—Diversion of route—Obstruction.

The right of a dominant owner to pass his water across the servient owner's land is not interfered with if the servient owner diverts the direction of the route of water on his own land. **A. LACHMI NARAIN v. RAM SARUP**, 13 A. L. J. 821 **508**

Right to take water—Channel running through Government lands—Non-user for some years—Obstruction by trespasser—Injunction.

A person having had enjoyment of an easement for less than the statutory period can obtain an injunction against a trespasser.

Where the plaintiffs had been taking water with the permission of the Government to a tank along a channel which mostly ran through Government *poramboke* lands, but had for some years prior to suit not used this channel, on a suit being brought for declaration of their right against the defendants trespassers:

Held (1) that the non-user by the plaintiffs did not disentitle them to the relief claimed by them against the defendants who had no right either by grant or by prescription;

(2) that the plaintiffs were entitled to a decree restraining the defendants from interfering in any way with the plaintiffs in their enjoyment of the channel and of the water flowing in it. **M. ANANTHA DESIKACHARIAR v. VISWANADHA MUDALI**, 18 M. L. J. 515 **989**

Easements Act (V of 1882), s. 23—

Thatched roof house changed to pukka three-storeyed house—Discharge of water—Additional burden.

The defendant had a single-storeyed house with a thatched roof. One portion of the thatched roof discharged the rain water on the plaintiff's land between the houses of the two parties. He removed his thatched house and built a three-storeyed *pukka* house with five spouts on the roof to discharge water on to the land;

Easements Act—concl'd.

Held, that there was a considerable increase of burden within the meaning of section 23 of the Easements Act. **A. DAMODAR DAS v. TILAK CHAND** 13 A. L. J. 791 **941**

s. 60**581**

Ejectment, contesting notice of—Statutory period, fresh, commencement of, plea as to—Lease, new, at enhanced rent—Enhancement, illegal—Tenant's action, effect of—Estoppel.

A tenant is estopped from pleading, in ejectment proceedings against him, commencement of a fresh statutory period from the date when a new lease was granted to him, if he does not pay the enhanced amount of rent entered therein, although the enhancement was illegal. **U. P. B. R., RAM PRASAD v. DALLA**, 2 O. L. J. 255 **86**

Lakheraj tenure, protected—Thak map, entry in, 60 years old, admissible in evidence—Lakheraj, existing from Permanent Settlement, not incumbence to be annulled—Regulation XIX of 1793, s. 6, construction of—Tenures of insignificant area—Presumption.

Where the purchaser at a revenue sale brings a suit to eject the defendants from the lands held by them, and it is found that the said defendants have been holding 3 *cottahs* and 7 *dhurs* as a *lakheraj* tenure from a time before the Permanent Settlement out of 7 *cottahs* 7 *dhurs* and 7 *powas*, the total area of the land in dispute:

Held, that the plaintiff is entitled to eject the defendants from the remaining 4 *cottahs* and 7 *powas* of land, in respect of which the defendants are obviously trespassers.

An entry in the *thak* map made about 60 years ago is admissible in evidence.

In 1793 the Government resumed all classes of invalid tenures but it did not think it necessary to resume *lakheraj* tenures of insignificant area.

Held, that that being so, the lower Appellate Court was entitled to presume that the disputed land was one of those tenures of insignificant area, which the Government did not think it worth while to resume and, therefore, to hold that the defendant's tenure was one dependent upon the estate of which it was a part. **C. TARAKISHORE v. NABIN CHANDRA** **53**

Notice to quit—Calculation of time—Calendar year—Contract **887**

suit for—Defendants' possession within 12 years—Lands lying waste—Title—Presumption.

Where in a suit for ejectment it appeared that the defendants' possession arose within 12 years before suit, but that during the remaining period of the 12 years the land in suit had been lying waste and uncultivated:

Held, that the lands were presumably in possession of the plaintiff who had title to them. **M. MURUGAPPA MODALI v. PANAGANTI JAGANNATHA RAYANIM GARU** **191**

suit for—Documents not filed, admission of, how far valid Appellate Court's power to admit—Oral evidence following documentary one—No objection to its admission.

Evidence which becomes relevant because of the discovery of some documents previously out of the reach of parties, can be admitted by an Appellate Court.

Ejectment—concl'd.

Where oral evidence is admitted as a natural consequence of the admission of a documentary evidence, there can be no legal objection to its admission. **C.** SHAIKH NURA v. BAIKUNTHA NATH RAY, 21 C. L. J. 596 **398**

—, suit for—*Estates Partition Act* (V of 1897 B. C.), s. 99, applicability of—*Common tenancy*—*Private arrangement*—*Plaintiff not allowed to abandon his own case and adopt that of defendant.*

To make section 99 of the *Estates Partition Act* applicable it is essential that the estate should be held in common tenancy and not in severalty in pursuance of a private arrangement between the parties.

Where on a partition of the entire estate by the Collector under the *Estates Partition Act* the lands held by the defendants as a tenure under the co-sharers, to whose exclusive share they had been assigned by private partition, were allotted to the plaintiffs:

Held, that the plaintiffs took the disputed lands subject to the tenure of the defendants and were not entitled to eject them.

A plaintiff is not allowed to adopt the case of the defendant and claim relief on that footing by abandoning his own case. **C.** NOGENDRA MOHAN RAY v. PYARI MOHAN SAHA, 21 C. L. J. 605 **420**

—, suit for—*Land let for agricultural purposes* **551**

—, suit for, against sub-tenant's sub-tenant, when maintainable—*Sub-tenant made party after limitation, effect of*—*Civil Procedure Code* (Act V of 1908), O. I, r. 10.

A suit for the ejectment of a sub-tenant's sub-tenant is not maintainable without the sub-tenant being made a party to the suit, and in such a case if the sub-tenant is joined after the expiry of the period prescribed for suits for ejectment, the entire suit still fails. **U. P. B. R.** FAKHR-UN-NISSA BIBI v. IMDAD ALI **795**

—*Trespasser, ejectment of, as sub-tenant*—*Tenant-in-chief, ejectment by, of trespasser*—*Oudh Rent Act* (XXII of 1886), s. 127.

A tenant-in-chief cannot eject a trespasser as his sub-tenant under section 127 of the *Oudh Rent Act* it is only the *zemindar* who is entitled to do so **U. P. B. R.** BHAGWAN DAT v. RAM DHAN, 2 O. L. J. 352 **206**

Electricity Act (IX of 1910), s. 33—*"Every person" meaning of*—*Application of section.*

In section 33 of the *Electricity Act* the term "every person" is not confined to persons who are licensed under parts II and III of the Act, nor is the section confined to cases in which the accident actually results in personal injury or death. **M.** MR. HAWKINS, *In re*, 18 M. L. T. 150; 16 Cr. L. J. 620 **444**

Encumbrance. See *BENGAL TENANCY ACT*, s. 86 (b).

Enhancement of rent. See *BENGAL TENANCY ACT*, s. 29.

Equity. redemption. See *MORTGAGE*.

Estoppel—Admission in pleadings, effect of

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— — — — — by conduct—Waiver **29**

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— — — — — Ejectment, contesting notice of—*Statutory period, fresh, commencement of, plea as to*—*Lease, new, at enhanced rent*—*Enhancement, illegal*—*Tenant's action, effect of* **66**

— — — — —, equitable **323**

— — — — — *Fraudulent transfer*—*Fraud successfully perpetrated*—*Plea as to fraud*—*Parties to fraud, position of.*

Where in cases of fraudulent transactions the fraud has been successfully carried into effect, the parties to them cannot, either as plaintiffs or as defendants' plead fraud to vitiate the transactions and escape from the consequences of their own acts. **O.** SARUP NARAIN v. MAJHO SINGH **253**

— — — — — *Hindu widow allowed to represent herself as owner, effect of*—*Heir, position of*—*Invalidity of mortgage by widow, plea as to, when not maintainable*—*Attestation, effect of*—*Priority*—*Registration and non-registration of prior and subsequent mortgage-deeds, effect of, as to priority.*

The heir of a deceased Hindu, deliberately allowing the widow to represent herself as the owner of the deceased's estate and attesting the mortgage-deed executed by her in respect of that estate, is estopped by reason of the attestation from setting up the invalidity of the mortgage and depriving the mortgagee of the money advanced on the faith of that representation.

No priority can be claimed in respect of an unregistered mortgage-deed when the subsequent mortgage-deed is registered. **O.** GAJADHAR LAL v. GULABA, 2 O. L. J. 368 **388**

— — — — — *Jurisdiction of Revenue Court denied*—*Suit in Civil Court—Jurisdiction, if can again be denied* **551**

— — — — — *Land standing in Revenue Registers in name of husband and wife, effect of*—*Wife, if precluded from showing that land was her sole property.*

Where land stood in Revenue Registers and the tax receipts appeared to be in the joint names of husband and wife and the wife was living on the property:

Held, that she was not estopped from showing that the land was her sole and separate property.

Held, further, that the very fact that the wife was living on the property was sufficient to put a mortgagee of the property on inquiry to ascertain what her real interest was. **L. B.** MEYAPPA CHETTY v. MA MO YEIK, 8 BUR. L. T. 124 **692**

— — — — — between landlord and tenant **299**

— — — — — *Mortgage—Priority claimed but not insisted upon in appeal, effect of* **366**

— — — — — *Mortgagee cannot dispute mortgagor's right to redeem*—*Surrender of vendee's rights*—*Mortgage rescinding previous sale*—*Registered sale-deed, cancellation of, by agreement evidenced in mortgage-deed*—*Conduct of mortgagor*—*Evidence Act* (I of 1872), s. 92, cl. 4—*Release executed by Hindu*

Estoppel—concl'd.

widow in favour of reversioners, effect of—Reversioner's right of redemption in widow's life-time—Transfer of Property Act (IV of 1882), s. 72—Improvements on mortgaged property, making of, mortgagee how far entitled to.

A mortgagee cannot go behind the mortgage to dispute the mortgagor's right to enforce redemption.

A vendee can surrender his rights as such by entering into a mortgage in respect of the property already sold to him, so long as there is no law describing the form in which the surrender is to be made.

A sale was effected in 1879 and six months later the vendor mortgaged the property covered by the sale to the vendee. On a suit for redemption having been brought in 1913, the mortgagee contended that the registered sale-deed could not have been cancelled by an oral agreement and that the mortgage in suit was fictitious and invalid for want of consideration. It was found, however, that the mortgagee did not set up any higher rights than those of a mortgagee at any time since the date of the mortgage and that the mortgage could not be fictitious:

Held, that section 92, clause (4), of the Evidence Act did not apply to the case, as prior to the passing of the Transfer of Property Act there was no law which required the sale of immoveable property to be in writing and as the mortgage-deed which evidenced the oral agreement rescinding or superseding the previous sale-deed was also registered.

The effect of a deed of release executed by a Hindu widow in favour of the reversioners of the deceased is to accelerate the vesting of the estate or, at all events, of transferring the widow's life-interest to them for life.

The reversioners of a deceased Hindu are entitled to sue for redemption in the life-time as well as after the death of the widow.

Section 72 of the Transfer of Property Act does not permit a mortgagee to make improvements at the expense of the mortgagor with the object of deriving greater benefit during the period of his enjoyment from the mortgaged property and to add the costs of the same to mortgage-money. **O. JANGI RAM V. SHEORAJ SINGH, 2 O. L. J. 333 234**

—Omissions, errors or mistakes of Collector, whether can affect Government's interests **539**

—Person bound by proceedings to which he is no party, when **161**

—Property jointly mortgaged by two persons as its owners—One of them cannot subsequently deny that the other had no title.

Where a property which stands in the names of A and B is jointly mortgaged by A and B to X, on the allegation that A and B are proprietors in respect of the shares for which they are registered, it is futile for A or his successors to contend subsequently, as against X or his representatives that B had no title to the property and that A was the sole owner. **C. BALDEO NARAIN JHA V. BHAYA LAL SINGH, 21 C. L. J. 635 47**

—Relief claimed on many grounds—Abandonment of grounds of relief before decision of case, right of party as to **207**

—, if created against Statute Law **403**

Evidence—Appellate Court, power of, to admit additional evidence **402**

—Applicability of new rules of evidence to pending suits **609**

—Handwriting expert **751**

—Hindu Law—Joint family property, nature of—Self-acquired property, when becomes joint property—Nucleus of joint family property, accretion to—Son's liability to pay father's debts—Debts contracted for immoral purposes—Proof, nature of **216**

—Statement before Committing Magistrate, when admissible in Sessions trial **439**

—No evidence against accused—Magistrate, right of, to question accused—Statement made by accused under circumstances, whether admissible in subsequent trial **447**

—Public document—Dakhalnama, copy of admissible in evidence without proof.

A *dakhalnama* is a document forming record of the act of a public officer and, therefore, its copy is admissible in evidence without proof. **A. SATNARAIN DUBE V. NARAIN BARGAH, 13 A. L. J. 935 830**

—Thak map, entry in, 60 years old, whether admissible **53**

—Transfer of statements, value of **436**

—Value of evidence of identification and production of stolen property **453**

—Will—Intention of testator—Proof—Oral evidence, admissibility of **391**

Evidence Act (I of 1872), s. 11 292 464

—ss. 31, 32—Judgment not inter partes, inadmissibility of, to prove admission—Admission, how to be proved.

A judgment in a previous suit not inter partes is inadmissible as evidence of an admission said to have been made by a party in the course of the previous suit.

The proper mode of proving any admission made by a defendant in a previous suit is by producing a certified copy of his written statement or if the admission was made orally, by producing a copy of the defendant's deposition or by putting in the witness-box some one who actually heard what the defendant said. **C. DEBHENDRA NATH HALDAR V. BIRESHWAR HALDAR, 22 C. L. J. 270 821**

—s. 32 **464, 821**

—s. 32 (6)—Old pedigree—Authorship of statements in old pedigree, whether necessary to prove—Admissibility of evidence, objection as to, when to be taken and decided.

Neither section 32 of the Evidence Act nor its clause 6 provide that it is necessary to show who it was that made the statements referred to therein.

Where an old pedigree, which was found to be genuine, was made long before the question in dispute had arisen and it was impossible to show who in fact had made the statements contained in the pedigree.

Held, that the pedigree was admissible in evidence.

The proper time to object to the admissibility of evidence is at the trial when the evidence is tendered and it is then that the Court should rule as to the admissibility or inadmissibility of the evidence.

A. JAHANGIR V. SHEORAJ SINGH, 13 A. L. J. 817 505

Evidence Act—contd.

ss. 33, 70—Statement made by witness in *ex parte* proceedings, whether admissible in evidence in subsequent proceeding of the case—Admission made before Registering Officer, if proves execution.

A witness was examined in a suit on a bond to prove its execution. The suit was decreed *ex parte*. At the instance of the defendant the decree was set aside and the case was restored to its original number. In the meantime the witness died. His statement was sought to be relied on to prove execution:

Held, that the fact of the service of process before the passing of the *ex parte* decree, not having been proved, the statement of the witness as to the execution of the document was not admissible in evidence under section 33 of the Evidence Act.

The "admission" referred to in section 70 of the Evidence Act is an admission in the course of the very proceedings, for example, made in the pleadings or by a party himself in his examination. The admission of the execution of a document by the executant before the Sub-Registrar as contained in the certificate endorsed on the document is not sufficient proof of its execution when a suit is brought on it. **A. RAJMANGAL MISIR v. MATHURA DUBAIN**, 13 A. L. J. 881 **576**

S. 44—Compromise decree—Defence that consent to it was obtained by misrepresentation and fraud, it can be set up—Suit to set aside compromise, necessity of.

Under section 44 of the Evidence Act a party to a compromise decree can show that his consent to it was obtained by misrepresentation and fraud without bringing a suit to set it aside. **M. BOMMAREDDI POLIREDDI v. BOMMAREDDI BAPIREDDI**, 13 A. L. J. 881 **576**

S. 66 **690**

ss. 66, 74—Document in possession of defendant—Production of document not sought—Genuineness of document not questioned—Discretion of Court—Certified copy of Letters of Administration, admissibility in evidence of—Public document **690**

S. 70 **576**

S. 74 **690**

S. 78 **643**

S. 90—Mortgage-bond

more than 30 years old signed by scribe—Presumption of execution—Proof.

A mortgage-deed more than 30 years old was signed not by the executant but by the scribe on behalf of the executant:

Held, that under section 90 of the Evidence Act, there was no presumption that the scribe had any authority from the mortgagor to sign his name on the document. **A. SHEO NANDAN v. RAM LAGAN SINGH**, 13 A. L. J. 921 **905**

S. 92 (4) **234**

S. 105 **113**

S. 114 **649, 721**

S. 114, III (g) **525**

S. 114, III (i)—Pro-

duction of bond by executant—Presumption as to discharge—Onus.

The mere fact that a bond creating an obligation is in the hands of the obligor is insufficient to dis-

Evidence Act—concl'd.

charge the obligation unless there is an endorsement of discharge. **M. PARA THURINJI, In re**, 2 L. W. 604; 18 M. L. T. 94 **258**

S. 115—Doctrine of 'no estoppel against law'—Public policy—Agreement to account for certain payments in execution of decree—Estoppel—Decree, construction of—Duty of Court **357**

S. 116 **299**

Exchange of land of value over one hundred rupees, how created—Registration, if necessary—Estoppel, if created against Statute Law—Exchange, if change created in a transaction of **408**

Execution, application for, dismissed for default—Attachment, if continues—Civil Procedure Code (Act XIV of 1882), s. 276—Civil Procedure Code (Act V of 1908), O. XXI, r. 57.

A decree was passed against a certain person and his property was attached. While an appeal against this decree was pending in the High Court the application for execution (under the old Code of Civil Procedure) was struck off on account of the decree-holder's default in not paying the process fees. After this the judgment-debtor made a gift of the property:

Held, that under the old Code the attachment was not withdrawn by reason of the dismissal of the application for execution and the transfer made by the judgment-debtor was void. **A. DAUD ALI SHAH v. RAM PRASAD**, 13 A. L. J. 750; 37 A. 542 **787**

Application to revise former application—Former application consigned to record room—Limitation

In execution of a decree certain property was put up for sale. An objection was filed that a part of the property belonged to a third person. The Court asked the Pleader of the decree-holder to make statement as to that by a certain date. The Pleader failed to make such statement. The Court struck off the application for execution and sent the file to the record room. Three years afterwards another application for execution was made:

Held, that the second application must be treated as an application to revive the former proceedings and was not barred by time. **A. YAKUB ALI v. DURGA PRASAD**, 13 A. L. J. 760; 37 A. 518 **877**

Assignment of rights prior to decree—Assignee, whether can execute decree.

An assignment of rights prior to decree does not give any party right to execute a decree subsequently obtained. **M. PEER MAHOMED ROWTHEN v. HARUTHAN AMBALAM** **831**

Attachment of decree—Stay of execution—Exclusion of time—Limitation—Civil Procedure Code (Act V of 1908), O. XXI, r. 53—Limitation Act (IX of 1908), s. 15.

A judgment-debtor had previously obtained a money-decree against his decree-holder in another Court. In the execution of his decree he got the decree against himself attached under Order XXI, rule 53, of the Civil Procedure Code. The execution petition was eventually dismissed for default but on that date the decree against him which had been attached by him was barred by time. The decree holder applied for the execution of his decree;

Execution—contd.

Held, that the attachment of the decree operated as stay of the execution by order of Court and the period during which the decree remained attached should be excluded in commutation of the limitation for execution of that decree. **C. KIRANSHASHI DEBI v. CHANDRIKA PRASAD SINGH** 587

Decree for possession and mesne profits—Separate execution for possession and mesne profits, if allowable 246

Execution sale set aside—Purchaser, suit by, against decree-holder for poundage deducted from purchase-money as well as for interest on amount of purchase-money deposited, maintainability of—Poundage, what is 827

Limitation Act (IX of 1908), Sch. I, Art. 164—Decree before the Act—Application to set aside *ex parte* decree—Law of limitation applicable 573

Printed judgment of Privy Council, if action can be taken on without order in Council 77

Trust—Decree directing trustees to perform some festival—Direction to trustees to perform same, if can be issued—Jurisdiction.

Where a decree directed certain trustees of a Hindu temple to perform a festival, it is not competent to the Court to issue any direction to the trustees to perform the same. **M. KRISHNEINGAR v. VIRARGHAVATHACHARIAR**, 2 L. W. 607 771

of decree—Decree for mesne profits and costs—Applications, separate, for execution of decree as to costs and as to mesne profits—Court-sale—*Lis pendens*—Attachment, effect of—Pendente lite proceedings—Sale of property in execution during pendency of suit concerning same property—Auction-purchaser, position of.

Where a decree was passed for mesne profits and costs, and the decree-holder first applied for execution of the decree as to costs only, and afterwards for that of the decree as to mesne profits alone:

Held, that the second application was not in continuance of the first, but that they were quite separate and distinct applications.

The doctrine of *lis pendens* applies to execution sales as well.

A mere attachment of a property does not confer any title upon any one. It only prevents the property being alienated by the person to whom it belongs during the continuance of the execution proceedings.

Execution proceedings taken against a property during the pendency of a suit in respect of the same property and resulting in a sale of that property sometime after the suit is decreed, are proceeding *pendente lite*, which cannot in any way affect the rights of the decree-holder, although the property may have been under attachment from before the institution of the suit. **O. KUNJ BEHARI LAL v. RAM SAHAL**, 2 O. L. J. 327 213

Joint Hindu family manager's power of discharge—Minor members of family—Limitation 75

Jurisdiction of execution Court to issue prohibitory order to person outside its territorial jurisdiction 487

Representative—Decree against ostensible representative—Execution against executor—Remedies of decree-holder—Suit upon *domestic* judgment 824

Execution—concl'd.

proceedings—Judgment-debtor failing to raise objection as to amount due under decree, if he can raise such objection subsequently—Civil Procedure Code (Act V of 1908), s. 11, Explanation 4—Res judicata.

The provisions of the Code of Civil Procedure as to *res judicata* are not expressly made applicable to execution proceedings.

If it is ever considered expedient to make all the provisions of section 11 of the Code applicable to execution proceedings, it should be done by the Legislature, not by the Judges.

If a judgment-debtor does not take exception to the amount, set forth as being due in an application for execution, he is not prevented by the rule of *res judicata* from ever afterwards raising the question.

A. KALYAN SINGH v. JAGAN PRASAD, 13 A. L. J. 828 523

Executors—Suits, inter se, of devastavit, if maintainable in India—English Common Law Rule against maintainability, if applies to Indian Courts—Forms of action, if exist in India.

Unlike in England, there are no forms of action within one of which every suit must be brought in Indian Courts and consequently the rule of English Common Law which forbids an action of *devastavit* being brought by one executor against another, has no application to India.

In the absence of any direction in the testator's Will, an executor is not entitled to lend money without security to another executor. **M. VARADARAJULU CHETTY v. RAJAMMA**, 2 L. W. 322; (1915) M. W. N. 252 63

Ex parte decree—Restoration of suit—Order, if can be questioned in appeal from final decree 2

Explosive Substances Act (VI of 1908), s. 8—Accidental explosion—Injury to property—Obligation to give notice to Police—"Occupier," meaning of—Penal Code (Act XLV of 1860), s. 176—Omission to give notice—Intention.

The primary requisite for the obligation to give notice to the Police under section 8 of the Explosive Substances Act is not "serious injury to property" but an accidental explosion. If the explosion was designed, the obligation to give notice does not arise even if the explosion may have been attended with "serious injury to property".

The word "occupier" in section 8 of the Act refers to some one on the spot at the time of the explosion who must necessarily have become aware of the explosion.

Unless the omission to give notice is intentional, section 176, Indian Penal Code, does not apply. **L. B. ZERI KHAN v. EMPEROR**, 16 Cr. L. J. 622 446

Ex-proprietary right, relinquishment of, not accompanied by surrender of possession—Relinquishment, effect of.

A relinquishment of ex-proprietary rights, not accompanied by the surrender of possession, is ineffective. **U. P. B. R. GAYA SINGH v. RAGGHA** 792

—, relinquishment of, effect of.

The effect of the relinquishment of ex-proprietary rights is as if the ex-proprietary rights had never come into existence at all. The person in whose

Ex-proprietary right—concl'd.

favour the relinquishment of ex-proprietary rights is made cannot subsequently claim those rights. **A.** DHANI SAHU v. RAJ MAHAL KUNWARI, 13 A. L. J. 651.

Fraud—concl'd.

into to defraud his creditors and for enforcing the rights which he possessed prior to the execution of the deed, only if the fraud has not been accomplished but when the object of the fraud has been carried into effect no relief can be granted to the plaintiff. **P.** RAM LAL v. FIRM OF ARUR CHAND JIWAN DAS, 175 P. L. R. 1915; 115 P. W. R. 1915.

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— *Suit for possession not brought within six months—Vendor if can obtain possession—Agra Tenancy Act (II of 1901), ss. 31, 24.*

B sold his property, which he had contracted to sell to **C**, to a third person. **C** thereupon brought a suit for specific performance of the contract of sale. The suit was decreed and possession given to him. **C** took possession not only as a proprietor but also took actual cultivatory possession of the *sir* land, which had become the ex-proprietary tenancy of **B** and which was so recorded. In a suit for correction of papers, **B** alleged that **C**'s name should be entered as sub-tenant:

Held, that as **C** had taken wrongful possession and a suit under section 79 was not brought within six months, **B** had lost his rights. **U. P. B. R.** CHANDIKA PRASAD v. BHAIROD PRASAD

482
— *Suit to set aside decree on ground of fraud—Nature of fraud—Perjured evidence—Suit, maintainability of—Res judicata.*

A suit brought to set aside a decree in a previous suit on the ground that the decree had been passed in contravention of the pleadings in that suit is barred by the principle of *res judicata*.

A suit to set aside a decree on the ground that the decree in the previous suit was obtained by perjured and false evidence, is not maintainable. **A.** JANKI KUAR v. LACHMI NARAIN, 13 A. L. J. 753; 37 A. 525

789
— *Suit to set aside decree on ground of fraud—Order for personal decree under s. 90 of Transfer of Property Act passed after notice to judgment-debtor, finality of—Transfer of Property Act (IV of 1882), s. 90.*

A person who after due notice allows an order for personal decree under section 90 of the Transfer of Property Act to be made against him without opposition is in the same position as a person who had such order made against him after contest. He cannot maintain a suit to set aside such decree without proving positive fraud.

A neglect to inform the Court of the fact that there had been a previous attempt at another stage of the litigation to get a personal decree, even assuming that the neglect was wilful, cannot amount to "fraud" which would entitle the plaintiffs to set aside the decree which was obtained by the defendants under section 90 of the Transfer of Property Act. **A.** RAMRATAN LAL v. BHURI BEGAM, 13 A. L. J. 901

792
Gift. See CONTRACT ACT, s. 25; HINDU LAW; MUHAMMADAN LAW; MUTATION.

Grant. See INAMDAR.

— *Crown grant—Construction* **609**

— *Water, free grant of, on any condition—Presumption—Water-cess, if can be imposed—Madras Water-cess Act (VII of 1865).*

Where for some consideration or other or without consideration, a grant is made by the Government of a particular quantity of water or a certain definite fraction of the water of a tank to a person irrespective of the use he might make of it, the proper presumption is that it is a free grant without claim to any kind of payment for the water. **M.** VENKATASUBBIAH v. SECRETARY OF STATE, 35 M. 425

425
Grove. See AGRA TENANCY ACT, s. 202.

Guardians and Wards Act (VIII of 1890), s. 47 (g)—*Order for removal till decision of a particular case—Appeal—Inquiry, if necessary before removal.*

One of the two joint guardians appointed under the Guardians and Wards Act applied for the removal of the other on the allegation that she had made an

811
— *tenancy—Occupancy holding—House acquired before acquisition of tenancy—Appurtenance, house if—Mortgage of house, validity of.*

An appurtenance is something belonging to another thing as principal and passing as an incident to it. It is an appendage, an adjunct, an accessory or something annexed to another thing more worthy.

Where a house was in occupation of a person long before he became an ex-proprietary tenant or acquired an occupancy tenancy in the village in which the house was situate; it is not an appurtenance to either of the holdings and its mortgage is not illegal. **A.** BUDHI MAL v. BHATI, 13 A. L. J. 846

549
First report—Story told in Court—Striking discrepancies **747**

Foreclosure. See MORTGAGE.

Fraud—Decree obtained through collusion—Parties to it or their representatives, whether can treat it as nullity—Decree for possession—Possession given by judgment-debtor—Fresh disposssession—Cause of action.

A decree of Court, though obtained by collusion in order to carry out a scheme of fraud, cannot be treated as a nullity as between the parties to the decree or their representatives, and any of them cannot be permitted to show that the transaction upheld by the decree was not really what it purports to be and does not bind him.

Where a decree is one for possession the decree-holder is not bound to obtain possession through Court, if the judgment-debtor gives it up amicably. Any subsequent disposssession gives rise to a different cause of action upon which a different suit may be brought. **M.** IDINE BEARY v. UMMATHUMMA

606
— *Decree, suit to set aside, maintainability of—Jurisdiction, method of exercise of, challenge of—Denial of jurisdiction* **249**

— *Document executed to defraud creditors—Suit to set aside document, when maintainable—In pari delicto, potior est conditio possidentis.*

A plaintiff is entitled to ask a Court of Justice to give him a decree, declaring that a deed of release executed by him was a colourable transaction entered

Guardians and Wards Act—conold.

application for Letters of Administration to the estate of the father of the minor and thereby had acted in a manner which disqualified her from holding the office of guardian. The District Judge made the following order: "The elder widow (the applicant) is permitted to manage the minor's estate singly, until the disposal of the case for the next three months." Two months after another order was recorded: "Put up after disposal of the Letters of Administration case. Order regarding the management of the estate by the petitioner will remain for the present." An appeal was preferred against these orders:

Held, that the appeal was competent under clause (g) of section 47 of the Guardians and Wards Act;

that an order of this description should not be made without some inquiry into the allegations made; that the matter should not remain in abeyance till the disposal of the Letters of Administration case.

C. KAMAKSHA BASINI v. JAGAT SUNDARI, 22 C. L. J. 70 **875**

Handwriting Expert, evidence of—Comparison, when to be made in Court **751**

High Court, decisions of, to be followed and not to be commented upon by Courts subordinate to it **292**

Procedure—Bench, jurisdiction of, to set aside judgment of another Bench Appeal, re-hearing of, application for, to be made to same Bench that heard appeal.

Where on an appeal being heard *ex parte* and decreed by one Bench of the Calcutta High Court another Bench of the Court, on an application made to them, set aside that judgment and directed the former Bench to re-hear the appeal:

Held, that the whole procedure was *ultra vires*, for one Bench of the High Court had no jurisdiction to set aside the judgment of another Bench and direct the re-hearing of the appeal, and that if there were grounds for setting aside the judgment of the former Bench, the application for re-hearing the appeal ought to have been made to that very Bench that heard the appeal, and to no other Bench. **C. RAM KRISHNA v. Mohanta BHAGWAN RAMANUJA DAS** - **27**

Hindu Law—"Bandhu," meaning of—Mitakshara—Grandfather's great-grandson's daughter's son, whether a bandhu.

The word "bandhu" under the Hindu Law means a "sapinda" who belongs to a different gotra, that is to say, a "bhinna gotra sapinda"

Therefore, for the bandhu-relationship to exist it is essential that the person claiming to be the bandhu and the last owner must have been sapindas of each other. The sapinda-relationship extends to seven degrees on the father's side and five degrees on the mother's side including the last owner

A grandfather's great-grandson's daughter's son is not a 'bandhu' under the Mitakshara Law. **A. SAIB SAHAI v. SARASWATI**, 13 A. L. J. 786 **903**

Adoption—Preferential right of senior widow—Junior widow, whether can validly adopt without consulting senior widow—Consent of sapindas.

Hindu Law—contd.

A senior widow has a preferential right to adopt and so long as such preferential right exists, an adoption by the junior widow without consulting the senior is invalid even if made with the consent of the sapindas.

Per *Wallis, C. J.*—Even on the view that a widow can adopt with the consent of the sapindas in the absence of any authority from her deceased husband, the senior widow is one of the kinsmen whom it is the duty of the junior widow to consult. Failure to do so renders the adoption invalid.

The law of adoption as applied in various Presidencies discussed. **M. DAMARA KUMARA VENKATAPPA NAYANIM v. DAMARA RANGA RAO**, 29 M. L. J. 18; 18 M. L. T. 19; (1915) M. W. N. 424 **106**

Alienation by widow of husband's estate—Widow—Compromise of suit, validity of—Reversioner's consent.

Where a compromise of a suit entered into by a Hindu widow has the effect of alienating her husband's estate, and where she effects such compromise with the consent of her husband's reversioners entitled to succeed on her death, they are bound by it. **M. BANGARAYUDU v. PERAYYA SASTRY**, 2 L. W. 1025 **927**

not for necessity - Widow's estate—Burden of proof Reversionary interest, whether liable to attachment in execution of decree against husband—Civil Procedure Code (Act V of 1908), s. 60 (m).

An alienation by a Hindu widow of her deceased husband's property not made for legal necessity is valid only during her life-time.

An absolute estate vested in a widow becomes by her alienation for her own purpose (valid during her life-time) divided into two estates 1) a life estate enjoyable by the purchaser during her life-time and (2) a reversionary estate to be enjoyed after her life-time. The ownership of the latter continues in her as part of the estate which she inherited from her husband and is available to her husband's creditors.

Such reversionary interest does not come under section 60 (m) of the Civil Procedure Code and is not exempt from attachment where the judgment-debtor is not the presumptive or contingent reversioner but a widow representing her husband's estate fully and the transfer which would be made by the attachment and Court sale of the reversionary interest is not made by any contingent reversioner or of the rights of the contingent reversioner in execution of a decree against him but by the Court acting upon the judgment-debtor's rights and upon the husband's estate vested in the judgment-debtor (widow.)

The burden of proving as against a creditor of the husband or as against a reversioner that an alienation by the widow is binding on the reversioner is on the alienee. **M. SEGU CHIDAMBARAMMA v. SAREDDI HUSAINAMMA**, (1915) M. W. N. 577; 2 L. W. 952; 18 M. L. T. 391; 29 M. L. J. 546 **101**

Reversioner, suit by, for declaration that alienation by widow is partially void—Form of decree—Hindu widow, power of, to alienate for future maintenance.

It is open to a Hindu reversioner to file a suit for a declaration that an alienation by a Hindu widow

Hindu Law—contd.

is partially valid and partially void as against his reversionary rights.

The proper form of decree in such cases would be one declaring that the alienation should affect plaintiff's reversionary rights only to the extent to which legal necessity is proved and that it is otherwise invalid as against him.

Where the income derived by a Hindu widow is insufficient for her future maintenance, she has power to reasonably alienate property to provide for her maintenance. She is not bound to wait till she has incurred debts on her maintenance before being justified in making any alienation. A widow like the manager of a family must be allowed a reasonable latitude in the exercise of her powers provided she acts fairly to the expectant heirs. **S. MOTISING v. SOBHOMAL**, 9 S. L. R. 69 **968**

—Alienation by widow—Widow's power to alienate husband's properties in order to pay off his debts—Motive—Alienation, when can claim value of improvements—Transfer of Property Act (IV of 1882), s. 51.

A Hindu widow can validly sell her husband's properties in order to discharge her husband's debts, but she cannot take advantage of the existence of a few debts to sell away her husband's properties for less than their value in order to get ready money into her own hands.

Where a widow alienates her husband's properties with the improper motive of preferring one creditor over another, that creditor is not entitled to profit by such fraud.

A person who cannot in good faith believe that he is absolutely entitled to the properties alienated to him is not a *bona fide* transferee within the meaning of section 51, Transfer of Property Act, and is not entitled to claim the value of improvements effected by him. **M. MUDDUSAMI SIDAPPA v. BHASKARA LAKSHMI NARASAPPA**, 2 L. W. 758; 18 M. L. T. 223; 29 M. L. J. 357 **853**

—Woman, estate of—Possession, suit for recovery of, by reversioner—Alienation, effect of—Reversioner, relinquishment in favour of—Limitation Act (IX of 1908), Sch. I, Art. 120—Declaration of right—Period from which right to sue accrues—Waste, what constitutes—Reversioner, when.

The estate of a Hindu widow or daughter may be determined in various ways but an alienation in favour of a third party clearly does not have the effect of accelerating the estate and entitling the next reversioner to immediate possession.

Where there has been no relinquishment in favour of a reversioner, nor is any such relinquishment alleged which would accelerate the estate in his favour he cannot successfully maintain a suit for immediate possession of the estates.

A claim to a declaration of right is governed by Article 120 of the first Schedule to the Limitation Act and the time begins to run from when the right to sue accrues.

A relinquishment by daughters of their right of inheritance to their father's estate does not amount to waste of the original estate to justify the Court in considering whether the estate should be taken out of their hands. A Hindu lady, in such a position has an absolute right and full power to alienate

Hindu Law—contd.

the estate for the period of her enjoyment, to an outsider. That will not give a reversioner the right to come in and plead waste and insist on the estate being brought into possession by the Court. **C. SARABJIT PRATAP BAHADUR SAHU v. BHAGWAT KOERI**

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—Custom and general law—Mitakshara—Impartibility, custom of—Female's right to succession—Rule of primogeniture—Joint family—Separation.

Where a custom is proved to exist, it supersedes general law, which, however, still regulates all outside the custom.

There is no inconsistency between a custom of impartibility and the right of females to inherit, and, therefore, the general law must prevail unless it be proved that the custom extends to the exclusion of females.

The widow of the last holder of an impartible estate which descends by the rule of primogeniture is not excluded from the succession if her husband was in fact separated and died without issue male, and if no custom which would exclude her from succession is proved.

In a *Mitakshara* family an ancestral impartible estate, on the death of the sole holder thereof, devolved, according to the family custom of primogeniture, on the elder of his two sons, the younger becoming entitled to maintenance. Subsequently, the elder brother granted to the younger brother a *mokurari patta* of a part of the estate for his and his descendants' maintenance. It was proved that thereafter the younger brother built a new house outside the family dwelling, removed his family there and lived there separately from his elder brother and his family, that the younger brother constructed a wall between his house and the family dwelling, that he established in his new house a separate *thakurbari* and *tulsi pinda* and raised money on the mortgage of property granted to him and spent it on the marriage of his son's daughter, and that after the younger brother's death his son stated on oath in a criminal case that he was separate from the elder brother's branch of the family:

Held, that at the time of the death of the elder brother's only son who succeeded to the said estate the younger brother and his only son were separate from the elder brother and his son, and that the elder brother's son having died without male issue his widow was entitled to succeed to the impartible estate in question in preference to the younger brother's son. **P. C. TARA KUMARI v. CHATURBHUJ NARAYAN SINGH**, 19 C. W. N. 1119; 19 M. L. J. 371; 18 M. L. T. 228; 21 W. 843; 13 A. L. J. 1034; 17 Bom. L. R. 1012 **833**

—Debts—Mitakshara—Liability of members of joint Hindu family.

The plaintiffs sued S, his father B, and his brother J, for recovery of a debt incurred by S alone and a decree was passed against them, on the finding that when the debt was incurred all the three defendants were members of a joint Hindu family. It was not shown that the loan was taken either for the benefit of the family or for the purposes of a joint family business:

Held, that under the circumstances B and J were not liable to pay the debt.

Hindu Law—contd.

There is no presumption that a debt contracted even by the Manager of a Hindu family is contracted for the benefit of the family or firm. **P. BHURA v. BANARSI DAS**, 174 P. L. R. 1915; 113 P. W. R. 1915 **481**

— **Gift to wife—Presumption—Life-estate**
— *Use of words sarva swathanthradhan, effect of.*

In the absence of a specific provision for alienation gifts by a husband to a wife of immoveable property even though accompanied by express words of inheritance, are not alienable. Even the use of such words as 'sarva swathanthradhan' does not give her an enlarged right

Per **Tyabji, J.**—The use of such words as 'malik' and "in the same way as I am the owner" indicates intention to confer an absolute estate. **M. MANIKA MUDALI v. MUTHACHU KAVANDAN**, 2 L. W. 887; 18 M. L. T. 346 **685**

— **Joint family—Ancestral business—**

Presumption—Managing member, power of—Liability of minor members—Contract Act (IX of 1872), s. 247.

In carrying on an ancestral trade, the infant member of an undivided Hindu family are bound by all acts of the adult member who is the manager, which are necessarily incident to, and flowing out of, the carrying on of that trade.

The power of a manager to carry on a family trade implies a power to pledge the property and credit of the family for the ordinary purposes of that trade and third parties in the ordinary course of bona fide trade dealings should not be held bound to investigate the status of the family represented by the manager whilst dealing with him on the credit of the family property.

In the case of a firm carried on by an adult member of a joint Hindu family consisting of an adult and a minor member, the presumption is that the minor member is also a partner in the firm but the presumption is rebuttable. **P. WADHAWA SHAH v. RATTAN CHAND**, 126 P. W. R. 1915; 189 P. L. R. 1915 **813**

— **Debt incurred by one of the members—Liability of other members.**

It is not a correct statement of Hindu Law to say that when a debt was contracted by one member of an admittedly joint Hindu family, it is necessary for the plaintiff to show that the debt was raised for joint family purposes, on the contrary the presumption would be the other way. **P. BRIJ LAL v. JAISHI RAM**, 172 P. L. R. 1915; 106 P. W. R. 1915 **500**

— **Evidence, nature of—Self-acquired property, when becomes joint property—Nucleus of joint family property, accretion to—Son's liability to pay father's debts—Debts contracted for immoral purposes—Proof, nature of.**

In order to establish that a certain property constitutes joint Hindu family property, it must be shown that the property falls within one or other of the three classes, viz., (1) ancestral property, i. e., property inherited from a direct male ancestor, (2) property acquired by the members of a joint family by or with the assistance of joint funds or by their joint labour, and (3) property originally self-acquired but afterwards voluntarily thrown by the owner into the joint stock with the intention of abandoning all separate claims upon it.

Hindu Law—contd.

Very strong evidence is required to prove that the property falls in class (3) mentioned above. Thus, it cannot be established that the property which had come to a father as self-acquired became the joint property of the family consisting of himself and his sons, merely from the fact that they lived together.

A self-acquired property obtained previously to an ancestral property cannot be said to have accreted to the nucleus of joint family property formed by that ancestral property, although it may be proved to have been voluntarily thrown into the joint stock.

General allegations as to a father's immorality cannot exempt the sons from their liability to discharge the father's debts, unless they prove that the particular debts in question were contracted for immoral purposes. **O. NARENDRA BAHADUR SINGH v. ABDUL HAQ**, 2 O. L. J. 237 **216**

— **Joint family—Gift by managing member of one-tenth of joint family properties to his daughters on occasion of their marriage—Gift, validity of.**

A gift of one-tenth of the joint family properties made by the manager of a joint Hindu family, consisting of himself and his nephew, in favour of his daughters on the occasion of their marriage is perfectly legal and valid and binding on the joint family. **M. SUBBA NAICKER, In re**, 2 L. W. 754 **701**

— **Maintenance, separate, when allowed—Imputation of unchastity—Mere suspicion—Wife voluntarily deserting husband, if entitled to maintenance.**

A judgment of a Court of Justice should not impute unchastity to a married woman on mere suspicion but only on strong and sure grounds.

Where a wife claims separate maintenance from her husband, she must show that he abandoned or deserted or expelled her without justifying cause.

A wife by voluntarily deserting her husband becomes disentitled to claim separate maintenance from him. **B. YESUBAI BHRATAR v. SADASHIV GANESH DESPANDE** **934**

— **Widow—Plea that she has other means of support, whether to be allowed.**

A plea that a Hindu widow has other means of support and is, therefore, not entitled to maintenance ought not to be allowed to be raised in a suit by her for maintenance out of her husband's joint family property. **M. KALIANI v. UTHARANKAT PARAKKAL EAZUVAN RAMAN** **891**

— **Mortgage—Joint family—Mortgage of joint family property by one member, suit on—Mortgages, position of—Sale, decree for—Personal decree—Legal necessity for mortgage-debt to be proved—Surviving members of joint family, non-liability of.**

In suits upon mortgages of joint Hindu family property, entered into by one member of the family, the mortgagee cannot get a decree for sale of the mortgaged property, or even a personal decree, against the surviving members, unless he proves that the money was borrowed for purposes which are binding on the joint family. **O. RAM NATH v. MAHADEO PRASAD**, 2 O. L. J. 378 **382**

— **Partition—Property, what, to be partitioned—Share of member already separated, if to be accounted.**

Hindu Law—contd.

A joint Hindu family consisted of three branches. A member of one branch separated having taken his share, which was $\frac{1}{12}$ th of the property, the others remaining joint. Later on the family separated. The question arose whether the branch from which a member had already separated was entitled to a full $\frac{1}{3}$ rd share or $\frac{1}{3}$ rd minus $\frac{1}{12}$ th:

Held, that under the Hindu Law the partition should be made *rebus sic stantibus* as on the date of suit and consequently the branch was entitled to a full $\frac{1}{3}$ rd share. **B. PRANJIVANDAS SHIVDAL v. ICHHARAM VIJBHUKHANDAS**, 17 Bom. L. R. 712 **918**

Reversioner, contingent, suit by—

Declaratory decree, scope of—Court, whether can grant other reliefs—Relinquishment, validity of—Consideration—Ability to maintain one-self otherwise, if necessary.

The only declaratory relief to which a contingent reversioner is ordinarily entitled when he disputes an alienation made by a Hindu widow is that the alienation is not binding beyond the life-time of the widow. Any other declaration *e.g.*, the order in which the reversioners should succeed on her death etc., is not in proper exercise of the discretion to grant declaratory reliefs.

The Hindu Law requires for the validity of a relinquishment by a co-parcener of his interest in the family property *only* that he should accept a trifle, and *not also* that he should be able to support himself otherwise by his own exertions. **M. VEERAMMAL v. KAMU AMMAL**, 2 L. W. 850 **815**

nearest—Evidence, nature of—Property, claim to—Descent and legitimacy, essential elements for establishment of claim, effect of—Legitimacy—Burden of proof.

A person claiming as the nearest reversioner to a deceased Hindu must establish that there is no intermediate heir in existence with a better claim to succeed to the property of the deceased than he asserts.

Where a plaintiff comes forward to claim property and his descent and legitimacy is a necessary element for the establishment of his claim, he is in the absence of the defendant's acquiescence bound to prove his descent and legitimacy. **O. CHANDAN SINGH v. BHABHUTI SINGH**, 2 O. L. J. 246 **220**

Succession—Bengal School—
Childless widow, whether entitled to inherit.

Under no circumstances can childless widows inherit the property in Bengal. **C. BIMOLA v. DANGOO KANSARI** **567**

Mitakshara—Putra, meaning of—Sapinda.

In the *Mitakshara*, as expounded in the Benares School, the word *putra* and its synonym employed by *Vijnaneswara* in connection with brothers and uncles must be understood in a generic sense as in the case of the deceased owner, and the descendants in each ascending line, up to the fixed limit, should be exhausted at any rate to the third degree before making the ascent to the line next in order of succession.

Under the *Mitakshara*, while the right of inheritance arises from *sapinda* relationship or community of blood, in judging of the nearness of blood relationship or propinquity among the *gotraja*, the

Hindu Law—contd.

test to be applied to discover the preferential heir is the capacity to offer oblations.

The practice of introducing the opinion of another Judge not a party to the judgment for the purpose of enforcing the conclusion arrived at condemned. **P. C. BUDDHA SINGH v. LALTU SINGH**, 29 M. L. J. 434; 2 L. W. 897; 13 A. L. J. 1007; 18 M. L. T. 409; 17 Bom. L. R. 1022; 20 C. W. N. 1 **529**

Succession—Mitakshara— Whole blood's preference to half blood—Preference applies to *sapindas* of same degree—Paternal uncle of half blood, whether preferable to cousin of whole blood **265**

Will by Hindu in favour of grandson by daughter Condition of residence with testator, interpretation of **868**

Rules of construction—Bequest in favour of daughter—Absolute estate, subject to the sheba—Charge on property—Testamentary power—Gift by Hindu widow having absolute power of alienation—Gift in favour of daughter's daughter.

In construing the Will of a Hindu it is not improper to take into consideration what are known to be the ordinary notions and wishes of Hindus with regard to the devolution of property. It may be assumed that a Hindu generally desires that an estate, especially an ancestral estate, shall be retained in his family, and it may be assumed that as a general rule women do not take an absolute estate of inheritance which they are enabled to alienate.

But where the property in the Will was the separate property of the testator, and the major portion of it was not ancestral, and his object was to make provision for his daughter who, though married, was too young at the time to have children:

Held, that the testator, a Judge's *sheristadar*, by conferring an absolute power of alienation on the daughter subject to the keeping up and maintaining the *sheba*, must be presumed to have intended contrary to the general presumption and practice of Hindus to confer an absolute right of inheritance on the daughter;

that the provision for keeping up the *sheba* was merely a collateral charge on the property in whosever's hands it may be and did not affect the absolute character of the gift;

that a reversioner of the testator in face of the testator's daughter holding an absolute estate could not sue either herself or her heirs for administration of the property as trust property.

When their Lordships of the Judicial Committee speak of a general rule in connection with Hindus' knowledge that women do not take an absolute estate of inheritance which they are able to alienate, it cannot be held that they meant a rule of Hindu Law, since the rule of Hindu Law with regard to gifts to mothers and daughters is the reverse.

A daughter being a person to whom the testator can, under the Hindu Law, give an estate of inheritance, if the Will shows that it was intended that she should have the estate of inheritance, a benignant construction is to be used even if the language is ungrammatical or mistaken as to name or description, or in any other manner incorrect, provided it sufficiently indicates what was meant, that meaning shall be enforced to the extent and in the form which the Law allows.

Hindu Law—concl'd.

There is no universal presumption with regard to mother or daughter that in every case the estate she takes is less than would be taken by a male.

Decided cases, too numerous to be now questioned, have determined that the testamentary power exists and may be exercised at least within the limits which the law prescribes for alienation by gift *inter vivos*.

There is no application of the English Law of powers to Hindu Wills.

In ordinary life-estates of Hindu widows, the gift of a widow would be taken not from her but from the testator, but where the widow, under a Will by her husband, has absolute power of alienation in derogation of the rights of the sole reversioner—her daughter who is only entitled to the residue—a gift by the widow in favour of the daughter's daughters is valid and a reversioner of the testator in possession of the property cannot plead his right as reversioner against a suit by the donees, who are also heirs of the testator's daughter, to eject him as a trespasser, even though the gift by which they originally obtained title should fail. **C. MARIM CHANDRA v. HARA KUMARI**, 42 C. 561 **798**

Hindu temple—Dedication to public—Character of temple, inference as to, from particular acts and circumstances.

One S, the paternal uncle of the defendant's husband, built a temple in 1830 and dedicated it to Sri Venkateswaraswami. Idols were installed. Servants such as *Archakas*, *Vedaparayanam* and *Adhyapakam* office holders and others usually employed in public temples were appointed. There was no difference between this temple and other public temples so far as the performance of *pūja* and other services was concerned. Ever since it was built the temple was under the management of the defendant and her predecessors-in-title as *dharma-kartas*. The public were freely allowed to worship therein and perform vows, and there was nothing to show that the public had to obtain the permission of the *dharma-karta* therefor. It also appeared that when the temple lands had to be enfranchised, *inam* *puttahs* were issued in the name of the idol. Some lands were also given to the temple by a stranger to the family. There was also a Will in which the defendant's husband was described as a *dharma-karta*:

Held, that the above facts clearly established that the suit temple was dedicated for public worship.

Held, further, that the fact that the food cooked in the temple and offered to the idol was used by the defendant, that the temple servants rendered services to her also, that the Will contained elaborate provisions regarding the management of the temple, and that no accounts had been maintained by the defendant or her predecessors-in-title of the management of the temple properties, did not in any way derogate from the public character of the temple and were quite insufficient to prove that it was the private property of the defendant. **M. PSESAPATI SITARAMANUJACHARI v. KANDURI VELLAMMA**, 2 L. W. 858 **822**

Illegal transaction. See TRANSFER.

Inam Bariki service Enfranchisement, effect of.—Ancestral property—Property received by daughter's son, if ancestral—Alienation of service inam, validity of—Transfer of Property Act (IV of 1882), s. 46.

Inam—concl'd.

The effect of enfranchisement of an *inam* is not to destroy the rights of any member of a joint family which has a hereditary interest in it.

The property which descends on daughter's sons from their maternal grandfather is ancestral property in which the grandsons take an interest by birth.

An alienation of service *inam* is wholly void and the subsequent enfranchisement will not make it alienable under section 43 of the Transfer of Property Act. **M. KARAI RAMA YIA v. VILLOORI JAGANNADHAM**, 2 L. W. 874; 18 M. L. T. 360 **89**

— title-deed—*Inamdar*—Claim to irrigate free of charge larger area than entered in *inam* title-deed, if allowable—Separate engagement, necessity of **605**

— **Village**. See MADRAS IRRIGATION CESS ACT.

Inamdar—Grant—Kadim hakdars—Grant subject to kadim hakdars' dues—Hakdars' right to receive their dues direct from Government—*Inamdar*, whether entitled to take payment of their dues in his own hands.

The Government rights in a village vested in an *inamdar* subject to the rights of the *kadim hakdars*, who were paid their dues out of the land revenue of the village before the surplus was paid to the *inamdar*. The *inamdar* claimed to take the payment of the *kadim hakdars*' dues in his own hands:

Held, that the *inamdars*' position was untenable inasmuch as the *hakdar's* right to deal direct with the Government was a valuable right of which he could not deprive them without any support from the *sanad* of the grant or from the practice of payment in the past. **B. CHINTAMAN GANESH OKA v. SECRETARY OF STATE**, 17 BOM. L. R. 682 **543**

Inheritance. See BUDDHIST LAW.

Injunction. See EASEMENT.

Contempt of Court by committing breach of injunction—Injunction on firm—Assistant, liability of, under what conditions **4**

Co-owners of lane—Drain constructed by one—Injunction, if issued—Nuisance, proof of.

Where one of two co-owners of a lane constructs a drain in it no injunction can be issued restraining him from doing so at the instance of the other, unless the latter proves the construction of the drain to be a nuisance to him. **M. THANGACHI AMMAL v. VAITHINATHA IYER** **768**

Interest. See COMPOUND INTEREST.

—, penal rate of—Stipulation by way of penalty—Court, duty of—Compensation—*Post diem* interest—Court, power of, to fix interest from date for payment to date of realisation **323**

Interest Act (XXXII of 1839), s. 1—

Debt certain—Debt expressed in measures of grain payable at specified time—Interest, if allowed.

A debt which is expressly expressed in measures of grain and payable at a specified time should be regarded as a debt certain within the meaning of section 1 of Act XXXII of 1839 although the commutation rate at the time of payment or suit may have to be determined. **M. GOVINDAN NAIR v. CHERAL**, 38 M. 484 **432**

Interpretation of khasra abadi 295

— of penal Statutes 456

— of Statute. See STATUTE.

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Irrigation from Government source

River flowing through a *zemindari*—Water taken off in channel belonging to *zemindar* and used by *inamdar* for irrigating second crop and dry crop—Water cess, if can be charged by Government—Madras Land Encroachment Act (III of 1905), retrospective effect of—Crown grant—Construction—Madras Act VII of 1863, applicability of, to *zemindaries* and *inam* villages—Grant—Construction—Presumption—Statute, construction of—Flowing water, whether can be owned—Riparian owner—Presumption of ownership of half bed, whether applicable to *zemindars*—Applicability of new rules of evidence to pending suits 609

Joint estate. See MORTGAGE.**Joint family.** See HINDU LAW.**Joint Hindu family.** See MORTGAGE.**Joint property.** See BUDDHIST LAW; HINDU LAW.

Judgment in personam—Judgment in rem—Adverse possession—Title to office—Performance of duties, necessity of, essential—Limitation Act (IX of 1908), Sch. I, Arts. 124, 141.

A judgment of a Court of competent jurisdiction pronounced against the only person or persons, who, at the time of such judgment, had any interest which would entitle them to resist the plaintiffs' title, is conclusive against all the world as to the facts stated in it and any person not a party to the suit in which it was pronounced but whose title is subsequent in origin, cannot question it on any of the grounds stated in it, except on the ground of its nullity for want of jurisdiction in the Court which pronounced it.

Title to an office by adverse possession can be claimed only by performance of duties attached to the office and not by possession for the statutory period of the *manibham* lands attached to it.

Quære.—Whether a suit for possession of an hereditary office on the death of a limited owner is governed by Article 124 or Article 141 of the Limitation Act? **M. SUPPA BHATTAR v. SUPPU SOKKAYYA BHATTAR**, 29 M. L. J. 558; 18 M. L. T. 402; 2 L. W. 1005 962

Jurisdiction. See BENGAL TENANCY ACT, s. 40; CIVIL PROCEDURE CODE, 1908, s. 115; DIVORCE ACT, s. 19; PUNJAB MUNICIPAL ACT, s. 219; U. P. LAND REVENUE ACT, s. 233 (k).

Community, property belonging to—Some members allowed to act as trustees—Gift by such persons in favour of third person—Possession of third person, whether permissive or adverse—Declaratory suit based on denial of title—Cause of action, when arises—Knowledge of some members, if affects rights of others 669

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Jurisdiction—contd.

— Execution—Trust—Decree directing trustees to perform some festival—Direction to trustees to perform same, if can be issued 771

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— Mere objection to jurisdiction, whether sufficient to show submission 511

— Order made by Governor-General in Council in Delhi—Local Government—Jurisdiction of High Court of Calcutta 746

— Powers of Judge raised—Notification, delay in publication of, effect of—Execution of decree.

Delay in issuing a notification to the effect that the powers of the Judge of a Court have been raised retrospectively from a certain previous date, does not affect his authority to dispose of a matter which he did dispose of between that previous date and the date on which the notification was published, and which he had otherwise no power to dispose of. **O. RAZA HUSAIN v. GAYA PRASAD**, 2 O. L. J. 212 205

— Power of single Judge sitting on original side to stay suit pending in Subordinate Judge's Court in *mofussil*—Consolidation of suits—Court's inherent power to consolidate 560

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— revisional, exercise of—Notice of appeal, failure to serve on District Magistrate—Irregularity, effect of 152

— Suit for declaration as to being nearest heir of *Vatandar*, maintainability of—Bombay Hereditary Offices Act (III of 1874), s. 36—Bombay Hereditary Offices Act (III of 1901), s. 36.

A suit for a declaration that the plaintiff is the nearest heir of a deceased representative *vatandar* is maintainable in the Civil Court. **B. SHANKAR BABAJI KULKARNI v. DATTATRAYA BHIWAJI**, 17 BOM L. R. 725 925

— Trespasser, suit against—Mesne profits, decree for—Jurisdiction of Civil and Revenue Courts 364

— of Civil Courts—Dispute between private persons and claims against Government distinguished 772

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— of Civil or Revenue Court—Defendant sued as trespasser—Alternative relief for declaration as tenant 546

— Ejectment—Under-proprietor 207

Jurisdiction—concl'd.**— of Civil or Revenue Courts**—Kattubadi, *suit to recover*—Inamdar not cultivator.

A suit to recover kattubadi from an inamdar who is not a cultivator, lies in the Civil and not in the Revenue Court. **M. MADAPATY VEKATESWARA V. NANDUM RAJAGOPALAM** 927

—Land let for pasturage—*Ejectment, suit for*—*Estoppel*.

Where in a suit brought in a Revenue Court the defendant pleads that the suit is not cognisable by the Revenue Court, he is precluded from raising a similar plea in the Civil Court when the suit is brought in that Court.

A suit for the ejectment of a tenant from pasture land is cognisable by a Civil Court. **A. ABDUL QAYUM V. FIDA HUSAIN**, 13 A. L. J. 854 551

—Revenue-paying land, division of—*Civil Procedure Code* (Act V of 1908), s. 54, O. XX, r. 18 *U. P. Land Revenue Act* (III of 1901), s. 233—Commissioner, partition by—Parties cannot by their consent confer jurisdiction upon Court—Jurisdiction, plea as to—Late stage, plea raised at—Court, duty of.

A Civil Court acting through a Commissioner is not competent to make a division of revenue-paying land, although the parties may consent to it, inasmuch as their consent cannot confer a jurisdiction upon that Court to do what it is prohibited to do by section 54 and Order XX, rule 18, *Civil Procedure Code*, and section 233 of the *U. P. Land Revenue Act*.

A Court is bound to take cognizance of a plea which challenges its jurisdiction, although the plea is raised very late. **O. ABDUS SALAM V. ABDUL RAHMAN**, 2 O. L. J. 321 209

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Jury. See CHARGE TO JURY.

—Accused charged with different offences—Some triable by Jury, others by Assessors—Joint trial, if illegal—Assessors, individual opinion of—Consultation between Assessors, if allowed—Misdirection in charge to Jury 1005

—trial by—Disagreement of Judge with verdict—Reference to High Court—Duty of Judge before making reference 139

—trial—Charge of dacoity—Return of unanimous verdict of abetment of robbery, validity of—*Criminal Procedure Code* (Act V of 1898), ss. 303, 305—*Lower Burma Courts Act* (VI of 1900), ss. 11, 12.

Under section 12 of the *Lower Burma Courts Act*, the Government Advocate's certificate must be as to something decided by the Judge and there is no power to certify as to anything decided by the Jury; the Court dealing with the case on the certificate cannot deal with any other part of the case until it has determined that there is an error on the part of the Judge on some point contained in the certificate. A Court dealing with a certificate is not a Court of Appeal and is subject to limitations even as a Court of review.

An unanimous verdict of a Jury is bound to be accepted by the Judge and under section 305 of the *Criminal Procedure Code* it is only when the Jury

Jury trial—cont'd.

are not unanimous that it lies with the Judge to take one of the courses specified in the section.

The fact that an accused has been charged with dacoity only, does not necessarily invalidate a verdict of guilty of abetment of robbery. **L. B. S. P. GHOSH V. EMPEROR** 724

—Misdirection—*Letters Patent* (Cal.) (1865), cl. 26—*Certificate of Advocate-General—Penal Code* (Act XLV of 1860), ss. 299, 300, 304—Culpable homicide not amounting to murder, conditions of—Exceptions—Not raised nor relied upon by accused—Judge refraining from directing Jury as to exceptions, effect of—Majority verdict, effect of—Jury's powers Judge, duty of—*Criminal Procedure Code* (Act V of 1898), ss. 297, 305—*Scintilla of evidence*—Judge's decision—Accused's case—Sudden and grave provocation, no charge as to—Evidence to go to Jury—Trial Court's proceedings—*Evidence Act* (I of 1871), s. 105, scope of—Burden of proof—Defending Counsel, duty of—Review.

Per *Jenkins, C. J.*—A certificate granted by an Advocate-General under clause 26 of the *Letters Patent* should reflect his judgment and not mere surmise; it should be granted in the interests of justice after a careful consideration of all available materials; it should be in conformity, and not in conflict, with the statement of the Judge who presided at the trial; and it should formulate and give effect to the accused's real grievances.

The certificate of an Advocate-General is entitled to respect and whether he grants it after a careful consideration of all available materials or without doing so, once it is granted, the Court has to deal with the case.

The statement of the trial Judge as to what actually took place before him is conclusive.

Culpable homicide may not be murder, (1) where notwithstanding the mental state it is sufficient to constitute murder, still one of the exceptions applies, or (2) where the mental state, though within the description of section 299, *Indian Penal Code*, is not of the especial degree of criminality required by section 300 of the Code.

It is erroneous to suppose that a case cannot be left to the Jury under section 304, *Indian Penal Code*, if the exceptions enumerated in section 300 of the Code are held not to apply in the circumstances of the case.

The Judge's duty is to determine whether any evidence has been given on which the Jury could properly find the question for the party on whom the onus of proof lies, for that is a question of law.

It is not enough to say that there was some evidence. A scintilla of evidence would not justify the Judge in leaving the case to the Jury. There must be evidence on which they might reasonably and properly conclude the fact to be established.

It is for the Jury to say whether and how far the evidence is to be believed. And if the facts as to which evidence is given, are such that from them a further inference of fact may legitimately be drawn, it is for the Jury to say whether that inference is to be drawn or not. But it is for the Judge to determine, subject to review, as a matter of law, whether

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from those facts that further inference may legitimately be drawn.

The burden of proof of the existence of circumstances bringing his case within an exception is upon the accused who must support the exception by evidence giving a full and true account of the transaction from which the charge has arisen against him.

The conduct of a case by Counsel is not a negligible factor even in a Criminal Court, though it may not necessarily conclude the accused.

Where grave and sudden provocation was no part of the defence case in the Sessions Court nor is any direct evidence given at the trial of such grave and sudden provocation or of facts from which this exception can be legitimately inferred, the trial Judge is quite justified in excluding inquiry into the exception. In fact it would be an error on his part to lay down law as to a matter which is not legally and properly before the Jury.

Where a trial for culpable homicide is proceeding before a Jury, it is not an appropriate mode of laying down the law to discourse on all branches and departments of this complicated topic of crime. To do so is calculated to confuse the Jury and possibly to direct their deliberations into channels that have nothing to do with the case. The duty of the Judge is to lay down the law in reference to the case presented to the Court and the facts of the case, and not to perplex the minds of the Jury with considerations that are outside the legitimate scope of the inquiry.

It is the duty of the Judge to keep the Jury within proper limits, and for this purpose, to simplify as far as he can the issues fairly and properly before the Court and direct the minds of the Jurors to those issues and those issues alone.

Where there is no misdirection or other error as certified, the certificate is misconceived and the Court has no power to interfere under clause 26 of the Letters Patent.

Per Stephen, J.—If a Judge omits to draw the attention of the Jury to any matter a consideration of which might lead them to return a verdict of culpable homicide not amounting to murder, instead of murder, he commits an error, though the defence did not suggest the existence of any such matter.

In laying down the law it is the duty of the Judge to show how the law applies to the facts on the record.

The absence of any evidence as to the circumstances immediately preceding a homicide is not by itself a fact from which the Jury can properly infer that the homicide was committed under provocation.

It would be a serious error on the part of a Judge to put a suppositious case before the Jury, in order to establish the existence of grave and sudden provocation.

The propriety and not the possibility of an inference is the test by which a Judge should decide whether or not he should suggest a case for the consideration of the Jury on his own initiative.

But a Judge fails in his duty if he makes a case himself on which he thinks the Jury cannot properly convict. For to do so is to mislead the Jury.

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It is the duty of a Judge to make a case for the accused on which he thinks that a verdict of not guilty may be properly returned, though the case has not been suggested by or on behalf of the accused.

It is the duty of the defending Counsel to make the Judge aware of any case that he considers may be made on behalf of the accused though he has not made it himself.

When defending Counsel hears a Judge omit in summing up, a point that he considers may be made on behalf of the accused, it is a dereliction of duty on his part not to bring the point to the notice of the Judge.

Per Woodroffe, J.—If there were 8 to 1 in favour of verdict of murder, there could not be in law an unanimous verdict of culpable homicide not amounting to murder.

A Court can and should consider a case in favour of the accused which he has not raised.

On the question whether an inference does arise in favour of the accused, the fact, that a particular defence has or has not been taken, may affect the significance of the evidence given.

In reviewing a case under clause 26 of the Letters Patent, the Court is not concerned with the merits of the case until it is established that there has been an error in law which opens out the case for the Court's judgment.

Per Mookerjee, J.—When the Court is called upon to review a case under clause 26 of the Letters Patent, it will accept as unquestionable the statement of the trial Judge as to what actually took place before him.

In section 297, Criminal Procedure Code, the expression "lay down the law" does not signify "lay down the whole law on the subject irrespective of the facts of the particular case before the Court." The reasonable construction of the section is that the Judge should lay down the law, only in so far as it bears upon the evidence adduced in the particular case.

All unnecessary and extraneous discussion and argument should be avoided by the Judge, and the summing up should be strictly confined to the evidence adduced and the mode of application of the law to such evidence.

The mere fact that Counsel for the accused has failed to present to the Court a particular aspect of the case, cannot justify an omission on the part of the Judge to draw the attention of the Jury to what appears to be a possible answer to the charge against the accused even on the prosecution evidence; it would be the duty of the Judge to draw the attention of the Jury to such possible view of the case on the evidence, notwithstanding that it may have escaped the Counsel for the accused.

To determine whether there was or was not evidence to go to the Jury, regard must be had to the whole course of the proceedings in the trial Court.

Mere non-direction is not necessarily misdirection; those who allege misdirection must show that something wrong was said or that something was said which would make wrong that which was left to be understood every summing up must be regarded in the light of the conduct of the trial and the question

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which have been raised by the Counsel for the prosecution and for the defence respectively.

Where no error of law is established, the Court is not called upon to express an opinion as to the propriety of the conviction and sentence.

Per *Holmwood, J.*—No error of law is committed by a Judge who refrains from directing the Jury as to exceptions which have neither been raised nor relied upon by the accused and have no basis in evidence on the record.

Where there is no evidence bringing a case directly within an exception it would be a misdirection to ask the Jury to come to a finding of fact on a hypothetical state of circumstances which do not bring the case within the exception as a matter of law. Indeed the Court must presume the absence of those circumstances. Section 55 of the Evidence Act is imperative.

It would be a most undesirable practice for Judges to put hypothetical defences not taken by the accused before the Jury and might cause serious prejudice to the accused.

Section 305, Criminal Procedure Code, is mandatory. If the Judge agrees with the opinion of the majority of the Jury, he shall give judgment in accordance with such opinion.

On a verdict of murder being given, it is not competent to the Court to take any verdict on the lesser charge of culpable homicide.

A majority verdict with which the Judge agrees has exactly the same legal force as a unanimous verdict, and if it be a verdict of murder, the Court cannot go behind it and take any further verdict upon the facts which have been found by the Jury to amount to murder. *C. EMPEROR v. UPEND A NATH DAS*, 19 C. W. N. 653; 21 C. L. J. 377; 16 Cr. L. J. 561. 115

Kabuliyat. See BENGAL TENANCY ACT, ss. 29, 105.

Kasbati, meaning of—Kasbatis of Ahmedabad, status of—Cession of territory, effect of, on rights of kasbatis—Burden of proof—Act of State—Annexation of territory—Municipal Courts—Jurisdiction—Legal right—Act of grace—Landlord and tenant—Lease for a term—Renewal—Ahmedabad Taluqdars Act (VI of 1862), s. 6, whether applies to kasbatis—Bombay Land Revenue Code (Act V of 1879), ss. 68, 73—Lessee—Term of lease.

The term "kasbatis" or "kasbatees" was used in the District of Ahmedabad, Gujarat, to designate dwellers in towns, whose lands were cultivated not directly by themselves but by *ryots*, to whom they let them, receiving therefor a rent in cash or in kind. They were, in addition, invested with certain powers of Government over their villages, including the management of village affairs.

The relation in which the kasbatis of Ahmedabad District stood to their native sovereigns before the cession of their territory and the legal rights they enjoyed under them, are, save in one respect, entirely irrelevant in determining their rights and relation to the new sovereign after the cession, inasmuch as after the cession of territory to a new sovereign when it comes to be a question of legal rights the contract with the new sovereign is conclusive and the rights against the old sovereign avail nothing. They could not carry in under the new regime the legal rights, if any, which they might have enjoyed under

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the old. The only legal enforceable rights they could have as against their new sovereign, were those, and only those, which the new sovereign by agreement express or implied, or by legislation chose to confer upon them. This implied agreement might be proved by circumstantial evidence, such as the mode of dealing with them which the new sovereign adopted, his recognition of their old rights, and express or implied election to respect them and be bound by them.

The annexation of territory is an act of State, and any obligation assumed under a treaty either to the ceding sovereign or to individuals is not one which Municipal Courts are authorised to enforce.

The kasbatis may have been absolute owners of their villages and yet the consideration of their ante-cession rights is beside the point, save so far as it can be shown that the Bombay Government consented to their continuing to enjoy those rights under its own regime.

The burden of proving that the Bombay Government did so consent to any, and if so, to what extent, rests upon the kasbatis.

The mere repetition by the Government of acts of grace cannot *per se* create legal rights to their continuance.

Prima facie a lease for a term does not import any right to a renewal of it, on the contrary, it *prima facie* implies that the lessee's right to the premises demised ends with the term.

Section 6 of the Ahmedabad Taluqdars Act (VI of 1862) does not apply to the kasbatis of that district inasmuch as they never were taluqdars in the true sense, they did not lose their ancient rights of ownership of their land by taking leases, and therefore did not suffer the injustice which the statute was designed to remedy.

Sections 68 and 73 of the Bombay Land Revenue Code (V of 1879) plainly mean that a lessee, whether a true "talukdar", or a "thakur", "mehwassee", "kasbati" or "nail" is bound by the terms of his lease, one of which is that he shall only occupy for the term of years for which a lease for years is granted, and *prima facie* no longer.

Status of the kasbatis of Ahmedabad District and the precise relation in which they stood to the Bombay Government at the cession of their territory considered. *P. C. SECRETARY OF STATE v. BAI RAJBAL*, 19 C. W. N. 1087; 3 A. L. J. 953; (1915) M. W. N. 56; 29 M. L. J. 242; 18 M. L. T. 179; 2 L. W. 731; 17 Bom. L. R. 730. 303

Khanarlan—Sale of, by one co-sharer to another—Estates Partition Act (V of 1897 B. C.), ss. 4, 99—Anomalous burden—Sale with a condition—Butwara authorities, power of—Vendee's power.

Where one co-sharer sells khamar lands to another with a condition for the payment of Government revenue by the vendee to the vendor, it becomes an anomalous burden and not an incumbrance; and in default of the vendee's being registered no notice of the interest claimed by the vendee can be taken by the butwara authorities.

When the other co-sharers secure the land purchased, the vendee is entitled to get equivalent land from his vendor or his legal representative. *C. BROJONATH SAMA v. DINES CHANDRA NEOGI*, 21 C. L. J. 599. 418

Kidnapping. See PENAL CODE, s. 366.

Lakheraj tenure, protected—Ejectment—*Thak map*, entry in, 60 years old, admissible in evidence—*Lakheraj*, existing from Permanent Settlement, not incumbrance to be annulled—Regulation XIX of 793, s. 6, construction of—Tenures of insignificant area—Presumption 53

Lambardar, liability of—Gross negligence—Misconduct—Profits, suit for, by co-sharer.

A *lambardar* who deliberately neglects his duty as such in making no attempt to collect rents of a certain share and allows the tenants of that share to cultivate the holdings therein without paying any rent, is guilty of gross negligence and misconduct and is liable to pay the co-sharer his proportionate amount of profits. *O. BAIJ NATH v. SHEO GOBIND*, 2 O. L. J. 206 203

Land, plot of, with cocoanut trees, whether garden 845

Land Acquisition Act (I of 1894), s. 36 (2)—Land acquired temporarily—Damage to land—Compensation, when to be calculated—Principle underlying such compensation.

Where culturable land is acquired temporarily for the purpose of quarrying *kankar* therefrom, compensation for re-levelling the land and making it fit for cultivation shall be calculated at the expiry of the period for which the land has been temporarily acquired, inasmuch as it is impossible to say in advance what damage will be caused to the land and what it will cost to make that damage good. *A. SECRETARY OF STATE v. ABDUL SALAM KHAN*, 37 A. 347 245

Landlord and tenant—Abadi land, owner of—Presumption—Tenant in possession of abadi land—Ejectment of tenant from holding—Tenant, right of, to remain on abadi land—Burden of proof.

In the United Provinces ordinarily the *zemindars* are under Government owners of every inch of ground within a *mahal* whether that ground be cultivated or waste. If any one other than the *zemindar* seeks to establish a title to any portion of the land, the burden is on him to prove the special circumstances or special contract under which he claims title.

As long as the tenant cultivates the land in the village he will remain. If he abandons or is ejected from the tenancy then, unless there be some special custom or contract to the contrary, the site reverts to the *zemindar* and the tenant who built the house at his risk has to remove his materials and vacate the site. *A. SHOHRAT SINGH v. JHAGRU*, 13 A. L. J. 745 782

—Alienation, whether works relinquishment or forfeiture of tenancy—Land-cess, right to recover—Madras Local Boards Act (V of 1894).

Where a lease-deed contained the following clause: "If while without alienating the land, in any manner, I am enjoying the said land through posterity, I find that I do not require the land, I shall relinquish the land to you and obtain from you the value of the improvement which I have made thereon";

It was held that under the clause an alienation did not indicate relinquishment or forfeiture.

Under Act V of 1884, a landlord is entitled to recover land-cess from the tenant even where

Landlord and tenant—contd.

the lease deed does not contain a provision to that effect. *M. MAILTHI HENGU v. SOMA*, 29 M. L. J. 452 484

—Decree, interpretation of—Pleadings—Adverse possession 917

—Dry area left waste without tenant's negligence—Tenant if liable to pay rent therefor—Madras Estates Land Act (I of 1908), s. 4, if disentitles tenant to claim exemption from payment—Practice—Procedure—Suit against dead man—Amendment of plaint into one as against legal representative, if allowable.

Section 4 of the Madras Estates Land Act does not debar a tenant from claiming that by agreement and custom he is not liable to pay rent for the portion of his holding left fallow.

A Court has no jurisdiction to allow the amendment of a plaint directed against a dead man into one against his legal representative and decide the suit as brought against the latter instead of the dead man. *M. ARUNACHALAM CHETTIAR, In re*, 2 L. W. 828 679

—Encroachment for land-lord's benefit Adverse possession 942

—Encroachment by tenant for his own benefit—Adverse possession—Limitation Act (XV of 1877), Sch. II, Art. 144.

A suit for declaration of title to land and for assessment and recovery of rent thereof is in its essence a suit for recovery of a limited interest in land.

Where the defendant has for more than 12 years repudiated the plaintiff's right to receive rent, under Article 144 of the second Schedule of the Limitation Act, the plaintiff has no enforceable title.

Encroachments made from the waste by a tenant, whether the land taken belongs to the landlord or to a stranger, are presumed to have been made for the benefit of his landlord, unless it appears clearly from some act done at the time that the tenant intended to make the encroachments for his own benefit and not to hold them as he held the farm to which the encroachments were adjacent.

As a general rule the intention of the tenant to make an encroachment for his own benefit must be shown at the time when the encroachment is made, but a subsequent severance of the encroachment from the demised premises may have the same effect, if brought to the knowledge of the landlord, although if the landlord is allowed to remain under the belief that the encroachment was held as part of the holding, the tenant might be estopped from denying it. *C. BIRENDRA KISOBE v. LAKSMI*, 22 C. L. J. 129 896

—"Kasbati," meaning of—

Kasbati of Ahmedabad, status of—Cession of territory, effect of, on rights of *kasbati*—Burden of proof—Act of State—Annexation of territory—Municipal Courts Jurisdiction—Legal right—Act of grace Landlord and tenant—Lease for a term—Renewal—Ahmedabad Taluqdars Act (VI of 1862), s. 6, whether applies to *kasbati*—Bombay Land Revenue Code (Act V of 1879), ss. 68, 73—Lease—Term of lease 303

Landlord and tenant—contd.

Lease before Transfer of Property Act (IV of 1882)—Notice to quit—Time to be calculated according to Bengali Calendar.

With reference to notice to quit in cases of tenancy created before the passing of the Transfer of Property Act, six months should, according to the practice in this country, be calculated according to the Bengali Calendar. **C. GOPI NATH CHONGDAR v. ABDUL GAFUR, 23 C. L. J. 74 836**

Muafi resumed—Ex-muafidars recorded as tenants on payment of privileged rates of rent—Dispossession of such tenants—Suit to recover possession—Jurisdiction of Civil or Revenue Court—Agra Tenancy Act (II of 1901), s. 79.

Certain persons were recorded as *muafi* in respect of certain plots of land prior to 1833. In 1438 the land was settled with the *zemindar* and the *ex-muafidars* were entered as tenants on payment of a privileged rate of rent with a right of transfer in the holding. In the Settlements of 1861 and 1869, they were again recorded as tenants with a right of transfer in the holding. The tenants were dispossessed by the landlord from a portion of the land. They sued the landlord to recover possession in the Civil Court:

Held, that the *ex-muafidars* were tenants within the meaning of section 79 of the Agra Tenancy Act and a suit to recover possession was not maintainable in the Civil Court. **A. KULSUM-UN-NISSA BIBI v. DAURU NATH, 13 A. L. J. 857 552**

Notice of ejectment—Compensation for improvement—Court-fee for the amount claimed—Revision 848

Occupancy holding Planting of grove with permission of landlord—Nature of holding if changed—Power of tenant to transfer trees.

Where an occupancy tenant plants a grove on his holding with the permission of the *zemindar*, the character of the holding is not changed. The tenant has no right to transfer the trees nor can they be sold in execution of a decree against him. **A. DAYA KISHEN v. MOHAMMAD WAZIR AHMAD, 13 A. L. J. 893 565**

Permanent lease with day of grace for payment of rent—Non-payment of rent—Forfeiture of tenancy, right to relieve against—Equitable principles, applicability of—Construction of Statute.

Where a permanent lease provides for payment of rent with days of grace on default in payment on the stipulated date and gives power to the landlord to re-enter when the rent is not paid even after the expiry of the days of grace:

Held, that default in payment of rent even after the days of grace does not work out a forfeiture of the tenancy and the tenant is entitled to be relieved against it and that the provision as to days of grace is only intended for the benefit of the lessee and cannot be made use of to deprive the Court of its power to grant relief.

Seshagiri Aiyar, J.—A proviso for re-entry on non-payment of rent is merely a security for the payment of rent and relief should be given if arrears and expenses are paid and if the parties can be placed in *status quo ante* and the insertion of such a clause

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should not be held to disentitle the tenant from equitable relief.

Napier J.—By providing for a right of re-entry under the Transfer of Property Act for non-payment of rent in non-agricultural leases, the Legislature did not intend that this principle should be extended to other leases also.

The principle which guides English Courts of Equity in relieving against forfeiture of tenancy for non-payment of rent, *viz.*, that the tenant, if not relieved against, should suffer enormous loss wholly disproportionate to the injury, applies also to India, and the provision in the lease for days of grace does not take the case out of that principle. **M. APPAYYA SHETTY v. MAHAMMADE BEARI, 29 M. L. J. 381; 18 M. L. T. 336 596**

Trespasser, remedy against—Lessor's rights devolving on another—Rule that tenant may not dispute his landlord's title, limitation of—Attornment by tenant, when necessary—Rent, suit for, whether amendable to suit for use and occupation—Provincial Small Causes Courts Act (IX of 1887), s. 23—Transfer of Property Act (IV of 1882), ss. 109, 111 (c).

A claim for use and occupation only arises where it is shown that the occupation was by permission or sufferance. No suit for use and occupation lies against a trespasser; the suit open to an owner against a trespasser is one for mesne profits.

The rule that a tenant may not dispute his landlord's title applies only to the title of the original landlord who let him into possession and not to that of an owner who has acquired the property by some title derived from the original lessor.

If a tenant disputes the title of the derivative owner who sues him for rent in a Small Cause Court in Lower Burma, due attention should be paid to the provisions of section 23 of the Provincial Small Cause Courts Act.

Attornment by tenant is necessary only in certain cases.

There is no bar to a suit for rent being amended to a suit for damages for use and occupation. **L. B. MAUNG PO SHIN v. MOHAMED THAMBI 753**

Wet crop raised on dry lands—Improvements not made at tenant's expense—Right to claim wet rate Custom, legality of

A custom to pay enhanced rent if wet crops are cultivated on dry lands (provided that the wet crops are not raised with the help of the improvements at the tenant's sole expense) is not illegal. **M. MUTHU CHETTIAR v. MUTHUSAMI PILLAI 486**

Lease. See MORTGAGE.

by certificated guardian, without sanction of District Judge, if valid **58**

execution and registration of, if sufficient to pass title—Parties, intention of, to be looked to—Findings Transaction, when complete.

The execution and the registration of a deed are not always sufficient to pass title. It is always a matter of the intention of the parties.

Where in the matter of an alleged execution of an *istemrari* lease for consideration, it is found that there was no payment of consideration, no delivery of possession and no delivery of the document, the transaction is not complete and no title passes. **C. NILMONI-BEHARA v. RUKUNA BEWA 210**

Lease—conold.

—Lessor — Sub-lessee — Sub-lease — Bengal Tenancy Act (VIII of 1845), Ch XIV, ss. 16, 167
—Stranger purchasing holding in execution of decree for arrears of rent—Annulment of sub-lease
898

—Lessor's right of re-entry—Re-entry by force, not justifiable—Lease, condition as to forcible re-entry in, void—Forcible re-entry explained 292

—Mortgagor in possession, power of, to grant lease—Perpetual lease, invalidity of Admissibility in evidence—Collateral purpose—Tenant-at-will
258

—Putni lease, grant of, by manager—Sanction by Commissioner—Final lease not sanctioned by Commissioner—Validity of lease—Term in sanction order that money should be advanced before particular date—Breach, if invalidates transaction—Successors of debtor, if can assail transaction on ground of non-observance of condition Sanction of putni to one person—Putni granted to another—Difference in persona, if affects validity
55

Legal Practitioner—Mukhtar—Professional misconduct—Circumstances—Changing sides, when allowed.

A professional gentleman should, as far as possible, stick to the side who first employed him.

In a proceeding for an assault upon the servant of a zemindar, a Mukhtar appeared for some of the accused to argue an appeal. Later on the zemindar brought proceedings under section 145, Criminal Procedure Code, against the accused for the same property a dispute about which led to the assault. The Mukhtar appeared for the zemindar. The Mukhtar's first client did not offer to employ him nor took any exception to his appearing in the case until the case was actually at hearing:

Held, that under the circumstances the Mukhtar was not guilty of professional misconduct. A A MUKHTAR, *In the matter of*, 13 A. L. J. 475; 16 Cr. L. J. 593
145

Letters Patent (Bom.), cls. II, 36
560

Letters Patent (Cal. 1865), cl. 26
113

Letters Patent (Mad.), s 15 "Judgment", meaning of—Order staying further trial of suit by single Judge of High Court—Appeal, maintainability of.

An order staying the further trial of a suit is similar to an order adjourning the trial of a suit and is not a "judgment" and from such an order passed by a single Judge of the High Court no appeal lies under section 15 of the Letters Patent to a Division Bench. M. PALANIAPPA CHETTY v. CHIDUMBARAM PILLAI, 18 M. L. T. 312
942

License—Breach of conditions—Every breach a distinct offence—Joinder of charges—Criminal Procedure Code (Act V of 1898), ss. 234 to 236, 239.

Every breach of the conditions of a license or permit is a distinct offence and under section 233 of the Criminal Procedure Code, 1898, should be made

License—conold.

the subject of a separate charge and tried separately. M. GONTLA KRISHNAMMA, *In re* 1005

—coupled with transfer of interest—Irrevocable—Easements Act (V of 1882), s 60.

A grant of a license coupled with a transfer of interest cannot be revoked. A. PARTAP SINGH v. DHUM SINGH, 13 A. L. J. 886
581

Limitation—Adverse possession—Plaintiff treating defendant as trespasser—Claim for rent.

Where the plaintiff takes his stand upon the position that the defendant is a trespasser and he does not elect to treat him as a tenant, the question arises whether the plaintiff has been in possession within 12 years. If it is found that he has not been in possession his claim for assessment will be dismissed as barred by time. C. BIRENDRA KISORE MANIKYA v. ANANDAPRIYA BAISHANABI, 22 C. L. J. 15
946

—Assertion of adverse title for more than 12 years—Landlord and tenant—Encroachment for landlord's benefit—Doctrine, applicability of.

The doctrine which would entitle the landlord to say that there is presumption that an encroachment was for his benefit has no application where the plaintiff and all proceedings in the suit do not suggest that the encroachment was a part of the holding.

Where more than 15 years before suit there was a direct assertion of title negating the theory of encroachment which would have conferred upon the disputed land the character of an addition to the original holding, the endeavour to escape from the plea of limitation based on adverse possession for more than 12 years fails. C. BIRENDRA KISORE v. RAM CHARAN DASS, 22 C. L. J. 147
942

Return of plaint to be presented to proper Court—Re-presentation, whether continuance of suit.

A plaint which had been presented within time was returned to be re-presented to the proper Court. It was re-presented in accordance with the order of the Court but after the limitation for the original suit had expired:

Held, that the re-presentation was a continuance of the suit and, therefore, the suit was not barred by limitation. A. GANGA PRASAD RAI v. RAMANAND GIR
44

Limitation Act (XV of 1877), Sch II, art. 144
896

—art. 144—Adverse possession—Pleadings—Landlord and tenant.

The plaintiff's case was that the defendant without any title unlawfully took possession of the disputed land situated within the estate of the plaintiff. The defendant alleged that more than 12 years before the commencement of the suit, in the course of Settlement proceedings, he had set up a rent-free grant and disclaimed all liability to pay rent to the plaintiff in respect of the land in dispute:

Held, that the right of the plaintiff to have rent assessed on the land had been extinguished under Article 144 of the second Schedule to the Limitation Act, 1877. C. BIRENDRA KISORE v. GANGAN CHANDRA, 22 C. L. J. 132
902

Limitation Act (IX of 1908), s. 5 703

s. 5 *Appeal, presentation of, to wrong Court—Bona fide mistake—Sufficient cause—Saving of limitation—Proper Court, delay in filing appeal to, when excusable—Minor appellant Counsel not engaged, effect of.*

A presentation of an appeal to a wrong Court under a *bona fide* mistake may be sufficient cause within the meaning of section 5 of the Limitation Act.

Thus, where proceedings were conducted on behalf of a minor appellant by his mother unaided by Counsel and she filed the appeal in a wrong Court but, the memorandum of appeal being returned for presentation to the proper Court, she presented the memorandum to the latter Court beyond the period of limitation:

Held, that the mistake in filing the appeal in the wrong Court was *bona fide* and that the delay in presenting the appeal to the proper Court was excusable. **O. SHEO PAL SINGH v. KRIPALA, 2 O. L. J. 325 211**

s. 6, applicability of—Civil Procedure Code (Act V of 1908), s. 43—Limitation—Minority—Execution.

As section 6 of the Limitation Act applies only to cases dealt with by the Statute itself it does not exempt a minor from the provisions of section 48, Civil Procedure Code. **A. RAM NATH TEWARI v. CHATTERPALMAN TEWARI, 13 A. L. J. 826 521**

s. 17— 94, 703

s. 7—Execution of decree—Joint Hindu family manager's power of discharge—Minor members of family—Limitation.

The manager of a joint Hindu family has a right to execute a decree for his own benefit and that of the remaining members of the family and to give a valid discharge with respect to the execution of the decree, without their concurrence, even though they be minors; and if he fails to exercise such right time does nevertheless run against the minor members. **O. NAURANGA SINGH v. SHEORAJA 75**

s. 15 264, 587

s. 20—Payment, what constitutes—Fresh starting point—Civil Procedure Code (Act V of 1908), O. XXI, r. 2—Payment by judgment-debtor not certified to Court, effect of—Statute, interpretation of.

'Payment' contemplated by section 20 of the Limitation Act must be of such a nature that it would be an answer to a suit brought by the plaintiff to recover the amount.

No payment towards a judgment-debt is a 'payment' within the meaning of section 20 of the Limitation Act so as to give a fresh starting point for purposes of limitation, unless it has been certified to the Court under Order XXI, rule 2, Civil Procedure Code, within the prescribed period.

It is the duty of the Judge to make such construction as shall suppress all evasions for the continuance of mischief. **S. NARSOOMAL v. TIRATHMAL, 9 S. L. R. 27 51**

s. 20—Transaction adding interest to the principal, if amounts to payment.

A transaction between the parties whereby the interest up to a certain date is calculated and added

Limitation Act—(1908)—contd.

to the principal, thus wiping out the debt on account of interest, is a "payment" which saves limitation under section 20 of the Limitation Act. **M. SUBRAMANIAM CHETTIAR v. SOMASUNDARAM CHETTIAR 777**

s. 22 34

s. 28, Sch. I, art. 144

Grant to—Municipality—Adverse possession against Municipality for more than 12 years, effect of.

The plaintiff sued the Karachi Municipality seeking a declaration of his title as against the Municipality regarding a portion of land forming a corner space adjoining a public street alleging to have acquired the rights of the Municipality to the land by adverse possession for more than 12 years before suit. By its Resolution dated the 3rd November 1873, the Government had granted the beneficial interest in all waste lands within the Karachi Municipal District to the Karachi Municipality including the exclusive right of possession for ever, subject only to the right of resumption if required for a public purpose:

Held, that the possession of the Municipality was not that of an agent or a servant of the Government but in its own right as a beneficial owner, and that consequently the right of the Municipality to possession was extinguished by adverse possession for 12 years under section 28 read with Article 144 of the Limitation Act. **S. KARACHI MUNICIPALITY v. SHAMOO LADHA, 9 S. L. R. 1 13**

s. 29 (a) 703

Sch. I, arts. 31, 49 840

art. 62 410

art. 64 84

arts. 64, 85—Punjab

Loans Limitation Act (1 of 1904)—Acknowledgment—Novation—Accounts stated.

Dealings between the parties began about the beginning of 1905, and balances were struck in May, July and November 1905. The dealings were of various kinds, entries had to be made sometimes to defendants' debit and sometimes to their credit. The last balance wound-up with the words *baqi deone* and it was contended for the plaintiff that they amounted to a promise to pay:

Held, that the words were simply equivalent to the English phrase 'balance due' and, though an acknowledgment, did not amount to a promise to pay and that, therefore, Article 85 and not Article 64 was applicable to the claim and that the mere fact that accounts were kept by one side alone was no sufficient reason for holding that the account was not an open mutual and current account within the meaning of Article 85. **P. JAS RAM v. ATTAR CHAND, 178 P. L. R. 1915; 118 P. W. R. 1915 491**

art. 68 429

art. 85 491

art. 89 697

art. 91, object of—Deed invalid—Suit for possession—Deed, if first to be set aside.

Where the deed or instrument which seems to stand between a plaintiff and the realization of his

Limitation Act—(1908)—contd.

claim in the suit is an actual nullity, the plaintiff is entitled to bring his suit for possession within twelve years and is not hindered by the narrower period laid down in Article 91 of the Limitation Act, 1908.

The only object of Article 91 of the Limitation Act, 1908, is to compel a plaintiff to remove out of his way some real existing obstacle, but where there is no real obstacle the Article has no scope for operation. **B. MANCHHARAM PRANJIVANDAS v. PANUBHAI LAL-LUBHAI**, 17 BOM. L. R. 698 **909**

Sch. I, art. 93—Attempt to enforce—Unsuccessful attempt to have lease recorded under Record of Rights, whether attempt to enforce—Recovery of rent under lease, whether attempt to enforce.

In August 1908, a landlord applied to the *mamlatdar* of his District for recording a lease under the Record of Rights. The lessee challenged the document as a forgery, and upon this the *mamlatdar* returned it to the applicant without recording it. The lessor then applied to the Collector who, in August 1909, ordered the lease to be recorded. On the strength of that record the landlord sued and recovered from the lessee a part of the rent due under the lease. Within three years of that recovery the lessee brought a suit to recover back the rent he had paid on the footing of the alleged lease being a forgery.

Held, that under Article 93 of the Limitation Act, the suit was within time, inasmuch as the words "attempt to enforce" in the Article were applicable to the attempt to recover rent under the lease and not to the unsuccessful attempt to have it recorded. **B. ACHYUT RAYAPA v. GOPAL SUBRAYA**, 17 BOM. L. R. 635 **399**

art. 97 410

arts 110, 132—Mortgagor and mortgagee—Usufructuary mortgage—Lease by mortgagee to mortgagor—Interest charged on mortgaged property—Rent not paid—Suit for principal and interest on foot of mortgage—Interest, whether can be decreed.

On the 8th April 1896, the plaintiff obtained an usufructuary mortgage of items 1 to 9 of the suit properties and by a document of even date leased the same to the mortgagors. On 1st September 1903, he obtained an usufructuary mortgage of the same items 1 to 9 and a simple mortgage of items 10 to 19 in consideration of further advances, the mortgagors obtaining at the same time a fresh lease of items 1 to 9 from the mortgagee. This second document expressly made the mortgaged properties liable not only for re-payment of the principal but also for interest. In 1912 the mortgagee instituted the present suit on the foot of both the mortgages for sale of the mortgaged properties and for the realisation of the mortgage amount, including the interest due. The Subordinate Judge gave a decree for the principal and three years' rent.

Held, that the document of 1903 having made the payment of interest also a charge on the mortgaged properties, the claim for interest was governed by Article 13 and not Article 110, Limitation Act, and that the plaintiff was entitled to recover the interest under the terms of the mortgage-deed irrespective of the fact that a portion of the properties had been

Limitation Act—(1908)—contd.

mortgaged usufructuarly and had been leased by the mortgagee to the defendants **M. VASUDEVAN ARISERIPAD v. GOVINDA MENON**, 2 L. W. 853 **818**

Sch. I, art. 115 697

art. 116 410

art. 120—Co-sharer

failing to pay rental—Suit by other co-sharer to recover balance due on account.

Where in a village the rents payable by the tenants together with the rental assessed upon the *sir* and *khudkasht* held by a *lambardar* and his co-sharer more than suffice to meet land revenue, cesses and miscellaneous charges and by arrangement between the parties no question of demanding a contribution from the co-sharer arises until the annual account is made up by the *lambardar*:

Held, that a suit brought by the *lambardar* to recover the balance due from his co-sharer by reason of his failure to pay the rental is governed by Article 120, and not by Article 61 or 49 of the Limitation Schedule.

A suit by a *lambardar* against his co-sharer in a village for the balance due to him on an account showing the extent to which the co-sharer is chargeable after taking into account the credit to which he is entitled in respect of his share in the estate is governed by Article 10 of the Limitation Act. **N. DEENDIRAJ v. WARU BAI**, 11 N. L. R. 156 **960**

art. 120 578

art. 124 562

art. 132 697, 810

art. 134—Auction—Bona

fide—Absolute title, purchaser of mortgagee right, purchaser from—Bona

A person who purchases by private treaty from an auction-purchaser of the rights of the original mortgagee is entitled to rely upon Article 134 of the Limitation Act, 1908, if he purchases in the *bona fide* belief that he is purchasing an absolute title. **A. GHASI RAM v. KISHNA**, 3 A. L. J. 877 **564**

art. 134—Sale by mort-

gagee of mortgaged property—Omission of words "in good faith", effect of.

The omission of the words "in good faith" from Article 134 of the Limitation Act of 1908 does not entitle a person who purchases, with full knowledge that his vendor's title is merely that of a mortgagee, to the benefit of that Article. **A. DIRGAPAL SINGH v. KALLU**, 13 A. L. J. 945 **556**

art. 141 962

art. 141—Adverse pos-

session against female holder—Suit by reversioner, whether barred.

Article 141 of the Limitation Act gives a fresh starting point to the reversioner on the death of the female limited owner, and a suit brought by the reversioner will not be barred even though the female owner was not in possession within 2 years before her death.

Where, therefore, in a suit brought to recover possession of certain property, it appeared that the original owner died in 1876 leaving a daughter and a daughter-in-law (wife of a predeceased son) and

Limitation Act—(1908)—contd.

the daughter, before dying in 1907, adopted a son who conveyed the suit properties to the plaintiff in January 1911 while the daughter-in-law sold them to the 1st defendant's father in 1901:

Held, that the suit was governed by Article 141 of the Limitation Act and was not barred. **M. SHRINIVASA RAYA V. RAMAPPA HEBBARA**, 2 L. W. 751; 18 M. L. T. 226 **991**

Sch. I, art. 144 13, 71**art. 144—Suit for**

declaration of title and assessment of rent—Suit for possession—Tenancy—Presumption.

The plaintiff sued for declaration of title to land and for assessment of rent, praying also that for the years antecedent to the suit damages for use and occupation may be decreed. The defendant pleaded adverse possession for more than 12 years:

Held, that the suit was essentially for recovery of possession and was, therefore, barred by time under Article 144 of the Limitation Act.

If a person squats upon the land of another and if the latter accepts him as his tenant; either by express declaration or by implication, the squatter acquires the status of a tenant. But it is open to the proprietor to repudiate the tenancy and to evict the person who has come upon the land without his consent. It is impossible to support on principle the proposition that if a person occupies the land of another, it is open to the proprietor, any length of time afterwards, to treat the occupier as his tenant, although the latter has not given any indication that he intended to hold the land as tenant. **C. GAGAN CHANDRA CHUKERBUTTY V. BIRENDRA KISORE MANIKYA**, 22 C. L. J. 134 **931**

art 164—Decree before

the Act—Execution—Application to set aside ex parte decree—Law of limitation applicable.

Where an *ex parte* decree was passed when the Limitation Act of 1877 was in force but an application to execute it was made after Act IX of 1908 came into force:

Held, that an application to set aside the decree by the judgment-debtor would be governed by Act IX of 1908. **A. JIA BIBI V. ILAHI BAKSH**, 13 A. L. J. 837 **573**

art. 181 494**art. 181, applicability**

of—Civil Procedure Code Act V of 1908, O. XXXIV, rr. 3, 6, applications under—Limitation.

Applications under Order XXXIV, rule 6, of the Civil Procedure Code, 1908, are not governed by Article 181 of the Limitation Act of 1908 any more than applications for orders absolute under Order XXXIV, rule 3. **C. BISHWAMBHAR SAHA V. RAM SUNDAR KAIBARTA DAS**, 42 C. 294 **719**

art. 182, cls. (5),

(6), construction of—“Applying in accordance with law,” meaning of—Transfer of Property Act (IV of 1882), s. 99—Disability of mortgagee to bring mortgaged property to sale—Change in procedure—Civil Procedure Code (Act V of 1908), O. XXXIV, r. 14—Sale permitted—Subsequent application for execution—Res judicata.

Article 182 of Schedule I to the Limitation Act,

Limitation Act—(1908)—conold.

1908, should receive a fair and not too technical a construction so as to enable the decree-holder to obtain the fruits of his decree.

Clauses (5) and 6 of Article 182, Schedule I, to the Limitation Act (IX of 1908) are independent and exclusive of each other and the provision contained in the one clause cannot be imported into the other.

Therefore the mere issue of a notice under section 248 of the Code of Civil Procedure, 1887, has the effect of starting the period of limitation afresh whether the application for execution upon which such notice was issued was one “in accordance with law or not”.

Where substantive rights are decided in an order passed in an execution proceeding; such decision is, no doubt, *res judicata* and subsequent applications are barred if the procedure under which such applications were made remains the same.

Where an order dismissing a previous application for execution was based on the view that the then existing procedure made it illegal for the decree-holder to claim the relief, that order will not operate as *res judicata* when that procedure is changed, and gives the decree-holder a right to claim that relief. **M. VARADARAJA MUDALI V. MURUGESAM PILLAI**, 18 M. L. T. 313 **707**

Sch I, art. 182 37, 264

Lis pendens, doctrine of, whether applicable to execution sales **213**

Lower Burma Courts Act (VI of 1900), s. 11, 12 724

Lower Burma Land and Revenue Act (II of 1876), ss. 19, 56—Jurisdiction of Civil Courts—Disputes between private persons and claims against Government distinguished.

In a suit between private individuals for possession of land in respect of which there is no grantee, lessee or person having a status of landholder, the jurisdiction of the Civil Courts is not ousted by section 56 of the Lower Burma Land and Revenue Act when the plaintiff bases his claim upon a title to possession by virtue of his having paid land revenue to Government under the rules made under section 19 of the Act and also upon the fact that he was in possession and was dispossessed by the defendant within 12 years before the institution of the suit. **L. B. MAUNG NAW V. MA SHWE HMAT**, 8 BUR. L. T. 191 **772**

s. 56 772

Lubbais. See CUSTOM.

Lunacy Act (IV of 1912), s. 24 654

Lunatic—Criminal Procedure Code (Act V of 1898) ss. 471 (1), 423, 427, 439—Lunacy Act (IV of 1912), s. 24—(Act X of 1911)—Court's power to direct reception of criminal lunatic into asylum—Warrant of arrest—Order, if prejudicial.

Under Lunacy Act IV of 1912 and Act X of 1911 the Magistrates or Courts are no longer required to report cases under section 471 (1), Criminal Procedure Code, for the order of the Local Government but are themselves competent to direct the reception of a criminal lunatic into any asylum which is prescribed for the reception of criminal lunatics.

Lunatic—conold.

A warrant of arrest is not an order to the prejudice of the accused within the meaning of section 439 (2), Criminal Procedure Code and can, therefore, be issued without previous notice to him.

An order under section 471 (1), Criminal Procedure Code, is clearly an order which the acquitting Court, whether Original or Appellate, not only has power to make but is bound to make under section 423 (d).
L. B. EMPEROR v. NGA E MOUNG 654

Madras Abkari Act (I of 1886)—Arrack—Possession of arrack below normal strength—Offence.

Where the seals put on a cask containing arrack are not tampered with, and the weakness in the strength of the liquor is such as could be due to exposure owing to natural causes or constant sales, a conviction of possession of arrack below the normal strength is unsustainable. **M. MARUTHA PILLAI, In re**, 16 Cr. L. J. 606 158

Madras City Municipalities Act (III of 1904), ss. 3, cl. (27), 248 (1)—Erection of sunshade overhanging drain—Drain, if part of "public street"—Powers of President.

Under the term "public street" as defined in section 3, clause 27, of the Madras City Municipalities Act III of 1904, the space covered by a drain is included and is vested in the Municipality even if it be private property.

Where a sunshade overhangs such drain, the President can, under section 248 (1) of the Act, treat it as a "projection" and remove it after notice to the owner. To exercise his powers under that section, it is not necessary for the President to prove that the sunshade interferes "with the repairing and proper management of the drain." **M. CORPORATION OF MADRAS v. MOHAN LAL SOWCAR** 683

ss. 248 (1) 683

Madras City Police Act (III of 1888), s. 75 752**Madras Court of Wards Act (I of 1902), ss. 32, 43 (5), 55** 357**Madras District Municipalities Act (IV of 1884)—Ootacamund Municipality By-law No. 54—"Other building material", meaning of—Sand, if included in the term.**

In Bye-law No. 54 of the Ootacamund Municipality the expression "the other building material" must be "*ejusdem generis*" to bricks, stone and road metal in its potentially deleterious effect on the public thoroughfare. Therefore it does not include sand. **M. HASSAN SAHIB, In re** 1004

ss. 103, 111, 147, 209, 218, 269—"Toll-gate kist," if tax—Non-payment of toll-gate kist—Prosecution, liability for.

A "toll-gate kist" is not an amount due on account of any tax within the meaning of section 103 of the District Municipalities Act, but it "is money due under a contract" dealt with in section 92, the non-payment of which is not penalized under section 269 of the District Municipalities Act. A prosecution for such non-payment will not, therefore, lie under section 103 of the Act. **M. MOHAMAD IBRAHIM SAHIB v. MUNICIPALITY OF ANAKAPALLE** 750

ss. 111, 147, 209, 218, 269 750

Madras Estates Land Act (I of 1908), ss. 3, sub-s (2), cl. (d), 6—Estate—Grant of village described as rent-free—Presumption—Existence of minor inams in village, effect of—Grantee not owner of kudivaram on date of grant, effect of—Receiver, whether land-holder under the Act

Where the grant of a village is described in various documents as a rent-free grant to a temple, the presumption is of a grant of the whole village and the existence of "minor inams" in the village will not affect that presumption unless it is proved that the grant was only of the revenue of a portion of the land in the village.

Where the inamdar grantee was not the owner of the kudivaram at the time of the grant, the subject of grant is an estate within the meaning of clause (d) of section 3 of the Madras Estates Land Act.

A Receiver having the power of letting tenants into possession of lands in an estate is a "land-holder" within the meaning of section 4 of the Madras Estates Land Act. It is not necessary that the land-holder should also be a beneficial owner of the estate. **M. GOPISETTI NARAYANASWAMI v. NALAM SUBRAHMANYAM**, 2 L. W. 683; 18 M. L. T. 148; (1915) M. W. N. 590; 29 M. L. J. 478 375

ss. 3 (1), 51, 148

—Rusums—"Fees paid with rent"—Rusums, if can be included in the patta.

Rusums collected for payment to the *karnam* in a *zemindari* village in lieu of salary can be included in the *putta* and they are covered by the words "fees paid with rent" in section 51 of the Estates Land Act and are also included in the term "rent" for the purpose of section 148 of the Act. **M. KARRI PEDDI REDDY v. RECEIVER OF NIDADAVOLE AND MEDUR ESTATES**, 18 M. L. T. 171 529

s. 4 679

s. 6 375

ss. 8, cls. (1), (3)

—Landlord purchasing from tenant his kudivaram right in land—Land continues to be "ryoti"—Conversion of "ryoti land" into private land by zemindar—Acts to, prove such conversion, nature of.

Where a land-holder purchases from a tenant for consideration his kudivaram right in the land, the land-holder purchaser should treat the land as a "ryoti land" and there is not such a merger of rights as to extinguish the "ryoti" character of the land.

Land once "ryoti" continues to be such unless the landlord, by strong and unequivocal acts (not necessarily those referred to in the proviso to section 8 of the Madras Estates Land Act) shows that he is entitled on the evidence to an exceptional finding that he has converted the *ryoti* land into his private land. **M. METHUKU SIVARAMAYYA v. MUNI-REDDIGARI CHINNA MUNEAPPA** 812

ss. 26 (3), 27, 28—

Presumption re condition of tenure, how rebutted—Amani system—Payment of rent in money—Temporary arrangement—Landlord's right to revert to original usage.

Section 27 of the Madras Estates Land Act raises a presumption that a *ryot* holds under the same conditions as in the previous revenue year; but that

Madras Estates Land Act—contd.

presumption can be rebutted by showing that these conditions were not in accordance with the agreement of usage prevailing between the parties.

Under section 26 (3) no *pattahs*, which have been granted by any landholder, at rates lower than the rates payable upon such lands or upon neighbouring land of similar quality and description, shall be binding upon his successor, unless *bona fide* granted for the purpose of making permanent improvements and unless the tenant shall have conformed to the condition upon which such lower rates were allowed.

The rule of law contained in sections 27 and 28 of the Act that the rent paid for the previous *Fasti* should be presumed to be fair, will not apply when it is fixed by an *ex parte* decision in which all the points upon which the parties were at variance were left open.

Where in a suit brought by a landlord to compel his *ryots* to accept *pattahs* on the *amani* system, the tenants contended that they were entitled to be assessed at a money rate of rent and denied the usage set up by the plaintiff to pay rents in kind and it was found that the arrangement to pay money rents was a purely temporary one liable to be given up at any time if the *zemindar* preferred to go to the trouble of collecting his *waram*:

Held, that whether the rates were high or low either party was at liberty to revert to their original contract or usage, shown to have been merely in abeyance during the years when the rents payable from year to year were uncertain and when temporary arrangements prevailed.

When no data are available to fix the *waram* rates, the proper procedure is to adopt the *pamaish* rate. *M. AYYAPERUMAL ODAYAN V. RAMASAMI CHETTIAR*, 2 L. W. 650; 29 M. L. J. 362

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ss. 27, 28 983

s. 51 529

ss. 143, 144—*Cess*

when obligatorily leviable—Amount exacted from *ryots*—Suit for recovery, when maintainable.

A cess cannot be held to be obligatorily leviable against the *ryot* unless the *zemindar* can show that, after the object, for which it was originally intended failed, there was a fresh contract founded on fresh consideration to continue to make the payment.

Before a *ryot* can sue to recover back cesses unduly levied from him, he must prove that they were "exacted" from him within the meaning of section 144 of the Madras Estates Land Act.

Meaning of the term "exact" discussed.

Where, therefore, it appeared that payments were made without the issue of any coercive process or a demand:

Held, that there was no exaction within the meaning of the section and a suit for recovery of the cesses so collected did not lie. *M. RAMASAMI AIYAR V. SUNDARAM AIYAR*

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s. 144 166

s. 148 529

s. 211 (1)—*Suit to*

recover rent due during plaintiff's minority before Act came into force, maintainability of—Construction of Statute—Retrospective effect—Limitation Act (IX of 1908), s. 7.

Madras Estates Land Act—conold.

Where rent accrued due to the plaintiff during his minority and he filed a suit for its recovery within three years from attaining majority claiming exemption from the bar of limitation under section 7 of the Limitation Act:

Held, (*Seshagiri Aiyar, J.*, dissenting) that the right to sue had become vested in the plaintiff at the time of the passing of the Madras Estates Land Act and was not, therefore, barred having been kept alive under section 7 of the Limitation Act.

Per *Wallis, C. J.*—Where an Act contains provisions for limitation of suits which take away altogether a vested right of suit without providing any equivalent remedy, the provisions must be considered to have been enacted subject to the implied exception that they were not to extend to such vested rights of suit which were to continue subject to the rules of limitation in force at the passing of the Act.

Per *Kumaraswami Sastri, J.*—It is a well-known rule of construction that retrospective operation ought not to be given to a Statute so as to take away vested rights, unless that effect cannot be avoided without doing violence to the language of the enactment, and that except in special cases the new law ought to be construed so as to interfere as little as possible with vested rights.

A Statute of Limitation ceases to be a Statute of mere procedure where it shortens the period and is sought to be used to defeat causes of action which had accrued earlier than the length of time prescribed in the new law.

Though laws affecting limitation might abridge or enlarge periods of limitation in cases of suits or causes of action which were alive at the date when the new enactment came into force and which under the old law would expire afterwards, the change cannot, unless there is a clearly expressed intention to the contrary, either by apt words in the enactment or otherwise, be retrospective so as to destroy rights of suit which were alive on the date.

Per *Seshagiri Aiyar, J.*—A litigant cannot approbate and reprobate. He cannot claim the advantage which a new law gives without submitting to the restrictions which it imposes.

No one has a vested right in any rule of procedure. When a Statute provides for a new procedure for the enforcement of rights, it is always retrospective.

The Limitation Act in force at the time a suit is instituted governs the action and not the one under which the right accrued. *M. RAJAH OF PITTAPUR V. GANI VENKAT SUBBA ROW*, 29 M. L. J. 1; 15 M. L. T. 67; 2 L. W. 661; (1915) M. W. N. 547

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Madras Forest Act (V of 1882), ss. 6, 10, 16, 17—Notice under s. 6, essential—

Knowledge of claimant by other ways, immaterial.

Per *Wallis, C. J.*, and *Coutts-Trotter, J.*—The Madras Act V of 1882 is an expropriating Act and therefore it must be strictly construed.

The combined effect of sections 6 and 10 of the Madras Forest Act, is to make the notice under the second part of section 6 of that Act an essential pre-requisite to confer jurisdiction on a Forest Settlement Officer to declare the land a reserved forest under sections 16 and 17 of the Act. Where

Madras Forest Act—conold.

no such notice is served on the claimant his ordinary right of action is not lost and the fact that he obtained notice of the reservation by any other means is immaterial.

Per *Coutts-Trotter, J.*—The terms of both parts of section 6 are not merely directory but mandatory; and the mandate in the second part as to notice must be strictly observed.

Per *Wallis, C. J.*—By the use of the words "besides poramboke" in an *inam* title-deed where the *inam* tenure was converted into a free-hold, the intention is to confer absolute rights over "porambokes" also. **M. MYSORE BALAKRISHNA RAO v. SECRETARY OF STATE**, 2 L. W. 695; 29 M. L. J. 276; 18 M. L. T. 151

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ss. 10, 16, 17 355

Madras Irrigation Cess Act (VII of 1865) 425

————— *Inam title-deed—Inamdar*
—Claim to irrigate free of charge larger area than entered in *inam* title-deed, if allowable—Separate engagement, necessity of.

Where an *inamdar* claims that he is entitled to irrigate free of charge in respect of a much larger area than that entered in the *inam* title-deed, it must be by virtue of some engagement with the Government other than the *inam* title-deed. **VI. SECRETARY OF STATE v. PERARULALA RAMANUJA JEER SWAMIGAL** 605

————— **S. I—Madras Land Encroachment Act (III of 1905)—Inam village—**
Irrigation from Government source—River flowing through a zemindari—Water taken off in channel belonging to zemindar and used by inamdar for irrigating second crop and dry crop—Water cess, if can be charged by Government—Madras Land Encroachment Act (III of 1905), retrospective effect of—Crown grant—Construction—Madras Act VII of 1865, applicability of, to zemindaries and inam villages—Grant—Construction—Presumption—Statute, construction of—Flowing water, whether can be owned—Riparian owner—Presumption of ownership of half bed, whether applicable to zemindars—Applicability of new rules of evidence to pending suits.

Where the *inamdars* of Varakanarasimhapuram utilised the water of the Vamsadhara river, flowing in the Mobagam channel belonging to the *zemindar* of Urlam, for irrigating second crop cultivation and wet crops grown on dry land:

Held, per *Oldfield and Bakewell, JJ.* (*Sadasiva Aiyar, J.*, dissenting) that under the combined operation of the Madras Acts III of 1905 and VII of 1865, the Government was entitled to levy water-cess for the same.

Per *Oldfield, J.*—Madras Act III of 1905, being a declaratory Act, has retrospective effect.

A person who claims exemption from payment of water-cess under Madras Act VII of 1865 is bound to prove that the water used by him was not Government water but that of a *zemindar* or *inamdar* or a person claiming under him.

A grant from the Crown, unlike one from a private individual, must be construed beneficially to it.

Madras Act VII of 1865 applies not only to *ryotwari* but also to *zemindari* and *inam* villages.

Where by a Statute, the burden of proving a fact in issue is placed on the subject as against the

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Government, a Court will not be justified in presuming or accepting inadequately supported inferences in support of a grant of which direct evidence is wanting, out of mere regard for the hardship that might ensue owing to the difficulty of proving it after the lapse of several years.

Where a grant is alleged as founded throughout the Presidency in the same manner, the fact that in two districts its existence has been negatived by practice is against its validity in others.

Per *Sadasiva Aiyar, J.*—A historical retrospect of the relations between the Government and *zemindars* and *ryotwari* tenants, and those between *zemindars* and *inamdars* and their tenants is of little importance in arriving at a true view of the provisions of the Statute and Case-Law governing their rights.

In construing a Statute considerations such as whether the Government could have intended to be guilty of so much harshness and oppression as would result if a particular Statute were to be interpreted in one way, or whether the Legislature could have intended such a sudden change in the law as would result from a particular interpretation, are of very doubtful utility and it is not legitimate to have recourse to such extraneous considerations, unless the words of the Statute are very ambiguous.

In deciding on the rights of Indian litigants references to the technicalities of English Common Law actions ought to be avoided as merely tending to confuse the mind.

According to Indian Law flowing water is capable of being owned.

The words 'river', 'stream', 'channel' and 'tank' in clause (a) of section 1 of Madras Act VII of 1865 are used in the sense of the collective body of waters which are called river, stream, channel or tank, according to the respective configurations of the receptacles.

The word 'supplied,' when used in connection with water-supply, does not imply a previous request by the owner of the land which is supplied with water.

So far as beds of non-tidal and non navigable rivers and streams bounded by *zemindari* and whole *inam* lands are concerned, it is too late to question the applicability of English Law that a *zemindar* who owns only one of the banks of a river is entitled to half the bed of the river along the length bounded on that side by his land. But in other cases, the Indian Common Law vests such rights in the village community as a whole within the village limits and in the Sovereign power as representing the community in other places.

Rules of evidence enacted by the Legislature come into force at once and must be followed by the Courts in deciding on the rights of the parties, whatever may have been the previous state of the law in regard to the proper presumptions and burdens of proof. Under Madras Act III of 1905, the Government starts with a strong presumption in its favour that all standing and flowing waters belong to it, but the presumption is rebuttable. The fact that the enactment was passed during the pendency of the suit does not estop the Government from invoking the aid of such presumption.

Section 2 (1) of Madras Act III of 1905 has not the effect of declaring plenary rights in standing or

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flowing water in favour of Government. The Legislature never intended by that section to give to the Government greater rights of ownership in flowing water than the principles of general jurisprudence would allow. Flowing water by its very nature can never be the absolute property of the Government or anybody else, though the ownership in a very real sense can be predicated of it as vesting in a person so long as the water continues to be situated vertically over land belonging to that person.

The right of distributing water among their *ryotwari* tenants is exercised by the Government as the Sovereign landlord. Where, however, they have parted with proprietary rights over the beds of particular streams in favour of *zemindars* or *inamdars*, it is impossible to hold that they retain proprietary rights over waters standing in tanks in *zemindaries* or flowing through *zemindari* lands, or in water flowing in all natural channels, or through artificial channels constructed with the knowledge and permission of Government and owned by the *zemindar* or *inamdars*, or in water percolating into *zemind* and *inam* tracts. **M. SECRETARY OF STATE v. KANNEPALLI JANAKIRAMAYYA**, 2 L. W. 763; 29 M. L. J. 389; 18 M. L. T. 277 **609**

Madras Land Encroachment Act (III of 1905) **609****Madras Local Boards Act (V of 1834)** **484****Madras Revenue Recovery Act (II of 1834, s. 8—Defaulter absent at time of distraining Demand in writing not necessary—Resistance, whether an offence.**

The Madras Revenue Recovery Act does not contain any provision requiring in cases where the defaulter is absent at the time of distraining, that the demand in writing described in section 8 should be delivered to the defaulter before the distress. A person distraining in these circumstances is not doing anything illegal and resistance to him is punishable as an offence under the Act. **M. MARAKKAR, In re**, 29 M. L. J. 60; 16 Cr. L. J. 607 **159**

Magistrate, jurisdiction of—Review of order.

A Magistrate has no power to alter or review the order once passed by him. **M. NARASINGA RAO v. VITTOBA RAO**, 16 Cr. L. J. 584 **136**

Maintenance. See CRIMINAL PROCEDURE CODE, s. 488; HINDU LAW.**Malabar Law—Purchase of property in son's name by father, whether sufficient to show that it is son's property—Family property.**

Under Malabar Law it is competent to a father governed by the *Marumakkattayam* Law to purchase property in the name of his son, to benefit his family (wives and children), and where he so purchases, property is that of the family and not of the sons.

Where the question is whether a debt is binding on the family or not, an alienee cannot plead its inclusion in a decree to prove his good faith when there is sufficient in the decree to put him on inquiry into the validity of the proceedings. **M. PAZHAYA OTTAYIL MUHAMAD v. ITHIRU AMMA** **692**

Marriage—Restitution of conjugal rights Lalungs—Custom regarding the residence of son-in-law in father-in-law's house, validity of.

Even if it be assumed that *Lalungs* are Hindus, their marriage relation must be governed by custom which prevails amongst the tribe, provided that the custom is neither immoral nor opposed to public policy.

There is nothing opposed to 'public policy' or 'the policy of the law' or injurious to the public interests, that is, to the interests of the tribe of the parties, or immoral in a tribal custom which requires a son-in-law to reside in the family of his father-in-law, if he can have there free access to his wife. **C. LENGA LALUNG v. PENGURI LALUNGANI**, 22 C. L. J. 92 **726**

Marumakkattaya n Law—Stridhanam gift made by mother to her daughter at time of marriage, nature of—Donees, rights of—Tarwad property, incidents of.

In the case of Moplahs governed by *Marumakkattayam* law, in the absence of proof of any special custom or course of conduct to the contrary, a gift to daughters made by their mother, at the time of their marriage enures for the lives of the donees and their descendants how low soever and is not terminable on their death or divorce. Such a gift has all the incidents of *tarwad* property. **M. THAYOTH PUTHIA PURAYIL SEETHI v. MANGOTTIL BYRATH UMMAYYA**, 2 L. W. 949; 18 M. L. T. 339 **777**

—Tavazhi—Gift to wife and children—Nature of property taken—Presumption that donees take with incidents of tarwad property—Rights of persons subsequently born—Rule of perpetuity.

Where properties are given by a person to his wife and children, or children alone, following the *Marumakkattayam* Law, the presumption is that the donees take the property with the incidents of *tarwad* property, including those mentioned; persons subsequently born into the *tavazhi* are entitled to be maintained, but not to claim partition, and an individual cannot alienate his share nor can it be attached and sold in execution of a personal decree against him.

Per Wallis, C. J.—*Query*:—Whether a gift with the incidents of *tarwad* property could be made to the mother and some of her issue only, viz., those by a particular husband?

Per *Sadasiva Aiyar, J.*—The rule against perpetuities cannot be applied so as to defeat gifts made to all the persons who can naturally form a joint Hindu family, the gifted property to be held as joint family property, or to the whole of a group of persons following the natural law of *Marumakkattayam* forming a natural *tavazhi* group.

The result of a woman marrying another husband and begetting other children to the latter is that there will be two separate groups in the same *tavazhi*, holding separate *tavazhi* property, the senior male in each *tavazhi* group being the *karnavan* of that *tavazhi* group.

Per *Srinivasa Aiyangar, J.*—It is not the giving of properties by a person to his wife and children that constitutes them a *tarwad* or *tavazhi*, but that if properties are given to a wife and children following the *Marumakkattayam* Law, they as a *tavazhi* hold those properties with the incidents of *tarwad* prop.

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party, and the right of management of the properties is vested in the senior male member of that *tavazhi*.

If the *tarwad* can purchase and hold properties with the incidents of *tarwad* property there is no reason why they should not take a gift and hold the properties with the incidents of *tarwad* property. The gift is made to the entity which is called the *tarwad* or *tavazhi* and the law governing the parties regulates the mode of succession and enjoyment. **M. CHAKKARA KANNAN v. KUNHI POKKER**, 18 M. L. T. 255; 29 M. L. J. 481 **755**

Merchant Seamen Act (1 of 1859).

s 83—Articles of agreement—Provision as to transshipment, whether *ultra vires*—Merchant Shipping Act (57 & 58 Vic., c 60), s. 114 (3)—Order of transshipment by Marine Superintendent in presence of Chief Officer of ship.

The applicant signed the usual articles of agreement with the Captain of the steamship "Arcadia" for a term of one year's service. In addition to the stereotyped conditions the applicant agreed to accept a transfer from that to any other of the P. & O. Company's steamships. The Company disposed of the "Arcadia" and the applicant was ordered by the Marine Superintendent in the presence of the Chief Officer of the "Arcadia" to tranship to the "Salsette." The applicant refused to obey the order:

Held, (1) that having regard to section 114, clause (3), of the Merchant Shipping Act and to the fact that the additional terms of the agreement had been initialled by an Officer of the Board of Trade, the terms were not *ultra vires*;

(2) that the order of tranship though not given actually by the Chief Officer himself, was obviously with his sanction and approval and, therefore, should have been obeyed by the applicant. **B. EMPEROR v. A GOODHEW**, 17 Bom. L. R. 603; 16 Cr. L. J. 58; 39 B. L. 58 **157**

Merchant Shipping Act (57 & 58 Vic., c 60), s 114 (3) **137**

Meane profits. See OUDH RENT ACT, s. 127.

Minor—Promissory note executed by alleged guardian—Liability of minor **481**

Promissory note executed and signed by guardian in his individual capacity—Money spent for purposes binding on minor—Minor's estate, if liable **514**

Misdirection. See JURY TRIAL.

Mortgage. See HINDU LAW; TRANSFER OF PROPERTY ACT, s. 59.

— Attachment—Mortgage, property sold subject to—Purchaser, not to question validity of mortgage—Sale of encumbered property subject to no encumbrance—Auction-purchaser, liability of **238**

— Clog on equity of redemption—Transfer of Property Act (IV of 1882), s. 60, principles of, applicability in the Punjab.

U mortgaged with B (a) mortgage rights of Rs. 1,000 in certain property, (b) equity of redemption of another property mortgaged to K, (c) certain

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other property free from mortgage. U agreed that B could recover Rs. 1,000, the amount due to him and pay the same to K the mortgagee of property (b) and that U was at liberty to sell the properties (b) and (c), but would be bound to pay the sale-proceeds to K to the extent of the mortgage-money due to K and the balance to himself:

Held, that the above conditions were not a clog on the equity of redemption and could be acted upon. **P. SAFDAR ALI v. GHULAM MOHI-UD-DIN**, 158 P. L. R. 1915; 145 P. W. R. 1915 **526**

— Commission agreed to be paid to mortgagee—Mortgagor's liability to pay commission—Circumstances attending agreement to be looked into—Penalty, definition of—Punishment, element of, essential—Default, agreement to pay interest at, when penalty—Interest, penal rate of—Stipulations by way of penalty—Court, duty of—Compensation, reasonable, assessment of—Conduct of parties subsequent to execution of deed to be considered—Mortgage-suit—Novation—Acceptance, qualified, effect of—Substitution of existing mortgage-deed by executing fresh deed, agreement as to, not fulfilled—Mortgagor, remedy and position of—Reduction in money in suit, claim as to—Estoppel, equitable—Construction of document Mortgage-deed, interpretation of—Right to sue, accrual of—Amendment of plaint—Costs, when defendant not entitled to—Limitation—Penal clauses in mortgage-deed, amount awarded for breach of, if portion of mortgage-money—Charge on mortgaged property—Contract Act (IX of 1872), s. 74—Discretion of Court—Post diem interest—Court, power of, to fix interest from date for payment till date of realisation—Circumstances of each case to be examined.

Where a mortgagor deliberately and voluntarily, without any deception, surprise, pressure, mistake of fact, or unfair dealing, agrees to pay a commission to the mortgagee, in short, where the parties are completely on equal terms when the agreement is arrived at, and pays it, the mortgagor cannot, in a suit subsequently brought by the mortgagee on the basis of the mortgage, avoid his liability for the commission paid.

"Penalty" may be defined as a liability agreed to by the parties to be imposed as a punishment, fair or unfair, on the party committing the breach of contract.

An agreement to pay at default simple interest, or even compound interest at the same rate as the simple interest, fixes the price for accommodation of money at an ordinary or at a progressive rate and does not contain the element of punishment or penalty; but an agreement to pay at default a higher rate of interest does contain that element.

Where a mortgage-deed contained *inter alia* (a) a primary obligation to re-pay the principal money in fifteen instalments with simple interest at 8 per cent. per annum payable six-monthly on balance due after payment of instalments due, (b) a secondary obligation to re-pay, in case of default of instalments, compound interest at 12 per cent. per annum with six-monthly rests on each instalment or part of an instalment not paid by due date, and (c) another secondary obligation to re-pay, in case of default of interest due, compound interest at 12 per

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cent. per annum with six-monthly rests on the balance of interest not paid by due date:

Held, that the stipulations (b) and (c) were stipulations by way of penalty within the meaning of section 74 of the Contract Act.

Where a stipulation in a deed is found to be in the nature of a penalty, the Court in assessing the amount of reasonable compensation must examine the evidence relating to the conduct of the parties subsequent to the execution of the deed.

No legal novation or modification of an existing contract is created in a case where one party proposes the novation but the other party accepts the proposal in a qualified manner.

Where a mortgagee agrees to have the existing mortgage-deed substituted by another on more favourable terms to the mortgagor, but never fulfills that agreement the mortgagor cannot subsequently claim the benefit of the terms of the deed that was to be substituted, if he had failed to sue the mortgagee for specific performance of the agreement within the limitation prescribed therefor by law.

A debtor cannot, by invoking in his aid the doctrine of equitable estoppel against the creditor, say that the creditor is bound, not by the terms of the contract entered into between them, but by those of another contract subsequently arrived at between the debtor and a third person for the purpose of paying off the existing debt, and afterwards broken off, unless the debtor can show that he was induced by the creditor to break his contract with the third person.

Where a clause in a mortgage-deed provided that the mortgagee could not sue unless (1) the entire demand for two instalments for two consecutive years and interest for the principal on two consecutive years remained unpaid and (2) nothing was paid for two consecutive years on account of principal or interest:

Held, that the two sub-clauses were quite independent of each other, and that the right to sue did not arise unless nothing had been paid on account of principal or interest for two years.

Where an amendment of plaint is allowed, which is purely of a formal nature and does not in any way prejudice the defendant or increase his costs, he is entitled to no costs.

The amount awarded as reasonable compensation for breach of penal clauses in a mortgage-deed must be considered for the purposes of limitation as a portion of the mortgage-money, and can be charged against the mortgaged property.

A penal clause is not invalidated by section 74 of the Contract Act. It remains effective, but the amount awarded as compensation for its breach is left to the discretion of the Court up to the maximum fixed by the clause.

A Court is not in any way bound to fix the rate of interest from the date fixed for payment up till the date of realisation according to the provisions of the mortgage-deed, but in fixing it it ought to be guided by the circumstances of each particular case. **O. NARENDRA BAHADUR SINGH V. ORDH COMMERCIAL BANK, LTD., 2 O. L. J. 402** **323**

Conditional sale—Payment by instalments
—Mortgagee, whether can enforce security before expiry of term—Intention of parties—Foreclosure.

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A suit for foreclosure can be brought for interest of an instalment of money secured by a mortgage by conditional sale.

The right of a mortgagee to enforce his security before the expiry of the term fixed for repayment of the whole of the principal, depends upon the intention of the parties as evidenced by the terms of the bond.

Where, therefore, a mortgage deed provided for payment by instalments in the interests of the debtor, and provided against failure to pay by a condition for compound interest adding that if the amount be not paid as stipulated, the mortgaged property will stand foreclosed:

Held (1) that the parties intended that there should be foreclosure only after failure to pay the whole amount in the manner stipulated,

(2) that a separate suit for the first instalment with interest did not lie. **N. KARNIDAN V. MEGHRAJ, 11 N. L. R. 153** **981**

— — — Decree for redemption on payment of mortgage-money not executed—Claim to redeem on basis of that decree, whether maintainable—Appeal for reduction of mortgage-money—Court-fee payable.

The sons of a mortgagor brought a suit in 1888 against the original mortgagees for redemption of certain mortgages and obtained a decree for possession of the mortgaged property conditional on payment of Rs. 3,404-3-0. This decree was never executed and the possession remained with the mortgagees as before. On the 18th November 1909 the present plaintiffs, claiming under the original mortgagor, sued for possession of the land by redemption on payment of the decretal amount. Defendants, successors-in-title of the original mortgagees, claimed Rs. 6,947 on the basis of the original mortgage-deeds and the lower Courts decreed redemption on payment of this sum. On second appeal to the Chief Court:

Held, (1) that Court-fee was payable on the value of the subject-matter in dispute in this appeal, namely, the difference between Rs. 6,987, the amount fixed by the lower Courts, and Rs. 3,404-3-0, the amount which the plaintiffs were prepared to pay;

(2) that the previous decree not having been executed within limitation had become inoperative so far as the amount of the incumbrance on the land was concerned and a fresh suit for redemption was only maintainable on the basis of the original mortgage-deeds. **P. CHUNI LAL V. BELI RAM, 58 P. R. 1915** **104**

— — — Estoppel—Mortgagee cannot dispute mortgagor's right to redeem—Surrender of vendee's rights—Mortgage rescinding previous sale—Registered sale-deed, cancellation of, by agreement evidenced in mortgage-deed—Conduct of mortgagee—Evidence Act (I of 1872), s. 92, cl 4—Release executed by Hindu widow in favour of reversioners, effect of—Reversioners' right of redemption in widow's life-time **234**

— — — Foreclosure—Sale—Burden of proof—Pleas—Preliminary pleas—Court to insist on filing full pleas—Ground of appeal, appellant when can go out of.

A mortgagee who alleges that the mortgage has

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become a sale must prove that all the necessary legal requirements have been fulfilled, nothing can be presumed.

As a general rule at all events, Courts of original jurisdiction should call on defendants to put in their complete pleas in the first place. Pleading piecemeal should be avoided as far as possible.

A party can go outside his grounds of appeal with the leave of the Court. **P. PARMA NAND V. THIKHU**, 121 P. W. R. 1915 **817**

— of house of ex-proprietary tenant—
Appurtenance **549**

— Joint estate—Mortgage by all joint-holders severally—Redemption by one joint-holder of all land mortgaged by all joint owners severally—Objection by one joint owner's widow—Priority of right of redemption—Transfer of Property Act (IV of 1882), s. 91.

In a joint holding, where each co-sharer has mortgaged his specific share separately, though technically each has an interest in every inch of the joint estate, its joint character may be regarded as in a state of suspension till the respective mortgages have been redeemed.

The interest contemplated by section 91 of the Transfer of Property Act is an interest derived directly or indirectly from the mortgagor since the making of the mortgage.

A mortgagor or his heir in possession has the preferential right to redeem the mortgage over the other joint owners of the estate who are merely reversioners. **P. JIWAN SINGH V. ACHHAR SINGH**, 92 P. W. R. 1915 **389**

— Joint family—Mortgage of joint family property by one member, suit on—Mortgagee, position of—Sale, decree for—Personal decree—Legal necessity for mortgage-debt to be proved—Surviving members of joint family, non-liability of **382**

— Joint Hindu family—Partition subsequent to mortgage—Suit for mortgage-money—Mortgagee, whether can claim lien on the property.

K, owner of only $\frac{1}{4}$ th share, mortgaged $\frac{1}{2}$ of three shops and a *haveli* which formed a part of the estate. After the mortgage there was a suit between the co-sharers which was settled by arbitration and two *kholas* valued at Rs. 940 were awarded to **K**. On a suit brought by the mortgagee to recover the mortgage-debt:

Held, that the only part of the estate against which the mortgagee could proceed was that which fell to the mortgagor on partition. **P. PREM SHAH V. KHAN CHAND**, 128 P. W. R. 1915 **31**

— Mortgagee purchasing property in execution of his money decree unconnected with mortgage **988**

— Mortgagor, legal representative of, suit against—Decree, personal, if legal—Necessity—Assets—Liability of land mortgaged.

The plaintiff, mortgagee, sued the defendants on a mortgage executed by their father and uncle and prayed for a decree against the defendants personally and the land mortgaged. On appeal the Divisional Judge granted decree against the defendants personally as heirs of the mortgagors, but finding that the mortgage was not for necessity refused to pass a decree against the mortgaged land:

Mortgage—contd.

Held, that the decree should not have been passed personally against the defendants, for they were only liable to the extent of the assets of the mortgagors in their hands. **P. ARURA V. BALAK RAM**, 157 P. L. R. 1915; 147 P. W. R. 1915 **528**

— Mortgagor, power of, to deal with mortgaged property subsequent to mortgage—Alienation of mortgaged property, mortgagor's right as to—Assignee of mortgaged property, position of—Lease granted by mortgagor after mortgage, validity of—Covenant against alienation, invalidity of—Personal liability between mortgagor and mortgagee—Lessee of mortgaged property, right of—Equity of redemption, interest in, acquisition of—Redemption—Long term lease granted after mortgage, how far enforceable—Declaration in modified form, grant of, power of Court as to—Transferee pendente lite, whether bound by result of litigation—Court, power of.

A mortgagor cannot by any dealings with the mortgaged property subsequent to the date of the mortgage affect the rights of the mortgagee under the contract, subject to the condition that the mortgagor's power of alienation is not restricted. The assignee of the mortgaged property can, of course, take only subject to the incumbrance, and, if the property is sold or foreclosed by the mortgagee in proceedings properly taken for the purpose, the interest which the mortgagor may have created subsequent to the mortgage may be destroyed.

A lease granted by a mortgagor after the execution of the mortgage-deed, absolutely prohibiting alienation by him, cannot be declared to be void and inoperative as against the mortgagee, merely on the ground that it has been executed in contravention of the covenant against alienation, inasmuch as such covenants create only a personal liability between the mortgagor and the mortgagee. And the lessee acquires an interest in the equity of redemption and can claim to redeem upon that footing.

The grant of a long term lease, say for twenty years, by the mortgagor, subsequent to the mortgage, is a transaction prejudicial to the saleable value of the mortgage security and injurious to the interest of the mortgagee. However, the lease cannot on that account be declared to be totally void but holds good in every respect except as to the long period.

Where the plaintiff sues for a declaration that a long term lease is void and inoperative as against him, the Court can grant a declaration in a modified form to the effect that the lease is not absolutely void and inoperative, but only in so far as the long term is concerned.

A Court can bind a transferee pendente lite by the result of the litigation, even though his name be not on the record, if the fact of the transfer is admitted before the Court during the progress of the litigation. **O. SYED HUSAIN V. BANK OF UPPER INDIA LTD.**, 2 O. L. J. 291 **289**

— Occupancy-holding, mortgage of—Zemindar taking rent from mortgagee—Position of mortgagee—Ejectment—Agra Tenancy Act (II of 1901), s. 21.

In September 1901 an occupancy-tenant mortgaged

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his holding with possession. The *zemindar* accepted rent from the mortgagee. In 1911 the occupancy-tenant relinquished his holding:

Held, that the occupancy having come to an end, the mortgagee was neither an occupancy-tenant nor a mortgagee but a mere tenant of the *zemindar* and liable to be ejected. **A CHAND MAL v. SARJU 70**

— *Prior usufructuary mortgagee's rights—Rights of purchaser of equity of redemption in decree of 1st mortgagee's suit to which puisne mortgagee was not made party—Declaratory suit by puisne mortgagee without asking for further relief, maintainability of—Transfer of Property Act (IV of 1882), s. 67—Civil Procedure Code (Act V of 1908), O. XXXIV, r. 1.*

A second mortgagee in possession under a mortgage under which he was entitled to possession, cannot be lawfully ousted from possession by his mortgagor or by the 1st mortgagee or by a purchaser at a sale under a decree in a suit on the 1st mortgage to which he was not a party. The purchaser in such a suit, whether he is a 1st mortgagee or a stranger, does not acquire the rights of the mortgagor as at the date of the 1st mortgage but only those that subsist in him at the date of the suit.

Therefore a puisne mortgagee's suit for declarations that the decree and sale in the first mortgagee's suit was inoperative against him and that the purchaser was not entitled to disturb his possession, without asking for further relief is maintainable. **L. B. MG. SAN BWIN v. NAGAMUTU 710**

— *Redemption 193*

— *Redemption, piecemeal, if permitted 497*

— *Redemption—Right to redeem on or before certain date—Intention.*

Ordinarily and in the absence of a special stipulation, the mortgagor is not entitled to redeem before the close of the period for which the mortgage was executed; but a provision in a mortgage-deed providing for payment by the mortgagor on or before a certain date is sufficient indication of an intention to allow him to redeem before that date, especially where a stipulation is made applicable only to the balance of the mortgage-debt. **M. CHANDU v. KOAJA POOJARI, 29 M. L. J. 86 370**

— *Same person holding several mortgages on the same property, whether entitled to sue on one mortgage reserving his rights under a prior mortgage—Mortgages, consolidation of—Several mortgages—Separate causes of action 317*

— *of sir before Tenancy Act II of 1901—Expropriatory right—Subsequent sale of sir—Right of mortgagee, if affected—Agra Tenancy Act (II of 1901), s. 10, cl. (12)—N.-W. P. Rent Act (XII of 1881) s. 7.*

In 1896 a *zemindar* executed a usufructuary mortgage of a portion of his *zemindari* including *sir*. In 1907 the *zemindari* was sold at auction. The auction purchaser got the *zemindar* ejected from his expropriatory right and then brought another suit to eject the mortgagee:

Held, that the mortgagee could not be ejected,

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inasmuch as the mortgage having been made prior to the passing of Act II of 1901, the *zemindar* had not become an expropriatory tenant by virtue of his mortgage. **A. BHAGWANA v. BHAGWAN DAS, 13 A. L. J. 925 911**

— *Stock mortgaged—Rent of shop—Mortgagee, if liable to pay rent—Want of privity of contract between landlord and mortgagee.*

Where the mortgagee of the stock in trade of a shop, who took possession of the stock and who received the incomings and paid the outgoings of the business carried on by the mortgagors, was sued by the landlord of the shop-premises for rent:

Held, that the mortgagee could not be held liable for any rent of the premises since there was no contract between the landlord and the mortgagee regarding payment of rent and since the mortgage being of goods only and not of the lease or tenancy of the rooms, the mortgagee did not acquire any interest in the rooms. **L. B. BANSILAL v. MAHOMED EBRAHIM, 8 BUR. L. T. 163 675**

— *Suit for redemption—Swadina tanaka meddatu sharatu pattiram—Stipulation by mortgagor to pay within fixed period and to relinquish land in default—Anomalous mortgage—Clog on redemption—Parties, liability of—Applicability of English principles of equity—Transfer of Property Act (IV of 1882), ss. 50, 58, 60, 88, 98.*

Where the material portion of a document, dated 20th March 1894, described as *swadina tanaka meddatu sharatu pattiram* (possessory mortgage-deed containing a condition for a period fixed) ran as follows:—"Within these limits a house site together with a thatched house thereon we have mortgaged, that is, we have kept it as possessory mortgage and have received Rs. 10 from you. So having paid the interest pertaining to these ten rupees within the end of a year from the said date we shall take possession of our house and site. If we do not act according to the said condition we shall quit the land and house as if this is a sale."

Held, in a suit for redemption brought 17 years after the term had expired, that the document was an anomalous mortgage falling within the provisions of section 98 of the Transfer of Property Act and, therefore, the parties must be strictly bound by the terms of their contract and neither the conditions of section 60 as to survival of the rights of redemption nor the English principles of equity could be applied. **M. FATTE MUHAMMAD v. DAVOOD, 18 M. L. T. 209; 29 M. L. J. 525 569**

— *Usufructuary mortgage—Subsequent simple mortgage—Covenant to pay money due under second mortgage first—Second mortgage barred by limitation, effect of.*

A simple mortgage was executed in favour of the mortgagee of the same property under a previous usufructuary mortgage with a covenant that the mortgagor would pay the money due under the second bond first and then that due under the usufructuary mortgage. The mortgagor brought a suit to redeem the first mortgage at a time when a suit to recover the money due under the second bond was barred by limitation:

Held, that the mortgagor was entitled to recover

Mortgage—concl'd.

possession of the property without paying the money due under the second mortgage. **A. KESAR KUNWAR v. KASHI RAM**, 13 A. L. J. 889 **777**

debt, release of—Mortgagee's heirs, entire money paid to some of, effect of—Heirs, remaining, of mortgagee, right of—Discharge of mortgage—Mortgagor's liability—Contract Act (IX of 1872), ss. 38, 45—Co-heirs.

A release of the mortgage-debt by some of the heirs of a deceased mortgagee, on payment to them of the entire mortgage-money, does not bind the other heirs of the mortgagee living separately from those to whom payment has been made. Such payment does not discharge the mortgagor from his liability to those heirs to whom payment has not been made.

Section 45 of the Contract Act applies to a case of co-heirs. **O. RUDRA SINGH v. JANGI SINGH**, 2 O. L. J. 361; 18 O. C. 154 **371**

decree—Attachment of mortgaged properties, whether affects character of decree—Admission.

A decree which is in substance a mortgage-decree for sale, though somewhat inartistically drawn up, does not lose its character as such merely because the mortgaged properties were attached before their sale in execution, nor does the attachment amount to an admission that the decree is not a mortgage-decree for sale but only a money-decree. **M. MUHAMMAD HUSAIN v. MUTIY CHETTIAR**, 2 L. W. 689 **280**

Costs—Declaration of personal liability, whether can be made against any person other than the mortgagor—"Defendant" in rule 6, meaning of **188**

, execution of—Civil Procedure Code (Act V of 1908), O. IX, r. 13—Decretal amount, deposit of, in Court with consent of decree-holder—Appeal by other judgment-debtors—Jurisdiction of first Court to enter application under O. IX, r. 13.

In a mortgage suit a judgment-debtor against whom an *ex parte* decree had been passed submitted an application under Order IX, rule 13, Civil Procedure Code asking to have the *ex parte* decree set aside, and with the consent of both the parties the decretal amount was deposited in Court by the judgment-debtor, but afterwards the decree-holder objected to this deposit. The Munsif overruled his objection and passed an order declaring the validity of the deposit and granted the application for rehearing the suit. The other judgment-debtors who had appeared had appealed from the decree but had failed:

Held, that the Munsif had no longer jurisdiction to entertain an application under Order IX, rule 13, Civil Procedure Code.

Held, further, that the judgment-debtor was entitled to take such steps as he was advised to enforce the agreement. **C. RAJ GOBIND SINGH v. BEHARI PATHUK** **447**

obtained by two joint mortgagees Decree executed by only one mortgagee subject to rights of other mortgagee Mortgaged property purchased in execution sale by executing mortgagee—Purchase, whether for benefit of both mortgagees **265**

Mortgage-deed, interpretation of—Construction of document—Personal liability of mortgagor—Remedy provided for satisfaction of mortgage-debt—Transfer by way of sale—Mortgagor covenanting to be personally liable in case of dispute as to or defect in title to property, effect of—Payment of mortgage-money within fixed period, promise as to.

The question of the personal liability of a mortgagor depends upon the construction of the instrument in each case, the test being the remedy provided for the satisfaction of the mortgage-debt.

Where the remedy provided for the satisfaction of the mortgage-debt is transfer of the mortgaged property by way of sale to the mortgagee, there is no personal liability on the part of the mortgagor to pay. Nor can such liability be inferred from a provision in the mortgage-deed that in case of there being any dispute as to the title to the mortgaged property or in case of any defect in title coming to light the mortgagor would be personally liable, so long as no such contingency has arisen. Nor does a mere promise to pay the money within a certain fixed period import the liability, for such a covenant is entered into in every form of mortgage. **O. NAZIM HUSAIN v. MAHABIR PRASAD**, 2 O. L. J. 357 **224**

suit—Balance due—Effect—Payment alleged, proof of.

Where in a mortgage suit it is found by the first Court that the sum alleged to have been paid by the mortgagor has not been paid, it being admitted by the mortgagor that there is a balance due, and on appeal, the District Judge has dismissed the suit, on the ground that the plaintiff-mortgagee has not produced the original deed upon which it is alleged that an endorsement of payment was made:

Held, (1) that in the face of the admission that there is some money still outstanding on the mortgage, the suit should not have been entirely dismissed;

(2) that the onus of proving the payment alleged by the defendant is upon the latter. **C. INDRA NARAIN SARKAR v. BIDESWARA DASSYA** **32**

Preliminary decree—Appeal—Decree affirmed by Appellate Court—Application made three years after expiration of period allowed for payment by first Court, if maintainable **494**

by reversioner—Hindu widow in possession of mortgaged property—Reversionary interests not mortgaged but property itself—Declaration, suit for, by widow, maintainability of—Period fixed by mortgage, expiration of, during widow's lifetime, effect of.

Where a reversionary heir to a deceased Hindu mortgages the property in the hands of the widow without stating that the property is for the time being owned by the widow or that he is mortgaging his reversionary interests only, the widow is entitled to claim a declaration that the mortgage is of no effect so far as her interest in the property is concerned, if the period fixed by the mortgage is such as may possibly expire during the life-time of the widow. **O. CHANDRA KUAR v. RAGHUBAR SINGH**, 2 O. L. J. 195 **198**

Mortgagor and mortgagee Usufructuary mortgage—Lease by mortgagee to mortgagor—Interest charged on mortgaged property—Rent not paid—Suit for principal and interest on foot of mortgage—Interest, whether can be decreed **818**

Penal Code—concl'd.

Where a part of a document was altered and made with the intention of causing it to be believed that it was made at a time at which it was not really made and the accused used it knowing it to be forged:

Held, that an offence under section 471 of the Indian Penal Code was committed, although there was not sufficient evidence to prove a charge of forgery. **M. PUBLIC PROSECUTOR V. RAMARAZU VENKATAPPAYYA**, 16 Cr. L. J. 701 **749**

— **ss. 467, 471**—*Forged document produced before Registrar for registration, effect of*
—*Document, subsequently found to be forged by Court*
—*Criminal Procedure Code (Act V of 1898), s. 195*
—*Sanction to prosecute.*

The accused presented before the Registrar a certain document for registration, the execution of which was denied by the complainant but the Registrar directed it to be registered. Thereafter as the result of a civil suit instituted by the complainant, the document was found by the Court to be a forged one. A complaint was then presented before the Sub-Divisional Officer under sections 467, 471, Indian Penal Code, and process was issued under section 467, Indian Penal Code:

Held, that the Magistrate could proceed under section 471, Indian Penal Code, without obtaining the sanction of the Civil Court, but that so far as the proceedings founded on the offence under section 467, Indian Penal Code, were concerned he could not proceed without the previous sanction of the Civil Court.

Sanction of the Civil Court is not necessary in the case of an offence that was committed by a prior use of the forged document outside the Court. **C. ABDUL GANI V. EMPEROR**, 16 Cr. L. J. 617 **441**

— **s. 471** **441, 749**

— **s. 471**—*Forged document mentioned in another document—Handwriting Expert, evidence of—Comparison, when to be made in Court.*

Where in order to support a false claim, a forged document is so mentioned in another document that it can be easily identified, it constitutes the offence of "using a forged document within the meaning of section 471 of the Indian Penal Code."

To make the evidence of a handwriting expert admissible, it is not necessary that the handwriting should be actually compared in Court but it is enough if the documents admittedly in accused's handwriting are shown to him in open Court and he expresses his opinion thereon. **M. SITHAVA NAIR, In re**, 16 Cr. L. J. 703 **751**

— **s. 478, 486**, *scope of—'Trade-mark,' counterfeited—Intention to deceive—'Counterfeit,' meaning of.*

The expression "trade-mark," as defined in section 478, Indian Penal Code, must not be confined to the trade-mark of the complainant as registered but must include the whole design.

Where the express intention is to deceive and the petitioners have failed to bring themselves within the exception to section 486, the case clearly comes within the definition of "counterfeit" in section 28, Indian Penal Code. **C. NILMONEY NAG V. DURGA PADO BANERJEE**, 19 C. W. N. 957; 16 Cr. L. J. 719 **1007**

Penal Statutes, interpretation of 456

Pendente lite, transferee, whether bound by result of litigation—Court, power of **289**

Perpetual lessee—*Adverse possession, qualified—Rent, uniform rate of, payment of, effect of.*

The mere fact that a lessee has remained in cultivatory possession of the land for over 12 years and all along paid the same amount of rent as entered in the lease, does not give him a right to hold in perpetuity by virtue of adverse possession.

U. P. B. R. BHAGWAT V. RAI KRISHNA PAL SINGH, 2 O. L. J. 320 **276**

Plaint, amendment of. *See* AMENDMENT OF PLAINT.

— return of, to be presented to proper Court—Representation—Limitation **544**

Pleader, use of title by **517**

Pleader's fees, power to grant special—Rules of the Sind Judicial Commissioner's Court, Appendix VI—Circumstances to be considered for granting such fees **19**

Pleader and client—*Pleader paying pre-emption money for his minor client on ground that pre-empted property was sold to him by his next friend—Alienation declared invalid—Right of Pleader to get back his money—Lien—Pleader commencing to act without fee—His incompetency to claim fee from his client's representative—Contract Act (IX of 1872), ss. 64, 65, 68, 70.*

An alienation of a minor's property in dispute by his next friend, who is neither a *de jure* nor a *de facto* guardian is wholly a nullity.

Where a Pleader paid pre-emption money out of his own pocket for his minor client and claimed the pre-empted property on the ground of its sale to him by the minor's next friend, which was neither proved nor valid, all that the Pleader can ask under section 65 of Act IX of 1872 is a simple money-decree at the most without any lien on the property, as sections 64, 65 and 70 of the Act do not apply in such a case.

A Pleader accepting to conduct a case without charging any fee from his client is not entitled to claim any remuneration for his services from the representative of his client when he dies. In the absence of any contract to the contrary the inference is that gratuitous services continued. **P. CHANDA SINGH V. HARBANS SINGH**, 108 P. W. R. 1915 **513**

Pleadings, admission in, effect of **204**

— Appellant, whether can argue point not raised in memorandum of appeal **22**

— Frauds should always be specifically pleaded **20**

— New plea set up at close of case **41**

— Pleas, preliminary—Court to insist on filing full pleas **817**

Police Act (V of 1861), s. 42 **173**

Police report—Relevancy—Admissibility in evidence **292**

Possession, suit for, based on trespass alone—*Alternative relief for assessment of rent—Bengal Tenancy Act (VIII of 1885), s. 157 bearing of, on question of limitation.*

In a suit for possession after establishment of

Penal Code—contd.

An offence of robbery cannot be converted into an offence of dacoity where there is a simple allegation but not adequate proof on behalf of the prosecution that five or more persons have taken part in committing or attempting to commit the crime.

An approver's testimony is not sufficiently corroborated so as to base a conviction thereon by

(a) the accused's producing stolen property from a place not in his possession as such an evidence can be easily fabricated;

(b) the evidence of the witnesses alleging to have recognized the culprit at the time of committing the crime where his name does not find a place in the first report to the Police made by a person who had ample time before doing so, to discuss the matter with them (witnesses.) **P. UDA V. EMPEROR, 26 P. W. R. 1915 CR.; 16 CR. L. J. 634** **458**

— **S. 395** **438, 453**

— **S. 396** **438**

— **S. 397** **439**

— **SS. 405, 24—Criminal breach**

of trust—*Dishonest act—Evidence Act (I of 1872), s. 114—Intention—Presumption as to one's own acts.*

A motor car was entrusted to the appellant under a hire-purchase agreement providing, *inter alia*, that the appellant "shall not, during the hiring, assign, underlet or part with the possession of the same in any way whatsoever." In violation of the agreement the appellant mortgaged the car for different sums to three different persons who were given, under their respective mortgages, either the right to recover possession of the car or to recover their moneys by its sale.

Held, (1) that the mortgage transactions amounted to assignments within the meaning of the hire-purchase agreement;

(2) that the appellant was guilty of the offence of criminal breach of trust, inasmuch as he caused wrongful gain to himself by obtaining moneys on the security of the motor car contrary to a legal agreement prohibiting him from assigning any interest in that car, and he caused wrongful loss to the owners by putting in their way difficulties in recovering the moneys due from him to them and by subjecting their car to the risks of attachment and litigation.

Every one must be presumed under section 114, Evidence Act, to intend the natural and probable consequences of his acts. **B. SILAS MOSES V. EMPEROR, 17 BOM. L. R. 670; 16 CR. L. J. 665** **649**

— **S. 415—Cheating—Deception by conduct.**

To constitute the offence of cheating it is not necessary that the deception should be by exp in words but it may be by conduct or impliedress the nature of the transaction itself.

Where an accused, after his application under Order XXI, rule 83, Civil Procedure Code, had been rejected by the executing Court, induced the complainant to advance him money on the security of his house under auction, representing that he was empowered to effect the mortgage in order to pay off the decree-holder, and paid the decree-holder out of the money which he had got from the complainant but afterwards intentionally neglected to obey the directions of the executing Court and took no steps to prevent the sale being confirmed, but on the other

Penal Code—contd.

hand received the sale-proceeds from the executing Court, saying that he had paid the decree-holder from his own pocket and after receiving the money from the Court paid nothing to the complainant mortgagee.

Held, that the facts constituted the offence of cheating as the intention of a party to a transaction must be inferred from his conduct. **P. RAM CHAND V. JAI DIAL, 18 P. W. R. 1915 CR.; 16 CR. L. J. 657** **641**

— **S. 415, Explanation—Cheating—Dishonest concealment of facts, what constitutes—False representation of title, not inducing bargain, effect of—Transfer of Property Act (IV of 1882), s. 55**

(1) (a)—*Duty of seller to disclose defects in title.*

No concealment is dishonest within the meaning of section 415, Indian Penal Code, unless there is a legal obligation to disclose it.

Defects in title being defects in the property under section 55 (1) (a) of the Transfer of Property Act, there is no duty on the seller to disclose them unless the buyer could not with ordinary care discover them.

A, one of the several members of a joint Hindu family, sold certain land to a Municipality without disclosing that the land was mortgaged or that the other members of the family had a share therein. A received the price and executed a sale-deed containing the usual covenant about title and indemnity in case of any defect of title. A was prosecuted for cheating.

Held, that A was not guilty of any dishonest concealment of facts within the meaning of the Explanation to section 415, Indian Penal Code, as there was no legal obligation upon A to disclose the mortgage or the fact of his being a member of a joint family, the Municipality knowing that he was a Hindu. **S. KABACHI MUNICIPALITY V. BHOJRAJ 9 S. L. R. 97; 16 CR. L. J. 706** **994**

— **S. 441** **731**

— **S. 447—Punjab Land Revenue Act (XVII of 1887), ss. 101A, 101B—Land transferred from one district to another—Failure to pass order of suspension at the time of transfer.**

The petitioners were convicted of an offence under section 47, Indian Penal Code. They were in possession of certain land formerly included in the Gujrat District but transferred under the operation of section 101A of the Punjab Land Revenue Act to Gujranwala District. The land was fit for cultivation and it appeared that the Collector apparently at the time of transferring the area failed to pass an order of suspension under section 101B of the Act, though such an order appeared to have been passed at a much later date.

Held, that the petitioners were entitled to be acquitted, for the transfer did not affect their proprietary rights and the transfer would not have justified their ejection otherwise than in the manner prescribed by law. **P. WIE SINGH V. EMPEROR, 170 P. L. R. 1915; 31 P. W. R. 1915 CR.; 16 CR. L. J. 631** **455**

— **SS. 467, 471—Evidence to prove charge of forgery insufficient—Knowledge that document is forged, whether sufficient to sustain conviction.**

Penal Code—contd.

of murder within the exception to section 300 may yet be sufficient for the reduction of the sentence.

A statement of an accused pleading guilty if probable and consistent should be given weight to and acted on in preference to the prosecution evidence. *M. In re KRUSHNO KARIKO*, 16 Cr. L. J. 611 **435**

ss. 299, 302, 304, 395, 396—*Mere stuffing of cloth into mouth of deceased to silence him, if murder.*

Where an accused merely stuffed a cloth into the deceased's mouth in order to silence him and not with any idea of killing him, the offence is not murder but one punishable under section 304, Indian Penal Code. *M. In re SENGODA GOUNDAN*, 18 M. L. T. 103; 16 Cr. L. J. 614 **438**

s. 300 113, 135, 435

ss. 300, 304—*Culpable homicide not amounting to murder—Provocation, grave and sudden—Wife found lying with stranger, murder of.*

Where an accused, finding his wife inside his house lying on a cot with a man with whom she had previously had an intrigue, murdered the wife:

Held, that the provocation caused by the wife and the man being found lying together on the cot in view of the previous intrigue was sufficiently grave and sudden to disturb the equanimity of the accused, so that the case fell within the exception contained in section 300, Indian Penal Code, and that the accused should accordingly be convicted under section 304, Indian Penal Code. *O. AJUDHI v. EMPEROR*, 2 O. L. J. 463; 16 Cr. L. J. 625 **449**

s. 300, cls. 1 to 4—Murder, brutal assault with lathis, when amounting to.

A brutal assault with lathis resulting in the death of the person assaulted does not ordinarily amount to murder unless the accused intended to cause death [section 300 (1)] or to cause such bodily injury as is sufficient in the ordinary course of nature to cause death. *S. SAIDINO v. EMPEROR*, 9 S. L. R. 99; 16 Cr. L. J. 710 **998**

s. 302 128, 737, 438

s. 304 113, 133, 438, 449

s. 325 138

s. 326 439

s. 339—Elements necessary to find a person guilty under.

To justify a conviction under section 339 of the Indian Penal Code a Court should find that the complainant had a right to proceed along the path and that he was obstructed by the accused from walking over it. *M. In re RAMA REDDI*, 2 L. W. 1035; 16 Cr. L. J. 701 **749**

s. 353—House search by Police Officer within limits of another Police Station—Assault—Criminal Procedure Code (Act V of 1898), ss. 165, 168.

A Police Officer conducted a search in the house of the accused, who did not reside within the limits of his jurisdiction, accompanied by a constable of the Police Station which had jurisdiction, but the con-

Penal Code—contd.

stable had no order, either written or verbal, from his own Sub-Inspector. While engaged in the search they were assaulted by the accused who was convicted under section 353 of the Indian Penal Code:

Held, that as the provisions of sections 165 and 166 of the Criminal Procedure Code were not complied with, conviction under section 353, Indian Penal Code, could not be maintained.

It is of great importance that Police Officers in the discharge of their duty should receive the protection of such sections as 353, 333, and 332, Indian Penal Code, but in order to entitle them to the protection of those sections Police Officers must comply scrupulously with the provisions of the law, particularly when they undertake an act such as searching the house against the will of the accused. *A. MADHO SONAR v. EMPEROR*, 13 A. L. J. 691; 16 Cr. L. J. 589 **141**

ss. 366, 373—Minor girl voluntarily leaving her guardian—Kidnapping—Selling minor for purpose of prostitution

A chamar girl between the age of 13 and 14 voluntarily left the house of her husband and parents, met *E*, on a public road and stayed with him for a month. Afterwards *E* made over the girl to certain other persons who bored her nose and made her appear a *Jat* girl. Subsequently the girl passed several hands until she was made over to a person to be married, with his brother:

Held, that *E* was neither guilty of the offence of taking or enticing the girl out of the keeping of her lawful guardian nor of the offence of selling the minor with the intent that she might be employed or used for the purpose of prostitution. *A. EWAZ ALI v. EMPEROR*, 13 A. L. J. 854; 16 Cr. L. J. 668 **647**

s. 373 647

s. 379—Dishonest intention—Burden of proof—Assertion of bona fide claim of right.

When a person is prosecuted for the offence of theft, it is for the prosecution to show that he was acting dishonestly. If the circumstances show that he was acting in the assertion of a bona fide claim of right, a dishonest intention cannot be attributed to him. *S. LUNIDOMAL v. EMPEROR*, 9 S. L. R. 75; 16 Cr. L. J. 715 **1003**

s. 381—Evidence Act (I of 1872), ss. 11, 32—Ownership of alleged stolen property—Witness stating what a deceased person had said to him—Admissibility of such statement.

A witness's statement as to what a deceased person had said to him regarding the ownership of the property alleged to be stolen is not admissible in evidence either under section 11 or under section 32 of the Evidence Act.

In the absence of evidence as to the ownership of stolen property, a conviction under section 381, Penal Code, cannot stand. *M. In re DORASAMI AIYAR*, 16 Cr. L. J. 640 **464**

s. 392 435

ss. 392, 395—When robbery is dacoity—Approver's testimony—First report, name of culprit not mentioned in, effect of—Value of evidence of identification and production of stolen property.

Penal Code—contd.

s. 188, *disobedience to injunction issued by Civil Court, if punishable under—'Promulgated', import of.*

The word 'promulgated' in section 188 of the Indian Penal Code refers to orders passed under the Code of Criminal Procedure, and disobedience to an injunction issued by a Civil Court is not punishable under that section. **M. VANIMAKANDY THAZHA V. THAZHITHATTATH KUTTI**, 2 L. W. 410; 17 M. L. T. 391; 16 Cr. L. J. 592 **144**

s. 188—Land-holder collecting suspended rent by distraint, if commits offence.

A land-holder endeavouring to collect suspended arrears by process of distraint is not guilty of an offence under section 188 of the Penal Code. **A. EMPEROR V. RAM SARUP**, 13 A. L. J. 619; 16 Cr. L. J. 674 **722**

s. 188—Operation of section—Injunction—Disobedience—Offence.

Operation of section 188, Indian Penal Code, is limited to the promulgation by public servants of public orders relating to the safety, the health or the convenience of the public. Therefore, the disobedience of an injunction directing a guardian not to marry a minor girl in his charge cannot fall within the purview of the section. **B. MALLAPA MALLAPA TAVARGI V. EMPEROR**, 17 Bom. L. R. 676; 16 Cr. L. J. 668 **652**

ss. 192, 193—False evidence, fabrication of—Document, admissibility of—Intention and not admissibility creates criminal offence.

Under section 192 of the Indian Penal Code it is the intention that creates the criminal offence and not the fact as to whether, under the terms of the law, the document is admissible in evidence.

Correctness of the reported decisions showing that section 192 is limited to such cases as those in which the fabricated evidence is, in fact, admissible under the terms of the law of evidence, is doubtful and the view expressed in such reported decisions might raise considerable difficulty in cases where the Judge has improperly admitted in evidence a document not admissible under the terms of the law. **C. BARODA KANTA SARKAR V. EMPEROR**, 16 Cr. L. J. 620 **444**

s. 193 444

s. 195—Persuading witnesses to make statements, if offence.

Where it appeared from the Police papers that the applicants 'got at' one Mussamat Putia and persuaded her to make a statement to the effect that she had seen certain persons whom she mentioned by name in the act of committing dacoity on her premises and that they apparently persuaded other persons to the same effect:

Held, that this was not sufficient to convict the applicants for an offence under section 195 of the Penal Code. **A. DURGA PRASAD V. EMPEROR**, 16 Cr. L. J. 667 **651**

ss. 201, 300—Murder, conviction for—Separate conviction for offence under s. 201, legality of.

A separate sentence under section 201, Indian Penal Code, along with a conviction of the accused of murder is illegal. **M. NALLI NARASIGADU**, *In re*, 16 Cr. L. J. 582 **135**

Penal Code—contd.

s. 224, *appeal from conviction for offence under—Appellant pleading illegality of confinement in stocks owing to his respectability—Appellate Court, duty of.*

Where in an appeal from a conviction for an offence under section 224 of the Penal Code, the appellant pleads illegality of the confinement in stocks on account of his respectability, the Appellate Magistrate should deal with that point before disposing of the appeal. **M. UPPALA KOTAYYA NAGARAM**, *In re*, 18 M. L. T. 310; 16 Cr. L. J. 672 **656**

s. 225B 154

s. 228—Interruption to Court, what acts constitute—Mere noise, if sufficient—Actions, when to be taken.

An audible remark by a person is not intentionally offering interruption to the Court so as to constitute an offence under section 228 of the Penal Code.

Action should be taken by Court under section 228 of the Penal Code only in exceptional cases as the Court in such cases is both a prosecutor and a Judge. **M. RAMASAMY GOUNDEN**, *In re*, 2 L. W. 686; 29 M. L. J. 274; 16 Cr. L. J. 610 **434**

ss. 297, 441—"Trespass" in s. 297, meaning of—Purchaser of land containing graves, if commits trespass by destroying graves—Purchaser, if acquires title in graves—Waqf.

The word "trespass" in section 297 of the Penal Code has not the same meaning as is attached to "criminal trespass" in section 441 of the same Code. It denotes there a wrongful act.

An act of a person who destroys or disturbs a place of sepulchre with the intention of wounding the feelings of any person, or with the knowledge that the feelings of any person are likely to be wounded is wrongful and amounts to a "trespass" within the meaning of section 297, Indian Penal Code, no matter whether the land in which the place of "sepulchre" is included does or does not belong to the persons who are guilty of the acts of destruction.

The sale of a *khasra* number containing graves does not and in law cannot pass to a vendee any proprietary rights in the graves which exist on that land at the time of the sale and the graves remain as before *waqf* property and so far as they are susceptible of possession remain in the possession of the persons whose relatives are buried in them.

Where, therefore, a vendee of a land which contains graves enters on the land and destroys the graves he enters not on his own property, but upon property which is *waqf* and which he cannot lawfully take possession of and his entry on the graves, for the purpose of destroying or levelling them is wrongful and amounts to a "trespass" on a place of sepulchre within the meaning of section 297 of Indian Penal Code.

Per *LeRossignol, J.*—The word "trespass" in section 297, Indian Penal Code, has not any peculiar meaning. **P. UMAR DIN V. EMPEROR**, 23 P. R. 1915 Cr.; 40 P. W. R. 1915 Cr.; 16 Cr. L. J. 683 **731**

s. 299 113

ss. 299, 300—Charge of murder—Provocation—Insufficient—Reduction of sentence—Statement of accused pleading guilty, value of.

A provocation though insufficient to bring a charge

Penal Code (Act XLV of 1860), s. 24**s. 34****649
128**

ss. 71, 326, 397—*Conviction for dacoity—Conviction also for grievous hurt, if legal—Criminal Procedure Code (Act V of 1898), s. 288—Sessions trial—Statement before Committing Magistrate, when admissible in Sessions trial—Charge to Jury—Misdirection.*

In a conviction for the offence of dacoity the grievous hurt should not be made the subject of a separate charge and a separate punishment should not be inflicted for it as provided in section 71 clause (2) of the Penal Code.

Under section 288 of the Code of Criminal Procedure, the statement of a witness before the Committing Magistrate will be evidence at the Sessions trial only when that witness was "produced and examined," that is examined as a witness and not if he is only cross-examined or tendered for cross-examination.

Where in a charge to the Jury it was stated that the knife with which the injury was inflicted was found in the accused's father's house without a further direction that it was not found in the house in which the accused was living and where it was also stated that the knife was covered with mammalian blood without stating at the same time whether it was human or not:

Held, that these were clear misdirections and that the verdict of the Jury based on a charge containing such misdirections was illegal and could not be sustained. **M. KOTAGADU, In re, (1915) M. W. N. 644; 16 Cr. L. J. 615** **439**

ss. 75, 392—*Conviction under sections 75, 392, whether for distinct offences—Separate sentences for each offence, if legal—Criminal Procedure Code (Act V of 1898), ss. 35, 106, applicability of.*

A person convicted under sections 392 and 75 of the Penal Code is not convicted of distinct offences within the meaning of section 35 of the Code of Criminal Procedure.

Section 106 of the Code of Criminal Procedure applies only when a person is convicted of an offence involving a breach of the peace. **M. MUTHURAKKA THEVAN, In re, 2 L. W. 681; 18 M. L. T. 121; 16 Cr. L. J. 611** **435**

ss. 82, 225B—*Criminal Procedure Code (Act V of 1898), s. 54—Arrest by Police of a boy less than 7 years of age for theft, legality of—Obstruction to such arrest, whether offence.*

As section 82 of the Penal Code exempts a child under 7 years of age from any criminal liabilities it is illegal for a Police Officer to arrest a boy less than 7 years of age for the offence of theft, and an obstruction offered to such arrest is not an offence under section 225B of the Penal Code. **M. SANTA CRUZ MORAIS, In re, (1915) M. W. N. 543; 16 Cr. L. J. 602** **154**

s. 86, construction of—*Intoxicated person—Knowledge—Intent.*

Per *Ayling, J.*—Under section 86 of the Penal Code ordinary drunkenness makes no difference to the knowledge with which a man is credited and if an accused knew what the natural consequences of his

Penal Code—contd.

act were, he must be presumed to have intended to cause them.

Per *Tyabji, J.*—Section 86 of the Penal Code does not lay down that an intoxicated person shall be dealt with as if he had the same intent as he would have had if he had not been intoxicated. **M. MANDRU GADABA, In re, 38 M. 479; 16 Cr. L. J. 627** **451**

ss. 87, 90, 304—*Death caused by consent under misconception of fact—Intention or knowledge of accused.*

The deceased, a middle-aged man, believed himself to have been rendered *da*-proof by charms and asked the accused to try a *da* on his right arm. The accused believed in the pretence of the deceased and inflicted a blow with a *da* with moderate force, with the result that the arteries were cut and the deceased bled to death:

Held, setting aside the conviction under section 304, Indian Penal Code, that the case was governed by sections 87 and 90, Indian Penal Code, and that the accused had no intention of causing death or grievous hurt and that he might not even have known that his act was likely to cause any such result. **L. B. NGWA SHWE KIN v. EMPEROR, 16 Cr. L. J. 581** **133**

s. 90 **133**
s. 149, 302—*Criminal Procedure Code (Act V of 1898), s. 537—Charge, omission in—Failure of justice—Unlawful assembly—Liability of all for offence committed by some.*

The specific common object of a riot need not necessarily be set out in a charge including section 149 of the Penal Code though it may be desirable to do so in a particular case.

A High Court will not interfere unless an omission in the charge has in fact occasioned a failure of justice.

Of the two parts of section 149 (1) the common object prosecuted and (2) the object which the members of an unlawful assembly must have known to be likely to be committed, for the application of the latter portion there must be an expectation founded upon facts known to all the members, amounting to something more than a mere speculation.

Where the whole of a party setting out from a particular town must have known that the common intention was to commit dacoity, that the party was going heavily armed, that there was every likelihood of something occurring either on their way or at the scene of dacoity to interfere with their highly criminal plans, and that their deliberate intention was to use their arms whenever necessary, either to effect the object in view or to avoid the risk of capture at any stage in the adventure, every one of them would be liable equally with others for the murders committed for which they were prepared beforehand and which they knew to be likely to occur. **P. DHIAN SINGH v. EMPEROR, 16 P. R. 1915 Cr; 17 P. W. R. 1915 Cr.; 16 Cr. L. J. 689** **737**

s. 176 **446**

s. 186—*Process-server—Obstruction to attachment.*

The persons seriously obstructing, insulting and jostling a process-server in the execution of his duty, are guilty of the offence under section 186, Indian Penal Code. **P. JATTO v. EMPEROR, 30 P. W. R. 1915 Cr; 16 Cr. L. J. 701** **748**

Oudh Rent Act—(1886)—conold.

take action under section 127 of the Oudh Rent Act in case the agreement is not proved.

No such amendment of plaint can be allowed as to raise a new case inconsistent with the case raised in the pleadings.

Where in a suit for recovery of arrears of rent the plaintiffs put up a definite case of a grain rent, it is for them to show how much grain was raised in the years in suit and how much of that grain is due to them and further to show what the market-rate of the grain was in each of the years in suit. They cannot rely upon the statistics of other years and the Court cannot strike a *مند* rate so as to arrive at the amount due to them. **O. BINDESWARI PRASAD SINGH v. BISHESHWAR SINGH**, 2 O. L. J. 383 **499**

— **S. 127—Trespasser, suit against**
— *Mesne profits, decree for—Jurisdiction of Civil and Revenue Courts.*

Section 127 of the Oudh Rent Act does not compel a person to recognise a trespasser as a tenant and to sue him for arrears of rent at such rate as the Revenue Court may consider fair and equitable. He has the option either of going to the Civil Court and suing him for possession and damages in the manner laid down in Order II, rules 2 and 4, Civil Procedure Code, or to acquiesce in his occupation and sue him for rent at a fair and equitable rate under section 127 of the Oudh Rent Act.

Where a person, who finds his agricultural land in the wrongful occupation of another, elects to sue him in the Civil Court for possession and mesne profits, the Court cannot, while giving a decree for possession, refuse that for mesne profits on the ground that the plaintiff's remedy lies in the Revenue Courts under section 127 of the Oudh Rent Act. **O. INDAR DAT v. BALGOVIND**, 2 O. L. J. 393 **364**

Pardanashin lady, deed executed by—Protection afforded by law—Burden of proof—Proof, matters of Independent advice—Attestation of document Document, execution of, inside parda—Attesting witnesses, what to ascertain before attestation.

In a suit brought upon a deed executed by a *pardanashin* lady the burden of proof rests not with her as attacking, but with the plaintiff as relying upon the deed and he must prove affirmatively and conclusively that it was not only executed by, but was explained to, and really understood by, her acting in the free and independent exercise of her will. It is not necessary, however, to prove affirmatively that she had independent advice at the time of the execution.

Where a *pardanashin* lady is unable under custom to appear before male witnesses, the attestation of a document, which by independent testimony is conclusively proved to have been executed by such a lady, is good, if the attesting witnesses present outside the *parda* satisfied themselves before attestation that there was no fraud and that the document had been actually executed by the lady inside the *parda*. **O. SUGHRA BIBI v. KAMLAPAT RAM**, 2 O. L. J. 313; 18 O. C. 147 **269**

—, summons, service upon **64**

Partition. See HINDU LAW.

—, See U. P. LAND REVENUE ACT,
s. 233 (k).

Partition—conold.

— *Mortgagee in possession—Party to partition between co-sharers—Objections to method of partition, when to be urged—Proprietor full, mortgagee subsequently becoming*

A mortgagee in possession of a share is a party to a partition between the co-sharers. If he has any objections to make to the method of partition, he should urge them at the proper time when the partition proceedings are being drawn up and not after they are confirmed, although he has become a full proprietor after the proceedings have been drawn up. **U. P. B. R. UDIT NARAIN SINGH v. RAM BAI**, 2 O. L. J. 381 **316**

—, suit for, on behalf of minor—Proof of malversation unnecessary **272**

Partition Act (IV of 1893), s. 4—‘Undivided family’ meaning of—Family member, right of, to compel outsider to accept money value for his share in family property.

The expression ‘undivided family’ in section 4 of the Partition Act must be taken to mean undivided *qua* the dwelling house in question and to be a family which owns the house but has not divided it. The condition is fulfilled if the parties are co-owners, whether as joint tenants or tenants-in-common; in either case a member of a family so owning is entitled to claim that the transferee of a share of such dwelling house, who is a stranger, shall accept a money valuation of his share therein. **S. KUNDANDAS v. DEUMAL**, 9 S. L. R. 84 **936**

Partnership — Dissolution — One partner authorised to collect outstandings and pay debts—Extent of authority, whether includes power to acknowledge debts—Acknowledgment **675**

— **assets, lands purchased out of—**

Presumption.

It cannot be laid down as an universal rule, that when lands are bought by partners in trade, and are paid for out of the partnership assets, they of necessity become part of the joint estate of the partners. There are different purposes for which the lands may have been bought.

If land is purchased out of the partnership assets and not used for the purpose of partnership business, the question is an open one and is to be determined on the general evidence. **S. GHUMANMAL v. PAPURBAI**, 9 S. L. R. 11 **24**

Party wall—Tenant-in-common entitled to build without consent of other tenants-in-common.

One of the tenants-in-common is not entitled to interfere with or build upon the party wall without the consent of the other tenants-in-common. **A. IKRAM ULLAH-KHAN v. MUHAMMAD YUNIS ALI KHAN**, 13 A. L. J. 473 **33**

Pauper suit—Application to sue in forma pauperis—Plaint showing prima facie case and cause of action—Court, duty of—Plea of limitation, if can be raised on mere surmises—Procedure, proper.

Where, in an application to sue in *forma pauperis* the allegations in the plaint suggest a *prima facie* case and show a cause of action, it is not open to a Judge to dismiss it on surmises which are not based on any evidence or on the pleadings filed in the case. The proper course is to frame an issue and decide it on evidence taken upon that issue. **M. DEVUPALLI AMMANNA v. PEDIREDLA NARAYANASAMI NAIDU** **689**

Possession—conold.

title or in the alternative for assessment of rent, the plaint, written statements, and issues in the case showed that the suit was based on trespass and on trespass only:

Held, that the mere fact that there was an alternative claim for rent would not make any difference on the question of limitation, because that claim was based on section 157 of the Bengal Tenancy Act. **C. BIRENDRA KISHORE MANIKYA V. GIRIS CHANDRA NAG**, 22 C. L. J. 154. **949**

Practice—Abatement set aside by one Division Bench—Order passed *ex parte*—Another Bench, if can re-open the same—Procedure **669**

Costs—Negligent conduct of case in lower Court—Case not properly set out and proper evidence not produced—Success in appeal—Right to costs **785**

Damages, assessment of—Reference **990**

High Court's power to enhance sentence beyond power of trying Magistrate **1000**

Munsif having tried a suit in part made Sub-Judge—Successor, decree passed by, in that suit—Appeal to former Munsif—Decision, if valid—Principles—Appellate Court, power of, to set aside lower Court's judgment—Mere bias or prejudice of Judge, effect of—Remedy.

A Munsif was promoted as a Subordinate Judge and his successor finished the remaining portion of a trial begun by him and delivered judgment. An appeal preferred against the decision in that case came before the former Munsif who was Subordinate Judge. He heard the appeal without any objection on the part of the parties and decided the appeal:

Held, that the decision of the appeal was not invalid inasmuch as there was no statutory disqualification for a Judge to hear an appeal in a case in which he himself did not pass the order or decree appealed against though he might have partly tried the suit or proceeding in which the order or decree was afterwards passed by another Judge.

Where there is no Statutory or Common Law disqualification in the Judge of a Court an Appellate Court should not set aside the judgment of that Court on the mere ground that it might have been swayed by bias or prejudice.

Semle.—Mere bias or prejudice on the part of a Judge does not disqualify him in the absence of a statutory provision.

The appropriate course in such cases is for the party to apply to the proper superior Court to have the case transferred to another Court. **M. VENKATAPATHI NAYANIVARU V. MAHOMED SAHIB**, 38 M. 531. **430**

Remand, to custody when to be ordered **993**

Service, insufficient, on appellant—Pleader informed of date of hearing—Appearance by Pleader without instructions, effect of—Dismissal of appeal in default, if legal.

Where an appellant is not properly served although his Pleader is informed of the date of hearing, and the Pleader alone appears on that date but states

Practice—conold.

that he is unable to prosecute the appeal for want of instructions, the appeal should not be dismissed in default. **U. P. B. R. SUKH MANGAL TEWARI V. RAUNAQ BIBI**, 2 C. L. J. 199. **199**

Suit against deadman—Amendment of plaint into one as against legal representative if allowable **679**

Time granted to a party to do a thing till a "certain date"—That date, if included.

Where time is given by a Court to a party to a suit for the performance of an act till a certain date it includes that date. **M. SUDALAYADUM PERUMAL NADAN V. SIVANANJI NADACHI**, 2 L. W. 729; 18 M. L. T. 199. **544**

Pre-emption. See **BUDDHIST LAW.**

Claim based on foreclosure of mortgage with conditional sale—Presumption that pre-emptor is suing for his own benefit—Plea of equal right of pre-emption, if allowed for first time in appeal—Owning land under building, if give status of land-owner—Vendee to prove improvements and produce accounts—Vendee, right of, to get price paid in good faith—Compensation for litigation and improvements, when allowed—Compound interest—Costs—Punjab Pre-emption Act (II of 1905), ss. 12, 16—Use of title by Pleader.

Unless the contrary is clearly established, it is to be presumed that a plaintiff sues for his own benefit.

A plea of the vendee that he has got an equal right of pre-emption with the pre-emptor cannot be raised for the first time in appeal specially where the materials on the record are insufficient to support it.

A person owning a plot of land under building is not a land-owner within the meaning of and for the purposes of section 12 of Act II of 1905, even if it is assessed with some land revenue.

It is the duty of the vendee or mortgagee to establish his claim for improvements by the most satisfactory evidence and production of accounts if any.

Section 16 of Act II of 1905 does not expressly allow a Court to award to vendees more than the market value or what they paid in good faith for the bargain, but the section is not exhaustive and equities are not excluded. A party who asks for equity must show that he has acted throughout fairly and honestly. So a vendee is not generally entitled to get compensation for litigation connected with the pre-empted property, but under special circumstances, he may be allowed to get it.

Compound interest is not interest on interest it is interest on a sum or sums which were interest, but which on default, etc., at once became principal.

When the vendee opposes the pre-emptor's claim on several grounds including inadequacy of the price, the latter is entitled to get his costs although the former succeeds in getting much more than what was offered by the pre-emptor.

A Pleader cannot arrogate to himself, if any, title which he is not authorized to use by any competent authority. **P. SHAM SUNDAR V. HARBANS SINGH**, 109 P. W. R. 1915; 71 P. R. 1915. **517**

Contract, whether can create right of pre-emption in Oudh—Construction of document—Transfer prohibited to be made to any other than one specified person, effect of.

Pre-emption—concl'd.

A right of pre-emption in Oudh can be created by a contract.

Where a clause in a deed prohibits transfer of property to any person other than the one mentioned in the deed, a right of pre-emption is created by that clause in favour of such latter person, and his only remedy is to enforce this right. **O. GIRIBALA DEVI v. CHANDIKA SINGH**, 2 O. L. J. 289; 18 O. C. 104 **265**

Proof—Custom.

In a suit for pre-emption based upon custom it lies upon the plaintiff not merely to prove the existence of some custom of pre-emption but to prove the existence of a custom under which he himself has a right to pre-empt. **A. MUHAMMAD MAHBUB ALI KHAN v. RAGHUBAR DAYAL**, 13 A. L. J. 951 **947**

Bundelkhand Land Alienation Act (II of 1903), s. 3—Sanction by Collector to bring suit for pre-emption, when required.

There is no provision in the Land Alienation Act, which entitles an intending pre-emptor to get the sanction of the Collector to bring a suit for pre-emption. The sanction contemplated in section 3 of the Act applies to a voluntary transfer. **A. SURAJ BHAN v. SOMWARPURI**, 13 A. L. J. 949 **949**

Presidency Insolvency Act (III of 1907), s. 43, proceedings under, nature of.

Proceedings under section 43 of the Insolvency Act are in the nature of criminal proceedings and hence there should be a definite charge, a finding and a conviction as a foundation for the sentence. **M. RAMASAMY CHETTI v. BANK OF MADRAS** **839**

Presidency Small Cause Courts Act (XV of 1882), ss. 19A, 38 488

Press Act (I of 1910), s. 4 (1)—Order made by Governor-General in Council in Delhi—Local Government—Jurisdiction of High Court of Calcutta.

The Governor-General in Council in pursuance of section 4 (1) of the Press Act, 1910, declared all copies of the issue of the newspaper called *The Comrade* bearing the date the 26th of September 1914 and published in Delhi, wherever found to be forfeited to His Majesty. This order was served on the person concerned. A recipient of a copy of the newspaper in Calcutta applied to the High Court to have the order of forfeiture set aside.

Held, that the High Court had no jurisdiction to interfere with the order made by an authority exercising at Delhi the powers of a Local Government. **C. In re ABUL KALAM AZAD**, 42 C. 730; 16 O. R. L. J. 698 **746**

Presumption. See ADVERSE POSSESSION; BEN-GAL TENANCY ACT; PUNJAB TENANCY ACT, s. 5.

Buddhist monk, power of disposal of property 112

Grant—Water, free grant of, on any condition—Water-cess, if can be imposed 425

Hindu Law—Joint family—Ancestral business—Minor members, liability of 815

Partnership assets, land purchased out of 24

Presumption—concl'd.

Possession—Rebutting of presumption—Compromise—Security for keeping the peace, order as to, cancellation of—Criminal Procedure Code (Act V of 1898), s. 106.

The presumption that possession is with that party who has sown crops on the land is rebutted when that party goes armed to attack the opposite party, in which case possession must be held to be with the party who was attacked.

Security to keep the peace taken from one of the parties should be cancelled when under a compromise between both parties one party is allowed to be in peaceable possession. **M. In re RANGA GOWNEN** 16 Cr. L. J. 700 **748**

Restitution of conjugal rights—Legal cruelty 924

Tenancy—Possession 931

Tenure of insignificant area 53

Title—Lands lying waste 191

Principal and agent—Agency, termination of—Agent throwing up work and leaving place of business—Starting point of limitation—Re-joining work, effect of.

Where an agent throws up the agency and leaves his place of business, the agency is terminated within the meaning of Article 89, Schedule I, of the Limitation Act. The fact that he subsequently goes back to the place, and does some business, cannot prevent the running of time as regards the first agency unless there is any acknowledgment of liability to account. **M. PALANIAPPA CHETTI v. ALAGAPPA CHETTI** **691**

Contract Act (IX of 1872), ss. 201, 209, 253—Death of principal—Agency, termination of—Implied agency—Agreement to render accounts yearly—Limitation Act (IX of 1908), Sch. I, Arts. 89, 115, 132—Accounts, suit for—Agent's immoveable property hypothecated as security—Demand and refusal—Termination of agency—Limitation—Agent's duty to submit and explain accounts.

Where an agent's immoveable property is hypothecated as security for the due discharge of his duty as agent, and his principal seeks to realise from him whatever sum may be found due on adjustment of accounts, by sale of the immoveable property hypothecated, the suit is one to enforce a charge on immoveable property within the meaning of Article 132 of the Indian Limitation Act.

An agency is terminated by the death of the principal and the agent does not continue to be the agent of the heirs of the deceased principal as he was before his death, but if the agent continues to work for the heirs a new agency is created by implication; and if under such new agency the parties agree that accounts should be submitted from year to year, a suit for accounts would be governed by Article 59 and not by Article 115 of the Limitation Act.

Where a principal's suit against his agent is governed by the second alternative provided in Article 89 of the Limitation Act, namely, where time runs against the principal from the date of termination of the agency, and a suit is brought within three

Principal and agent—concl'd.

years, the principal is entitled to accounts for the entire period of the agency.

If there has been a demand for accounts and the agent has not responded to the call, there is, by implication, a refusal within the meaning of Article 89. If, however, the principal demands an account and the agent submits papers, there is not necessarily a refusal on the part of the agent to render accounts unless the agent fails to respond to the further demand of explaining the papers submitted by him.

When there is nothing to show that there was a demand and refusal, a claim for accounts would be governed by the second alternative in the third column of Article 89.

The duty of an agent when he is called upon to render account to his principal does not terminate merely by the submission of account papers; he is bound to explain those papers, and if, on accounts taken; it is found that he has in his hands money which belongs to his principal, he is bound to pay that sum.

If an agent for collection has submitted the collection papers to one of the several principals, he is under no obligation to submit papers, again to the other principals; and he cannot be held responsible for the production of the papers, if they are not produced by the person to whom they were submitted by him. But he is obliged to produce such papers as have not already been produced and to explain all the papers to the satisfaction of the Court. *C. MADHUSUDAN SEN V. RAKHAL CHANDRA*, 19 C. W. N. 1070 **697**

Privy Council Appeal. See **APPEAL**.

Concurrent findings of Appellate Court and Court below—Substantial question of law.

No appeal lies to the Privy Council unless there is a substantial question of law arising on the concurrent findings of the Appellate Court and the Court below, i. e., a question of law not already settled by several previous decisions of the Privy Council. *O. NISAR HUSAIN V. ASHRAF-UN-NISA*, 2 O. L. J. 214 **239**

leave as to, application for—Subject-matter of suit, real or market-value of, investigation as to—Civil Procedure Code (Act V of 1908), O. XLV, r. 5—Admission in pleadings, effect of—Estoppel.

The real or market-value of the matter in dispute is the test as to whether or not an appeal lies to the Privy Council. But where the plaintiff asserts in his plaint that such value is less than Rs. 10,000 and it is accepted by the defendants in their written statement and is not challenged even afterwards in appeal, they cannot subsequently be heard to say that in spite of their admission in the written statement, the real value is over Rs. 10,000 and claim that they have a right to have this matter investigated for the purpose of determining the question of the right to appeal to the Privy Council. *O. JAGANNATH BAKSH V. MENDANA*, 2 O. L. J. 208 **204**

Prize Court—Enemy ship, capture of—Goods consigned before war to enemy merchants, confiscation of—Test—Property in goods at time of capture—Risk—Confiscation, liability of.

Prize Court—concl'd.

The *Rappenfels*, a German merchantship, sailed from Calcutta on the 2nd of August 1914 with goods consigned by British subjects to British as well as German merchants. War was declared between Great Britain and Germany on the 4th of August 1914. The ship was captured and was in due course condemned as good and lawful prize by the Prize Court in Ceylon, but was sent to Calcutta in order that the liability to condemnation of the cargo might be considered and determined by the High Court at Calcutta. The bills of lading of the goods were made out to the order of the consignors and were endorsed by them in blank and at the time of the capture of the ship the price was not paid and the bills of lading were still held by the consignors. The Crown maintained that they were liable to confiscation as the risk, not the property, was the test of liability to confiscation:

Held, (1) that in determining the question of liability to confiscation regard must be had to the property in goods and not the risk;

(2) that the sellers had not the idea of passing the property to the buyers at the time of appropriating the goods to the contract and that the property in the goods consigned, therefore, remained in the sellers;

(3) that under the circumstances the goods were not liable to confiscation. *C. CARGO ex S. S. RAPPENFELS, In re*, 42 C. 334 **174**

Probate. See **WILL**.

revocation of, application for—Probate proceedings—Reversionary heir, whether entitled to intervene—Statement as to relations of deceased to be correct—Probate and Administration Act (V of 1881), s. 50, 69—Special citation, conditions of—Grant of Probate, defect in—Person bound by proceedings to which he is no party, when—Full knowledge—Burden of proof—Waiver, effect of.

A reversioner under the Hindu Law has no present alienable interest in the property left by the deceased but he is substantially interested in the protection or devolution of the estate, and as such is entitled to appear and be heard in a Probate proceeding relating to the deceased's property.

Where an applicant for Probate chooses to make a statement as to the relations of the deceased, the information he gives to the Court must be correct and not misleading.

In a case where a Will is propounded which alters the devolution of property the District Judge should, in the exercise of the discretion vested in him by section 69 of the Probate and Administration Act as to the mode of issuing citations, direct special citations to persons whose rights are immediately affected by the Will.

Where a Court misled by the untrue statement of an applicant for Probate did not direct the issue of special citation on a relation of the deceased, as it would undoubtedly have done if apprised of his existence:

Held, that the proceeding to obtain the grant was defective in substance, within the meaning of the first clause of the explanation to section 50 of the Probate and Administration Act.

If a person knowing what was passing was content to stand by and see his battle fought by somebody else in the same interest, he should be bound by the result and not be allowed to re-open the case.

Probate—concl'd.

Where a person has full knowledge of the proceedings and has capacity to make himself a party he is bound by proceedings to which he is no party and of which he has received no notice from Court.

Where in answer to an application for revocation by a person on whom citation should have been issued, it is pleaded that he did not intervene though aware of the proceedings, the burden of proof that he had full knowledge is on the person who alleges it, it is not necessary for the party who applies for revocation to prove not only that no special citation was served on him but also that he had no knowledge of the proceedings.

There can be no acquiescence without full knowledge both of the right infringed and of the acts which constitute the infringement.

A person cannot be barred of his remedy on the ground of waiver unless at the time of the alleged waiver he is shown to have been fully cognizant of his right and of the facts of the case.

A waiver must be an intentional act with knowledge. **C. SHYAMA CHARAN BAISYA v. PRAFULA SUNDARI**, 21 C. L. J. 557; 19 C. W. N. 882 **161**

—, revocation of—Non-citation—Special notice, non-service of, effect of.

The Probate of a Will cannot be revoked on the mere ground of non-citation without a consideration of the other questions arising therefrom. **C. NALINI SUNDARI GUPTA v. BEJOY KUMAR ROY**, 21 C. L. J. 555 **12**

Probate and Administration Act (V of 1881), ss. 50, 69

— s. 86 **394**

Procedure. See CIVIL PROCEDURE CODE, O. XL, R. 4.

— Abatement set aside by one Division Bench—Order passed *ex parte*—Another Bench, if can re-open the same **669**

— Disposal of suit in manner not warranted by law—Consent of parties, effect of.

No agreement between the parties to a cause would enable a Court to dispose of a case in a manner not recognised by law or by authority. **M. POTLA SUBBARAYUDU v. RAVI LAKSHMAYYA**, 2 L. W. 605; 18 M. L. T. 93 **260**

— New plea set up at close of case—Amendment of plaint **41**

— Pauper suit—Application to sue in *forma pauperis*—Plaint showing *prima facie* case and cause of action—Court, duty of—Plea of limitation, if can be raised on mere surmises—Procedure, proper **689**

Professional misconduct. See LEGAL PRACTITIONER.

— Pleader accepting fees for whole case and failing to appear after few hearings—Presumption—Terms of engagement—Procedure.

Where an Advocate receives instructions from his

Professional misconduct—concl'd.

lay client or his friends, it is incumbent on him to see that the terms of his engagement are clear and are understood by his client; and in the absence of a special contract to the contrary, the fee should be presumed to have been taken for the whole case. It is desirable that an Advocate should take a note in writing from the person paying the fee of the terms of the engagement and should make a similar note on the receipt for fee given by him.

Where a case takes more hearings than anticipated by an Advocate at the time of his engagement and he refuses to appear in the case unless he is paid a further fee he is guilty of professional misconduct. **L. B. In the matter of A FIRST GRADE PLEADER**, 16 Cr. L. J. 707 **995**

Pro forma defendant made plaintiff—New party—Limitation Act (IX of 1908), s. 22.

A *pro forma* defendant, who is made a plaintiff, after the period of limitation, is not a new party within the meaning of section 22 of the Limitation Act, 1908. **C. DWARKA NATH DASS v. MONMOHAN TOPEDAR**, 21 C. L. J. 611; 19 C. W. N. 1269 **34**

Promissory note executed and signed by guardian in his individual capacity—Money spent for purposes binding on minor—Minor's estate, if liable—Negotiable Instruments Act (XXVI of 1881), ss. 28, 30 Bills of Exchange Act, 1882, (45 & 46 Vict. c. 61), s. 28.

Where the mother of the defendant borrowed from the plaintiff certain moneys for purposes binding on the defendant and executed a promissory note therefor but did not sign the same as guardian and the defendant was sued on the note:

Held, that the estate of the defendant was liable for the debt.

The Negotiable Instruments Act contains no provision as to promissory notes signed by guardians. Sections 28 and 30 of the Act do not cover all cases of representatives and cannot, therefore, be applied to guardians.

The case of one person signing for another who is *sui juris* is not in *pari passu* with that of a person executing a document on behalf of another who is incapable of contracting.

Where the validity of a transaction has to be looked at from two standpoints, each of them should be regarded as supplementing the other. The doctrine of Hindu Law is not to be ignored because a contract coming under its purview is also regulated by another provision of law. **M. PADMA KRISHNA CHETTIAR v. NAGAMANI AMMAL**, 18 M. L. T. 216 **574**

— Minor—Guardian—Promissory note executed by alleged guardian—Liability of minor.

The executant of a promissory note was described in the body of the note as the guardian of a minor and the necessity for borrowing was stated in it as arising from the minor's father's debt:

Held, that on these facts the minor was not liable on the promissory note. **M. RAMASAMY MUDALIAR v. MUTHUSAMY AYYAR** **481**

ver—Estoppel.

... a suit against one ... set aside the adop-
... The suit was decreed
... on appeal to the High Court
... set aside, the question of the
... open until the death of Ohhaya
... afterwards an application was made to
... Judge under section 31 of Act VIII of
... for leave to raise certain moneys to pay off debts
... from the son of Nilkanta, then a minor, by
... granting a *putni* of a certain portion of the estate,
... and the plaintiff's husband appeared before the
... District Judge and expressed his desire to take the
... *putni* lease at a premium of Rs. 10,000:

Held, (1) that this was a clear case of waiver, by
the plaintiff's husband who with full knowledge of
his rights obtained the *putni* which recognised the
validity of the adoption of Nilkanta;

(2) that the plaintiff was estopped from questioning
the adoption of Nilkanta, as she was still in
possession of the property comprised in the *putni*,
and claimed through her late husband.

That whether the adoption of Nilkanta be or be not
valid the plaintiff cannot succeed in this suit. **C**

KIRANBALA DEBI V. KALI CHARAN SINGHA **29**

Provincial Insolvency Act (III of 1907), ss. 13, 16, 34—Interim Receiver, appointment of, object of—Attachment of insolvent's property before adjudication, effect of—Creditor, right of.

In an insolvency case an order for the appointment of an interim Receiver of the property of the debtor is made for the protection of the estate of the debtor for the benefit of the entire body of creditors.

A creditor who had attached a sum due to the insolvent before the estate of the insolvent vested in the Receiver appointed after the adjudication order, is entitled to apply it exclusively in satisfaction of his claim. **C. MADHU SARDAR V. KHITISH CHANDRA**, 42 C. 259 **82**

s. 16 **82**

s. 16 (2)—Decree against

the estate of deceased debtor—Execution—Heirs insolvents after decree but before execution—Estate, whether liable in the hands of Official Receiver—Civil Procedure Code (Act V of 1908), s. 52, scope of.

Where after the passing but before the execution of a decree for realisation of the debts of a deceased debtor from his estate in the hands of his heirs the heirs become insolvent, the deceased's estate like other assets of the insolvents vests in the Official Receiver and is immune from execution proceedings under section 16 (2) of the Provincial Insolvency Act and the creditor must prove his debt like other unsecured creditors.

Section 52, Civil Procedure Code, merely states the extent to which and the manner in which debts can be recovered and in no way provides for the reservation of property to satisfy them. **M GADA LAKSHMI NARAYAN V. PILLALAMARRI JAGANADDA ROW**, 18 M. L. T. 147 **256**

s. 16 (2)—"Pendency

of the insolvency proceedings", meaning of—Proceedings, when terminate—Right of creditor seeking to enforce his right of suit or execution application

Provincial Insolvency Act—contd.

during insolvency proceedings—Leave of Court, when to be obtained—Limitation Act (IX of 1907), Sch. I, Art. 182 Application for execution without obtaining leave of Court under section 16 (2) of Provincial Insolvency Act, if legal.

A obtained a money-decree against B and C on 10th April 1903, B and C were adjudged insolvents on 1st June 1910 under the Provincial Insolvency Act and by orders of the Insolvent Court on 17th November 1912 and 26th February 1913, respectively, their discharge was suspended till 11th November 1913. On 12th October 1914, A applied for execution of his decree against B and C relying for the purpose of saving limitation on a prior execution application by him on 7th June 1913 while the discharge of B and C remained suspended. It was contended on behalf of B and C that A's application of 7th June 1913, having been made during the pendency of the insolvency proceedings and the leave of the Court not having been obtained, was not an application in accordance with law and was barred by section 16 (2) of the Provincial Insolvency Act:

Held, that the phrase 'pendency of the insolvency proceedings' in section 16 (2) must be construed with reference to the object of the enactment, which was to prevent a general scramble of creditors for the assets, that this object was achieved when the assets were collected and distributed in an orderly manner by the Receiver and that the final dividend having been declared and distributed before the 7th June 1913, the insolvency proceedings were no longer pending so as to operate as a bar under section 16 (2) of the Provincial Insolvency Act:

Held, also, that as the leave referred to in section 16 (2) could be granted after the application was filed and would relate back to the date of the application, the Court might have received the application and then granted the leave, and that as the application also prayed for a relief that the Court was competent to give, it was in accordance with law. **S. FIRM OF GOPALDAS V. PAHLUMAL HEMANMAT**, 9 S. L. R. 34 **37**

s. 16 (3) **950**

ss. 16 (4), 46 (4)—

Limitation Act (IX of 1907), ss. 5, 7, 29 (a)—Charter Act (24 & 25 Vict. C. 104), s. 15—Official Receiver, whether necessary party to suit against insolvent's property—Power of Court to excuse delay in presentation of appeal—Appeal, when to be treated as revision.

Per *Oldfield* and *Sadasiva Aiyar, JJ.*—An Official Receiver is a necessary party to any proceedings affecting the insolvent's estate when once it has become vested in him under section 16 (2) (a) of the Provincial Insolvency Act. Any order affecting the estate in his absence is clearly illegal. Proceedings so instituted cannot be rectified by impleading him subsequently in an Appellate Court.

An appeal against an order affecting the estate of an insolvent even if presented out of time can be treated as a revision petition and a High Court can interfere with such an order under section 15 of the Charter Act if it is clearly illegal and interference is necessary in the interests of justice.

Per *Oldfield, J.*—In regard to the applicability of sections 5 and 12 (2) of the Limitation Act to the

Provincial Insolvency Act—contd.

orders passed under section 46 (4) of the Provincial Insolvency Act, there is no reason for distinguishing between cases under the Madras Forest Act and the Provincial Insolvency Act and the time taken in obtaining copies of judgment cannot be deducted in favour of an appellant.

Per *Sadasiva Aiyar, J.* (dissenting)—The power to excuse delay in the presentation of an appeal under section 5 of the Limitation Act, can also be exercised in regard to appeals presented beyond period of limitation prescribed by a special or local law; in the cases which hold otherwise, the question did not distinctly arise for decision. **M. MUNJULURI SIVARAMAYYA v. SINGUMAHANTI BUJANGA RAO**, 18 M. L. T. 200 **703**

s. 27—Insolvency proceeding, scheme of arrangement proposed by insolvent in—District Judge, duty of, under Insolvency Act—Creditors, approval of scheme by—Scheme proposed by insolvent when rejected.

Where in an insolvency proceeding a proposal is made on behalf of the insolvent for a scheme of arrangement of his affairs the District Judge must, under the provisions of section 27 of Act III of 1907, fix a date for consideration of the proposal and issue notice to all creditors and put the scheme before them. If a majority in number and three-fourths in value of all the creditors whose debts are proved and who are present in person or by Pleador resolve to accept the proposal, it is the duty of the Court to consider whether it shall or shall not approve the proposal. The fact that the proposal is approved by the creditors does not involve approval by the Court. But if there is no such majority in favour of the proposal it will stand rejected whatever be the opinion of the Court as to its merits. **O. SHAFIQ-UZ-ZAMAN v. DEPUTY COMMISSIONER**, 18 O. C. 125 **694**

ss. 31, 34—Property sold in execution of decree before adjudication—Secured creditor, right of.

P obtained a decree against *E*. In execution of the decree he attached certain property of *E* and put it to sale. After the realization of the sale-proceeds, the judgment-debtor was declared insolvent:

Held, that *P* was entitled to recover his debt out of the sale-proceeds.

B brought a suit against *E* and attached certain property of *E* before judgment. He obtained an *ex parte* decree against the defendant. The property so attached was sold in execution of another decree and certain sale-proceeds were realized. In the meantime the Subordinate Judge had set aside the *ex parte* decree on the condition that a certain portion of the sale-proceeds would stand security for any decree that might be passed in the suit in favour of *B*. Subsequently the judgment-debtor was declared insolvent. Ultimately a decree was passed in favour of *B*:

Held, that *B* was a secured creditor and he was entitled to draw out the money which stood security for his claim against *E*. **A. PARSOTAM DAS v. DAVID**, 13 A. L. J. 893 **779**

s. 34, 82, 779
ss. 46 (3), 47—Dismissal of application on the ground of fraud, meaning of—Appeal—Revision.

Provinci.

Under section vency petition if an abuse of the process petition was presented fraud but not if the fraud is an

Where the leave required under not obtained from the District Court, Court may treat the appeal as revision under given by section 47 (2). **L. B. MAUNG PO MAUNG PO KYIN**

s. 46 (4) 703

s. 47 943

Provincial Small Cause Courts Act (IX of 1887), s. 23 753

s. 25 353, 493

s. 25—Revision—Limitation—Wrong decision—Limitation Act (IX of 1908), Sch. I, Art. 68—Punjab Loans Limitation Act (I of 1904).

The defendants executed an agreement in which they acknowledged the receipt of an advance to deliver certain goods within a fixed period and further agreed that on a breach of their contract they would pay damages to the plaintiff and return the amount paid in advance to the plaintiff. The plaintiff sued and it was pleaded that his suit was barred by limitation. The agreement contained a clause to the effect that if any delivery were made the fact should be entered on the agreement itself or a separate receipt be obtained. No such entry was made and no receipt was obtained and the evidence produced by the defendants as to delivery was found to be worthless. The Small Causes Court decreed the claim holding on the point of limitation that Article 68 of the Limitation Act read with Act I of 1904 applied:

Held, that the decision as to the question of limitation was wrong, but that as it appeared that substantial justice had been done by the decree of the Small Cause Court, there was no ground for interference. **P. SHER KHAN v. GOKAL CHAND**, 171 P. L. R. 1915; 107 P. W. R. 1915 **429**

Sch. II, Art. 13—

Suit for dues accruing to hereditary office in temple—Civil Procedure Code (Act V of 1908), s. 86—Suit against Ruling Chief—Consent of Governor-General.

Where the plaintiff, a purveyor of a temple, sues for dues accruing to him by reason of his hereditary office and not for the value of goods received by the temple, the suit is not cognisable by a Small Cause Court.

A Ruling Chief cannot be sued in a competent Court without the consent of the Governor-General in Council obtained under section 6, Civil Procedure Code, whether he is a principal party or only a *pro forma* defendant in a case, inasmuch as the section makes no distinction between cases in which personal relief against a Ruling Chief is sought and others.

Where the Raja of Cochin was sued as the Cochin Sircar represented by the Dewan of Cochin:

Held, that the suit being virtually against the Raja was forbidden by section 86 of the Civil Procedure Code. **M. KUTTIYALI VADAKKEDATH v. BANERJI AVERGAL**, 18 M. L. T. 163 **351**

Public Charity, suit against. *See* CIVIL PROCEDURE CODE, 1908, s. 92.

Public Document. *See* EVIDENCE ACT, s. 66.

Public place—"Place of public resort," meaning of—*Madras City Police Act* (III of 1888), s. 75.

A legal right of access by the public is not necessary to constitute a public place. A public place is one where the public go, no matter whether they have a right to go or not.

The harbour premises which respectable people and other people who have business are permitted to enter, are "places of public resort" within the meaning of section 75 of the *Madras City Police Act*. *M. EMPEROR v. GOVINDARAJULU*, 2 L. W. 937; 16 Cr. L. J. 704 **752**

Punjab Alienation of Land Act (XIII of 1900), ss. 6, 9—*Consideration—Bond in favour of mortgagee non-agriculturist by agriculturist in lieu of mortgage-bond—Consideration.*

Where A in consideration of the money due to C, executed a registered mortgage-deed of his land in favour of B, which transaction did not contravene the provisions of the *Punjab Alienation of Land Act* and B executed a registered bond for the same amount in favour of C:

Held, that the bond by B in favour of C was with consideration although the execution of the mortgage-deed in favour of C by A would have infringed the provisions of the said Act. *P. MUZUFFAR KHAN v. WAISAKHI RAM*, 105 P. W. R. 1915 **509**

— **s. 9** **509**

Punjab Courts Act (III of 1914), s. 41 **505, 507**

Punjab Land Revenue Act (XVII of 1887), ss. 101A, 101B **455**

Punjab Loans Limitation Act (I of 1904) **429, 491**

Punjab Municipal Act (III of 1911), s. 219—*Autrefois acquit—Constructing building without permission—Conviction for prospective disobedience—Jurisdiction of Magistrate to order demolition.*

A Magistrate is competent to convict and sentence an accused for constructing a building overhanging a Municipal street under section 219 (2) of the *Punjab Municipal Act* but he is not authorised to pass an order for demolition of the building, nor can he pass a sentence of daily fine until such time as the building should be demolished.

Where the Chief Court set aside the order directing the demolition of a building and fine for prospective disobedience:

Held, that the order of the Chief Court was no bar to a fresh prosecution in respect of proved initial disobedience and continuing breach of the Municipal Committee's notice. *P. EMPEROR v. MOHAN LAL*, 119 P. L. R. 1915; 16 Cr. L. J. 605; 38 P. W. R. 1915 Cr. **157**

Punjab Pre-emption Act (II of 1905), ss. 12, 16 **517**

Punjab Tenancy Act (XVI of 1887), s. 5 (1) (a), (2)—*Presumption not rebutted, effect of.*

Where the presumption given in clause 5 (2) of the

Punjab Tenancy Act—*conold.*

Punjab Tenancy Act, has not been rebutted, the plaintiff is entitled to occupancy rights under section 5 (1) (a). *P. KANWAN v. NATHU SINGH*, 2 P. W. R. 1915 Rev. **845**

— **ss. 70, 70 (2), 74, 84 (5)**—*Notice of ejectment—Landlord and tenant—Compensation for improvement—Court-fee for the amount claimed—Revision.*

Courts have no power to ask a tenant to pay Court-fee for improvements claimed by him, but are bound to determine the amount in a suit to contest a notice of ejectment.

A finding on merits cannot be disturbed in revision.

It is a material irregularity justifying revision not to determine the question of compensation in pursuance of section 70 (2) of the *Punjab Tenancy Act*. *P. WASAYA v. ISA*, 4 P. W. R. 1915 Rev. **848**

— **ss. 70 (2), 74, 84 (5)** **848**

Putni lease. *See* LEASE.

Railways Act (IX of 1890), s. 75—*Passenger's luggage booked, loss of—Liability of Company.*

The luggage of a passenger which is booked is a package within the meaning of section 75 of the *Railways Act*. If the luggage contains silver and silk as regards which the passenger does not make any declaration at the time of booking, the Railway Company is not liable for its loss. *A. EAST INDIAN RAILWAY v. M. K. ROY*, 13 A. L. J. 658; 37 A. 463 **400**

Railway receipt—*Title to goods—Possession as pledgee of receipt, effect of—Local custom—Charge—Provincial Insolvency Act (III of 1907), s. 16 (3).*

A railway receipt is a mercantile document of title to goods.

Where the local custom of the trade was that lawful possession as pledgees of a railway receipt entitled the holder of that receipt to get possession of the goods from the carrier and to retain the goods as security for the moneys advanced on pledge of the railway receipt:

Held, that the custom really created a charge on the goods themselves in the possession of the carrier and as soon as the pledge was made the insolvent's right to get delivery from the Railway Company ceased. The goods were no longer in the eye of the law in "the possession, order or disposition of the insolvent" within the meaning of clause (3) of section 16 of the *Provincial Insolvency Act* as against the right of the pledgee to get possession of the goods and sell the same for re-imbursing the advances made by him. *M. FAKHERAPPA v. THIPPANNA*, 38 M. 664 **950**

Receiver. *See* CIVIL PROCEDURE CODE, 1908, O. XL, r. 1.

— *Provincial Insolvency Act (III of 1907), ss. 13, 16, 34—Interim Receiver, appointment of, object of—Attachment of insolvent's property before adjudication, effect of—Creditor, right of* **82**

Redemption. *See* MORTGAGE.

Reference. See CRIMINAL PROCEDURE CODE, s. 307(1).

Damages, assessment of—Practice.

Cases should only be referred to other persons for assessing damages where the inquiry involves questions of detail which it would be wasting the time of the Court to investigate. **C. D. N. GHOSE v. POPAT NARAIN**, 42 C. 819; 19 C. W. N. 609 **990**

Registration Act (III of 1877), s. 2 (6) & (9) 281

s. 17 (n)—Receipt re-

leasing liability to pay compound interest as written in mortgage-deed, if required registration.

A receipt by a mortgagee releasing the mortgagor from the liability to pay compound interest as written in the mortgage-bond, does not require registration, and operates as a full acquittance for the money already paid. **C. KAILASH CHANDRA NATH v. SHEIKH OHHENU**, 42 C. 546 **804**

Registration Act (XVI of 1903), s. 35

—Interlineation at end of deed—Denial of execution by executant—Deed, if can be registered.

Where there is an interlineation at the end of the deed and the parties are not prepared to admit it, a Sub-Registrar is justified in refusing to register the deed. In such cases the executant must be taken to have denied the execution within the meaning of section 35 of the Registration Act. **M. VEERAPPA CHETTIAR v. VISVANADHA AIYAR**, (1915) M. W. N. 543 **507**

— s. 50 7

Relinquishment. See EX-PROPRIETARY RIGHT.

Rent, enhancement of, suit for—Landlord and Tenant Procedure Act (B. C. VIII of 1869), ss. 14, 18, scope of 'Prevailing-rate', how to ascertain.

A rate brought into existence by the landlord pending disputes with the tenants regarding enhancement of rent is not contemplated by the term 'prevailing rate' mentioned in section 18 of Act VIII of 1869. **C. ASIR MAHOMED SHEIKH v. RAJA PROBHAT CHANDRA BARUA**, 21 C. L. J. 576 **1**

— suit—Bengal Landlord and Tenant Procedure Act (VIII of 1869 B. C.), s. 102, scope of Appeal, when maintainable—Bengal Tenancy Act (VIII of 1885), s. 153, scope of—Amount of rent payable, question as to.

An appeal under section 102 of Act VIII of 1869 (B. C.) lies only in cases in which a question of right to enhance or vary the rent of a raiyat or tenant or any question relating to a title to land or to some interest in land as between parties having conflicting claims thereto has been determined by the judgment.

No appeal lies under section 102 in cases in which merely a question as to the amount of rent payable is involved.

Section 153 of the Bengal Tenancy Act provides for an appeal in cases where there is a decision on a question of the amount of rent annually payable by a tenant. These words do not occur in section 102 of Act VIII of 1869; and therefore no second appeal lies in the case governed by section 102. **C. DINA NATH SARMA v. SARAN RAM DEB** **277**

Rent suit—concl'd.

Commutation—Bengal Tenancy Act (VIII of 1885), s. 41—Revenue Courts, competence of, if can be questioned by Civil Courts—Jurisdiction—Presumption.

Per **Jenkins, C. J.**—The Civil Courts can consider the competence of the Revenue Courts in commutation proceedings, where a suit is brought for recovery of arrears of rent as determined by these proceedings.

Per **N. Chatterjea, J.**—The exercise of jurisdiction by a Revenue Court presupposes that the raiyat is an occupancy raiyat and the rent is payable in kind as indicated in section 40 of the Bengal Tenancy Act. **C. DURGA MOHUN v. SUKUMAR DAS**, 19 C. W. N. 825; 21 C. L. J. 590 **412**

Repealing and Amending Act (X of 1914) 654

Res judicata. See CIVIL PROCEDURE CODE 1908, s. 11.

— Case decided in favour of one party—Decision, adverse, on one point not affecting ultimate favourable decision of case, effect of—Appeal, party not entitled to, effect of.

Where a point in a case is found against a party, but the case is ultimately decided in his favour, and thus he is not entitled to appeal against that decision, the finding on that point does not operate against him as *res judicata* in a subsequent case. **U. P. B. R. JAGAN NATH v. SURAJ BAKSH SINGH**, 2 O. L. J. 385 **502**

Execution—Change in procedure—Sale permitted Subsequent application for execution.

Where an order dismissing a previous application for execution was based on the view that the then existing procedure made it illegal for the decree-holder to claim the relief, that order will not operate as *res judicata* when that procedure is changed, and gives the decree-holder a right to claim that relief. **M. VARADARAJA MUDALI v. MURUGESAM PILLAI**, 18 M. L. T. 313 **707**

Execution proceedings—Two inconsistent orders—Later to prevail against earlier.

A decree for possession of property and costs was passed against several persons. On an application for execution of this decree a compromise was entered into between the decree-holder and some of the judgment-debtors, who had been *pro forma* defendants by which the decree-holder admitted that he had no claim against these judgment-debtors. The decree-holder sold the decree and the transferee applied for execution against these judgment-debtors as well. They objected and it was decided that they were no longer liable. The transferee in another application for execution again joined these judgment-debtors and attached their property. They made an objection but they allowed it to go by default. In another application for execution against them they again made the same objection:

Held, that the later of the two inconsistent decisions in the proceedings must prevail against the earlier and that the objection was barred by the rule of *res judicata*. **A. DAMABAR SINGH v. MUNWAR ALI KHAN**, 13 A. L. J. 764; 37 A. F. 31 **715**

— Fraud—Suit to set aside decree on ground of fraud—Nature of fraud—Perjured evidence—Suit, maintainability of 789

res judicata—concl'd.

—Hindu widow, suit by, to set aside adoption—Suit dismissed on ground of estoppel—No oral evidence taken—Privy Council deciding on merits—Second suit by reversioner, if barred—Civil Procedure Code (Act V of 1908), s. 11.

A Hindu widow sued her alleged adopted son for a declaration that she had not adopted him and even if she had adopted, the adoption was invalid, as she had no authority from her husband. The Court of first instance dismissed the suit finding that the defendant had been adopted and the widow was estopped from questioning the validity of the adoption without trying other issues or recording oral evidence in regard to them. The High Court affirmed the decision. The Privy Council agreed with the High Court as to the factum of adoption but found on a consideration of the documentary evidence that the authority to adopt had been proved. After the widow's death a reversioner sued the defendant for possession on the same grounds as the widow had sued.

Held, per *Banerji* and *Chamier, JJ.*, (*Richards, C. J.*, dissenting) that the previous suit was a bar to the present suit inasmuch as a decree fairly and properly obtained against a widow in possession of her deceased husband's estate is, in the absence of fraud and collusion, binding on the reversionary heirs unless the decree relates to a matter personal to her.

Per *Chamier, J.*—A Court may refuse to summon witnesses or admit evidence, and, when its decision is subsequently relied upon as constituting a question *res judicata*, the Court trying the subsequent case cannot disregard the decision because it thinks that the Court trying the earlier case ought to have summoned the witnesses or admitted further evidence.

Per *Richards, C. J.*—It is very dangerous to place too much reliance on expressions used in giving judgments in other cases where the facts and circumstances were different. A. 13 A. L. J. 694; 37 A. 496

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—Bengal Tenancy Act (VIII of 1885), ss. 102, 104, 106—Bengal Tenancy (Amendment) Act (III of 1898 B. C.), s. 9—Interpretation—Competency of Settlement Officer to decide rent-free title

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—Bengal Tenancy Act (VIII of 1885), s. 106—Order of Settlement Officer in Survey and Record of Rights—Decree—Civil Procedure Code (Act XIV of 1882), s. 13—Bengal Tenancy (Amendment) Act (III of 1898), s. 9, effect of—Claim of rent free—Jurisdiction of Settlement Officer

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—, principle of.

Per *Tyabji, J.*—The doctrine of *res judicata* is based on the principle that neither the Courts nor the parties should be permitted to be harassed by the same question being repeatedly brought up for adjudication. M. BOMMADEVARA SATYANARAYANA V. DASIKA SRIRANULU, (1915) M. W. N. 467; 29 M. L. J. 597

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Regulation (XIX of 1793), s. 6

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Restitution. See CIVIL PROCEDURE CODE, 1908, s. 144.

—High Court, power of, to direct restitution of money withdrawn by decree-holder

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Restitution of conjugal rights. See MARRIAGE.

—, suit for—Motive or delay, if affects suit—Legal cruelty—Presumption—Keeping low caste woman, if sufficient.

In a suit for restitution of conjugal rights, the motive with which a man brings the suit or delay in instituting it has nothing to do with the enforcement of his right, and if there is no legal defence to the suit, it must be decreed.

It is no answer to a suit for restitution of conjugal rights to say that the husband keeps a low caste woman as his concubine, unless actual legal cruelty or reasonable apprehension of it is proved against him.

Legal cruelty will be presumed to exist only when the husband has so conducted himself towards his wife as to render future cohabitation more or less dangerous to her life, or limb or mental or bodily health. M. AMBALATH VEETIL V. VALIYAKATH PATRUMMA, 2 L. W. 894

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Retracted confession. See CONFESSION.

Reversioner. See HINDU LAW.

Review. See CIVIL PROCEDURE CODE, 1908, O. 47, r. 4; JURISDICTION; LETTERS PATENT (CAL.), cl. 26.

—Notice to opposite party, necessity of—“Opposite party,” meaning of—Bench of High Court reviewing order of dismissal—Power of another Bench to consider propriety of order of review—Review, whether re-opens the whole case

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Revision (Civil). See CIVIL PROCEDURE CODE, 1908, s. 115; PROVINCIAL INSOLVENCY ACT, s. 47.

—, application for, maintainability of—Civil Procedure Code (Act V of 1903), O. XLIV, r. 1—Pauper, leave to appeal as, refusal of, when open to revision.

An order of a lower Appellate Court rejecting, under Order XLIV, rule 1, Civil Procedure Code, an application for leave to appeal as a pauper, is not open to revision by the High Court, although the former Court has formed an erroneous opinion regarding the merits of the judgment of the first Court, unless it is shown to have exercised its jurisdiction with some illegality or irregularity. O. AHSAN ALI V. MUHAMMAD JAFAR ALI KHAN, 2 O. L. J. 254

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—Case open to appeal—High Court, power of, to interfere

845

—Finding on merits

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—Presidency Small Cause Court, decision of, if subject to revision by High Court—Jurisdiction—Presidency Small Cause Courts Act (XV of 1882), ss. 19A, 38—Right to apply for new trial, whether in nature of appeal—Order returning plaint for presentation to proper Court—Application for new trial not made—Revision to High Court, if competent

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—Sub-letting from year to year extending over five years, if illegal—Failure to consider applicability of s. 64—Material irregularity—Section 66 considered but not applied, if material irregularity

770

—(Criminal). See CRIMINAL PROCEDURE CODE, s. 435.

Revision (Criminal)—concl'd.

— Criminal cases—Failure to observe prescribed procedure, effect of 432

— Criminal Procedure Code (Act V of 1898), Ch. XII, ss. 145, 5:2—Magistrate's power to dispossess a person and place another in possession 1002

— Dismissal of petition—Another petition on same matter, if can be entertained.

Once a criminal revision petition is dismissed on the merits by a High Court, the rules of equity, justice and good conscience require that no other petition on the same matter should lie. *M. KANA-KASABHAI, In re*, 16 Cr. L. J. 697 745

— High Court, power of 433

— Omission to ask accused if he is an European British Subject—Irregularity 440

Riparian Owner—Presumption of ownership of half bed, whether applicable to *zemindars* 609

Rule of Perpetuity. See *MARUMAKKATTAYAM LAW.*

Rules of Practice of Madras High Court, r. (1) (f) 145

Rule of primogeniture. See *HINDU LAW.*

Rules of the Sind Judicial Commissioner's Court, Appendix VI—Plead-er's fees, power to grant special—Circumstances to be considered for granting such fees.

Where the defendants made the plaintiff's suit a test case in order to decide an important question bearing upon their right of disposal of waste lands and the intricacy of the trial was chiefly due to defendants' ignorance of their own title:

Held, that it was a fit case for granting Plead-er's special fees assessed under clause (g) of Appendix VI of the Rules of the Judicial Commissioner's Court.

A low valuation of his claim by a party is only one of the circumstances which the Court will consider in the exercise of its discretion to grant special fees. *S. KARACHI MUNICIPALITY v. SHANOO LADHA*, 9 S. L. R. 10 19

Sale. See *MORTGAGE; TRANSFER OF PROPERTY ACT*, s. 54.

—, auction, independent of value of bid 68

—, auction, held at time and date other than those proclaimed—Sale, if voidable.

An auction sale held at a time or date other than those proclaimed is not a nullity but is voidable on proof of material injury. *P. SAFFAR ALI v. FAZAL*, 156 P. L. R. 1915; 143 P. W. R. 1915 524

— Purchaser not put in possession—Suit for recovery of purchase-money—Limitation Act (IX of 1908), Sch. I, Arts. 62, 97, 116.

The plaintiffs purchased certain property on 17th November 1905 and got mutation of names effected in their favour on 7th February 1906. The sale-deed contained a recital that the vendor had placed the purchasers in possession and if the purchasers were disturbed or dispossessed by any person proving himself to be entitled to the property, they would be entitled to recover from the vendor the price paid by them for the property. But the purchasers did not obtain possession in fact of the property. In 1907, certain persons brought a suit against the vendor and the purchasers to have the

Sale—concl'd.

sale set aside and obtained a decree which was finally upheld by the High Court on 28th May 1906. The plaintiffs instituted the present suit for the recovery of the purchase-money on 18th of April 1911:

Held, that the suit was not governed by Article 116 of Schedule I of the Limitation Act 1908 but was governed either by Article 62 or Article 97 of the Act, and was barred by time. *A. JANAK SINGH v. WALIDAH KHAN*, 13 A. L. J. 669 410

Sanction to prosecute. See *CRIMINAL PROCEDURE CODE*, s. 195.

Second Appeal. See *APPEAL.*

Security for good behaviour. See *CRIMINAL PROCEDURE CODE*, s. 110.

Service grant—*Jirayati land in occupation of grantee Grant in shape of reduction of list—Resumption, meaning of—Eviction from land—Burden of proof.*

Where subsequent to the Permanent Settlement the occupants of certain *jirayati* lands were granted by the *zemindar* a *damilla inam* for personal service in the shape of a reduction of the *list* which they were liable to pay but for such grant:

Held, on *zemindar's* suit for resumption of the service *inam* lands,

(1) that the onus lay on the plaintiff to show that he had a right to evict the occupants;

(2) that though the plaintiff had a right to resume the grant, he was not entitled to evict the occupants from the lands, inasmuch as resumption did not imply dispossession from the lands but meant only a taking back of that which was once given. *M. IDUBILLY SIYYADI GARU v. VISWESWARA NISSANKA*, 18 M. L. T. 142 416

Sessions Court, power of. See *CRIMINAL PROCEDURE CODE*, s. 193 (1).

Shamilat—Sale of *khevat* land, whether includes *shamilat*—Intention of parties.

It is a question of the intention of the parties as to whether a sale of the *khevat* lands includes the *shamilat* pertaining to the lands, a determination of which depends upon the facts and circumstances of each particular case.

Where the ancestor of the plaintiffs in 1862 sold to the ancestors of the defendants his entire well with all the culturable and unculturable land attached to it, this being the only property he owned, and after selling it he migrated to and settled in another district, and the *shamilat* of the village being partitioned in 1905, the plaintiffs sued the representatives-in-interest of the vendees to recover that area:

Held, that the vendor having severed all his connection with his original village and having taken no interest during all these long years in the *shamilat* area, it was evident that he meant to transfer all the rights he possessed in the village to the vendees and that both the parties to the transaction intended at that time that the vendees should step into the shoes of the vendor. *P. SHAHAMAD v. IBRAHIM*, 57 P. R. 1915; 134 P. W. R. 1915 100

Shinbyu gifts, validity of. See *BUDDHIST LAW.*

er, liability of—"At shipper's risk with reason of carrying on deck" in the Bill of Lading, meaning of.

Apart from the general law which imposes on a carrier by sea the duty of carrying goods under decks, except in the case of 'express contract or custom to the contrary, the meaning of the clause "at shipper's risk without option of carrying on deck" is clearly in favour of the ship-owner and he is exempted from liability for damages caused to the goods by want of ventilation, by the terms of the clause "at shipper's risk" though he did not exercise the option of carrying the goods on deck. **L. B. BRITISH INDIA STEAM NAVIGATION CO., LTD. v. JIAWOOLA** 939

Sind Encumbered Estates Act (XX of 1896), ss. 7, 8, 9—*Suit on mortgage—Mortgagor getting protection order under s. 9, effect of.*

Section 9 (1) of the Sind Encumbered Estates Act is not limited to proceedings pending, or decrees asked for, against the debtor, but extends to all proceedings pending at the time an order of management is published under section 7 in respect of the debts and liabilities mentioned in section 8. Consequently a suit in respect of a mortgage-debt against such a debtor must be stayed, even though no personal relief is claimed against him on account of his insolvency. **S. PINIAL SHAH v. ABDULLA**, 9 S. L. R. 48 25

ss. 8, 9 25

Specific performance—*Agreement to sell land—Time named in agreement not adhered to, effect of—Time when essence of contract—Notice by one party to the other—Contract Act (IX of 1872), s. 55—Laches—Limitation—Specific Relief Act (I of 1877) not applicable—Rules of justice, equity and good conscience should apply.*

Where the Specific Relief Act does not apply a suit for the specific performance of the agreement to sell land is governed by the ordinary rules of justice, equity and good conscience.

Time is not of the essence of a contract, until the parties expressly make it so.

Where in an agreement to sell some time is named, it is not until one side or the other gives the opposite party reasonable notice to complete the agreement within a definite time that the opposite party can be tied down to the time so prescribed.

A suit for specific performance should succeed if no laches is found on the part of the plaintiff and his suit is within limitation. **C. JANARDAN MAHTO v. BHAIKAB CHANDRA MONDAL** 365

Specific Relief Act (I of 1877), s.

s. 23 365
785

Statute, construction of 94, 603

—, interpretation of. See INTERPRETATION OF STATUTE.

—, interpretation of 51

Succession. See AGRA TENANCY ACT, s. 22; CUSTOM; HINDU LAW.

Succession Act (X of 1865), s. 50—

Will, validity of—Attestation clause wanting, effect of.

A document put forward as a Will, and containing no attestation clause, is not a valid Will duly executed in accordance with the provisions of section 50 of the Succession Act. **O. BURTON v. JACOBSON**, 2 O. L. J. 193 263

ss. 82, 121 868

s. 137—*Unprobated Will, if*

defendant can rely upon—Bequest of property by Hindu father to son—Character of property taken by son—Ancestral or self-acquired—Suit for partition on behalf of minor—Proof of malversation not necessary.

A Will though not probated may be used by a defendant in order to contest the plaintiff's suit.

Where a Hindu father makes a bequest of his property to his son, in coming to a conclusion whether the property is taken absolutely or with the incidents of ancestral property, the terms of the Will have to be ascertained as indicating the intention of the testator and if there are no words indicating a contrary intention, the natural inference is that the father intended his son to take the property as ancestral property.

A minor member of an undivided Hindu family can file a suit for partition if there are circumstances which show that it would be for his interest to separate his share, and it is not necessary to prove malversation on the part of the adult members.

Where a Hindu father sets up a hostile title and denies the rights of his minor sons to any share of the joint family properties and is living apart from his wife with a concubine, it is the duty of the Court to safeguard the interests of the minor sons by declaring their rights and giving effect to such a declaration. **M. SHADAGOPA NAIDU v. THIRUMALASWAMI NAIDU**, 18 M. L. T. 129 272

Succession certificate not produced in Court of first instance—Certificate necessary—Admission of certificate by Appellate Court—Conditions.

A party who fails to produce the necessary succession certificate in the Court of first instance, should be permitted to do so by an Appellate Court on payment of costs for non-production of the certificate in the Court of first instance. **C. MURALIDHAR ROY v. MOHINI MOHAN KOR**, 19 C. W. N. 794n. 510

Suit for declaration—Correction of rent entry in Settlement Record—Rent payable by defendants varying according to their castes and occupations—Power of Revenue Officer in revision to direct payment of Court-fee—Bengal Tenancy Act (VII of 1885), ss. 105, 105A, 106, 107, 108 862

Summary trial—Conviction, reasons for, what to show 1001

Summons, service of. See CIVIL PROCEDURE CODE, 1908, O. V.

Supreme Court Rules, O. XL, rr. 15 (a) to 27 303

Surety—Security-money, when legally payable to judgment-creditor Notice to surety.

Without a finding that the conditions of a surety bond were not complied with and without a finding that notice was duly served upon the surety calling

Surety—conold.

upon him to show cause why his security amount should not be utilised for payment to the judgment-creditor, a Court is not entitled to pay the surety's money to the judgment-creditor. **M. KRISHNASWAMI AIYAR V. RANGASWAMI NAYADU** 517

———, *liability of Surety, if discharged by creditor's giving time to principal debtor—Contract Act (IX of 1872), s. 135.*

Where, in respect of a debt which bore no interest, the creditor gave three months' time for its payment in consideration of the principal debtor promising to pay him interest at 12 per cent. per annum in case of her failure to pay up at the end of three months:

Held, that the surety was discharged from his liability on account of the agreement to give further time. **L. B. MAUNG PO LU V. BEGBIE & Co., 8 BUR. L. T. 114** 637

Surrender. See **BENGAL TENANCY ACT, s. 86 (6).**

Tavazhi. See **MARUMAKKATTAYAM LAW.**

Thak map, entry in, 60 years old, admissible in evidence 53

Trade mark—Proof of actual deception of any person, if necessary—Misdescription of place of manufacture, effect of.

In cases of infringement of trade marks it is not necessary for the plaintiff to show that defendant's colorable imitation of plaintiff's mark did actually deceive any person or persons.

Where it is clear from the evidence that traders in rose water used the words 'Ghazipoor Rose Water' as descriptive merely of a good kind of such water just as the word 'Cologne' is used for a particular kind of scent, though not necessarily manufactured at Cologne:

Held, that people buying such goods do not set any particular store upon their coming from the particular places to which they are ascribed and that such misdescription not being calculated to deceive any one does not disentitle the plaintiff to the relief which he might otherwise have obtained. **L. B. BALLADIN ALLA DIN V. PURANMAL BALBEHARI LALL, 8 BUR. L. T. 113** 633

Transfer—Ex-proprietary holding exchanged for house—Illegal transaction—Suit for recovery of possession of house, if maintainable.

An exchange of a house for the ex-proprietary right of a holding is an illegal transaction and the owner of the house is not entitled to maintain a suit for recovery of possession of the house. **A. LACHMAN DAS V. MUHAMMAD YUSUF KHAN, 13 A. L. J. 783** 192

——— Minor, sale to, validity of 200

Transfer of Criminal case. See **CRIMINAL PROCEDURE CODE, s. 523.**

Transfer of Property Act (IV of 1882), s. 43 889

——— s. 50 569

——— s. 51 853

——— ss. 52, 53 238

Transfer of Property Act—contd.

ss. 54, 55 (6) (b),

113—*Exchange of land of value over one hundred rupees, how created—Registration, if necessary—Estoppel, if created against Statute Law—Exchange, if charge created in a transaction of.*

A transfer of property by way of exchange can be made only by a registered instrument under sections 118 and 54 of the Transfer of Property Act if the value of the property is Rs. 100 or upwards.

No estoppel can be pleaded against the directions and prohibitions enacted by the Statute Law and against the rights accruing to any party by reason of such directions and prohibitions.

As in a transaction of exchange no question of money or purchase-money is involved, the charge created for purchase-money under section 55, clause (6) b, of the Transfer of Property Act, cannot arise in such a transaction. **M. CHIDAMBARA CHETTIAR V. VAIDILINGA PADAYACHI, 38 M. 519** 408

ss. 54, 113—*Exchange*

—*"Thing," meaning of—Equity of redemption—Pre-emption—Transferee's intention, effect of—"Price," meaning of.*

The word "thing" as used in the definition of "exchange" in section 113 of the Transfer of Property Act, does not include tangible things only, but intangible things as well, such as the equity of redemption.

No right of pre-emption can be exercised in a case where the mortgagee in order to avoid pre-emption gets the equity of redemption by way of exchange and not by way of sale.

Where certain rights in land are given in lieu of a right of equity of redemption, neither of them is a "price" for the other within the meaning of section 54 of the Transfer of Property Act. **O. LACHMAN PRASAD V. FIDA HUSSAIN, 2 O. L. J. 220; 18 O. C. 109** 232

s. 54—*Sale—Consideration postponed, effect of—Public policy.*

In a sale-deed there was a stipulation that the price should be paid within one year provided that possession was obtained within that time, that if possession was not so obtained, then the payment of the price should be postponed, and further that in the event of the vendee not getting the property the price should not be paid at all:

Held, that the deed was a sale-deed within the meaning of section 54, Transfer of Property Act.

There is nothing contrary to public policy in providing that the payment of the consideration should be postponed in certain events and that it should not be paid at all in the event of the property being lost. **A. KAULESHAR PRASAD MISRA V. ABADI BIBI** 512

s. 54—*Sale by unregis-*

tered document followed up by delivery of possession—Subsequent vendee under registered sale-deed—Notice of prior sale—Priority—Registration Act (XVI of 1908), s. 50.

Mere delivery of possession in pursuance of an unregistered deed of sale will be effective to pass title to the vendee but such delivery must be with the consent, express or implied, of the seller, and in connection with and to give effect to the contract of sale,

Transfer of Property Act—contd.

to give such sale priority (where the competition is between the purchaser and a subsequent vendee claiming under a registered document) it is essential that the subsequent vendee should at the time of his sale have notice of the prior unregistered sale-deed and possession thereunder.

Per *Tyabji, J.*—In the case of immoveable property of less than Rs. 100 in value, an oral transfer (without any document) but followed by delivery of possession confers on the transferee an indefeasible title to the interest transferred.

A sale or mortgage by a written but unregistered instrument, if followed by delivery of the property, transfers the ownership of or an interest in the property but the title so created is liable to be defeated by the vendor subsequently selling or mortgaging the same property by a registered instrument.

The right of an unregistered transferee is not defeated by a registered transferee who had notice of the prior unregistered transfer. *M. AMMANI v. JAGANNATHA REDDI*, (1915) M. W. N. 442; 18 M. L. T. 103

_____	s. 55 (1) (c)	994
_____	s. 55 (6) (b)	408
_____	s. 58	569

_____ **s. 59**—*Mortgage executed by pardanashin ladies—Attestation—Witnesses identifying ladies by their voices—Mortgage—Priority—Priority claimed but not insisted upon in appeal, effect of—Estoppel.*

A mortgage, the amount secured by which exceeded Rs. 100, was executed by two *pardanashin* ladies. The ladies did not appear before the two attesting witnesses and, consequently, their faces were not seen by the witnesses. However, the witnesses were well acquainted with the voices of the ladies and recognised and identified them, at the time when the mortgage-deed was executed, by their voices:

Held, that the mortgage-deed was duly attested by the two witnesses within the meaning of section 59 of the Transfer of Property Act.

In 1887 the two villages A and B were mortgaged to S. In February 1892 the village A alone was mortgaged to L. In June 1892 the villages A and B were again mortgaged to S with three more villages. In 1893 the village A alone was further mortgaged to L, who in 1896 sued on his both mortgages making S a defendant to his suit. In his written statement S distinctly claimed priority in respect of his mortgage of 1887. But under an erroneous decree, against which S did not appeal, the village A was sold, the proceeds of the sale were applied first in payment to L in respect of his mortgage of February 1892, and the balance was paid to S, though it was insufficient to satisfy the mortgage of 1887. As L's mortgage of 1893 remained entirely unsatisfied, L obtained a decree, under section 90 of the Transfer of Property Act, in execution whereof the village B was sold and was purchased by P in 1904. In defence to a suit by S it was contended by P, that as S did not, by an appeal against the first decree of L, insist on his priority under the mortgage of 1887, the village B was relieved of all liability in respect of that mortgage.

Transfer of Property Act—contd.

Held, (overruling L's contention) that the fact that S did not insist on his priority did not affect his claim against the village B. *P. C. PADARATH HALWAI v. RAM NARAIN UPADHIA*, 13 A. L. J. 809; 19 C. W. N. 991; 17 Bom. L. R. 617; 18 M. L. T. 85; 2 L. W. 639; 29 M. L. J. 159; 22 C. L. J. 165; 37 A. 474 **366**

_____	s. 60	526, 569
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_____	s. 72 —Improvements on mortgaged property, making of, mortgagee how far entitled to	234
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_____	s. 83 —Amount due on mortgage, meaning of—Deposit of amount found due, effect of—Redemption piecemeal, if permitted.	
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The words "amount remaining due on the mortgage" in section 83 of the Transfer of Property Act mean the amount which a Court finds as due, and not the whole amount stipulated for payment under the terms of the mortgage document.

Where, therefore, a mortgage-bond provides for payment of a higher rate of interest on default, the deposit of the amount found by the Court to be due under the mortgage is sufficient to entitle the mortgagor to the benefit of section 83 of the Transfer of Property Act.

A mortgagee is not bound to be redeemed piecemeal. *M. AYYAKUTTI MANKONDAN v. PERIYASAMI KAYANDAN*, 2 L. W. 585; 18 M. L. T. 161 **497**

_____	ss. 83, 84 —Deposit—Application dismissed before notice to mortgagees—Withdrawal of application—Interest, if ceases to run.	
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A deposit under section 83 of the Transfer of Property Act and the subsequent dismissal of the application before service of notice on the mortgagee, is in effect no tender even if the money remains in Court. The dismissal of the application is tantamount to a withdrawal of the money and interest does not cease to run under section 84 of the Transfer of Property Act. *M. BULUSU VENKATESWARUDU v. NIMUS-HAKAVI BALA TRIPURASUNDARI* **769**

_____	s. 88	569
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_____	s. 90	792
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_____	s. 91	389
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_____	s. 98	569
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_____	s. 98 —Anomalous mortgage—Mortgages, simple and usufructuary, combination of—Redemption, right of—Possession, mortgagee's claim for.	
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Under the terms of a mortgage-deed, if the interest for four six-monthly instalments was not paid in full or if the entire amount due on the mortgage was not satisfied on a certain specified date, the mortgagee was to be given possession over the mortgaged property for a certain fixed term and redemption was not to take place until the mortgagee had remained in possession for that term. The mortgagor having occasionally paid something towards interest, but not having satisfied the entire amount on the specified date as agreed upon, the mortgagee brought a suit for possession of the mortgaged property. The mortgagor contended that the mortgage was not an anomalous mortgage and that

Transfer of Property Act—concl'd.

the suit for possession was, therefore, not maintainable; that under the terms of the deed the only remedy open to the mortgagee was to sue for the amount due to date under the terms of the mortgage, and that a decree should be passed awarding possession in lieu of the payment of the amount due by the mortgagor within the specified time:

Held, that the mortgage was not an anomalous mortgage as defined in section 98 of the Transfer of Property Act, but was a combination of a simple and a usufructuary mortgage, so that the rights and liabilities of the parties were not to be determined by their contract as evidenced in the mortgage-deed.

Held, further, that the mortgagor could not obtain a right of redemption, which would have the effect of defeating the mortgagee's claim for possession, by obtaining a decree stating the amount which would have to be paid as a condition precedent to redemption, inasmuch as he had legally no right to redeem otherwise than what he had agreed upon under the terms of the mortgage-deed.

Held, lastly, that the decree for possession would not affect any right of redemption exercised in the manner provided by law before the delivery of possession. **O. MUHAMMAD SHER KHAN V. SWAMI DAYAL**, 2 O. L. J. 372; 18 O. C. 105 **377**

————— **s. 99 707, 958**

————— **s. 101 878**

————— **s. 106—Ejectment—Notice**

to quit—Calculation of time—Calendar year—Contract.

Where rent is made payable in instalments on certain specified dates which are the last days of months of the Bengali year, there is no room for doubt or controversy that the parties intended that the tenancy would be regulated according to the Bengali year.

The six months' notice to quit required by the provisions of the Transfer of Property Act, will be calculated according to the Bengali Calendar, expiring with the end of a year of the tenancy which terminates with the Bengali year. **C. RAJ BEHARI NATH V. KAILAS CHANDRA DUTT**, 22 C. L. J. 78 **857**

————— **ss. 109, 111 (c)**

753

————— **s. 118 232, 408**

————— **ss. 124, 126 878**

————— **ss. 130, 131 Action-**

able claim—Transfer—Notice.

Though there be a valid transfer of a debt between its transferor and transferee, the person bound to pay the debt is not bound by the transfer unless he receives an express notice in writing conforming to the provisions of section 131 of the Transfer of Property Act from the transferor, or, if the transferor refuses to sign the notice, from the transferee stating the name and address of the transferee.

The notice must be given to the person concerned or to his agent authorised to receive such notices. **L. B. BASANT SINGH V. BURMA RAILWAYS, Co., Ltd.** **278**

————— **s. 131 278**

Trees, transaction regarding—Transfer, —Moveable or immoveable property—Timber, —Registration Act (XVI of 1908), s. 2 (6) and .

Where there is a transaction regarding trees in connection with which an instrument of transfer has been executed, the character of the transaction has to be looked at in order to determine whether the trees referred to are moveable or immoveable property.

Thus, where a *nim* tree is mortgaged without any intention of its being severed from the land and used as timber, as a result of the mortgage the tree is an immoveable, and not a moveable, property as defined by the Registration Act. **O. MUHAMMAD AHMAD SHAH V. MUHAMMAD TAQI**, 2 O. L. J. 283 **281**

Trust, creation of **878**

Gift for charitable purpose—Construction of document—Cypres doctrine of, when applicable.

If a gift is for a charitable purpose the question is, is the testator's intention to promote some specific and well-defined purpose and that only, or is there a general charitable intention, which the testator wishes to carry out in a particular way, in which latter case the Court will give effect to his wishes *cypres*.

A deed creating a charity and providing for its conduct by competent members of the family is void for uncertainty as it is difficult to ascertain who are the competent members.

An Indian Christian executed two deeds of trust under the first of which he gave certain property to a *chattaram* which he recited as having been built by himself. The *chattaram* was in fact never built, and the property was, with the acquiescence of the settlor, applied to a purpose quite different to that of the trust. In a suit by the plaintiffs claiming as trustees under the deed for recovery of the property, the subject of the trust:

Held, that the purpose of the trust failed as the *chattaram* did not come into existence, and as no general charitable intention could be gathered from the deeds, the doctrine of *cypres* did not apply. **MR. DORAISAWMY PILLAI V. SANDANATHAMMAL**, 2 L. W. 577; (1915) M. W. N. 478 **225**

————— *Trustees, majority of, power of—Document intended to be signed by all trustees—Signature by some only, effect of—Trusts Act (II of 1882), s. 42—“Any trustees or trustee,” meaning of.*

The majority of a body of charitable trustees can legally bind the whole body.

Where a document is drawn up in the name of all the trustees and if it is the intention of the parties that all should execute it, it will be incomplete and inoperative till all have done so.

Where it was intended at first that all the trustees should join in the execution of a deed but where it was found impossible after the lapse of a month to obtain the consent of one of the trustees and the obligee of the bond paid the money without his signature:

Held, that the intention of the parties was to hold the parties bound by the obligation notwithstanding the refusal of one trustee to sign the deed.

The words “any trustee or trustees” in section 42 of the Trusts Act (II of 1882) mean the “trustee where there is only one, the trustees where there are more” and, therefore, a few only of the trustees without any authority to themselves cannot validly discharge

—conold.

third parties from payment of rent due by them to the trust. **M. ULLATTIL KALATHIL NETHIRI MENON v. MULLAPULLI GOPALAN NAIR**, 2 L. W. 714; 29 M. L. J. 291; (1915) M. W. N. 586; 15 M. L. T. 220

713

Trusts Act (II of 1882), s. 42 713

Trustee of temple—Money borrowed on promissory note—Co-trustee not consulted—Personal liability.

Where the trustee of a temple borrows on a promissory note money for the benefit of the temple without consulting his co-trustees, he makes himself personally liable. **M. THIRUVENGADASWAMI IYENGAR v. VEERA PILLAI** 778

Under-proprietor, rights of, not affected by execution of fresh qabuliat at enhanced rent—Kabuliat at enhanced rent, fresh, execution of, effect of—Enhanced rent, agreement to pay, effect of.

The mere fact that an under-proprietor executes a kabuliat agreeing to pay an enhanced rent does not affect his under-proprietary rights. **U. P. B. R. GANGA DIN SHUKUL v. KRISHNA PRASAD SINGH**, 2 O. L. J. 367 387

Under-proprietary rights, claim for—Settlement decree for dahyak—Possession of land not owing to decree for dahyak, effect of—Dahyak, right to, whether confers under-proprietary right in land—Cause of action—Declaration that defendant is not under-proprietor, suit for—Adverse possession—Lessee—Tenancy, class of, determination of—Jurisdiction of Civil and Revenue Courts.

Where a Settlement Court does not pass a decree for under-proprietary rights or for sub-settlement but merely for dahyak rights, and the decree-holder's continued possession of land is not by virtue of that decree, he has no right to possession of land as distinguished from the right to dahyak decreed to him.

Where the plaintiffs in a suit to contest a notice of ejectment claim to be under-proprietors of the land, and the notice is cancelled by the Revenue Court on the finding that they have greater rights than those of a mere tenant, such decision of the Revenue Court affords a good cause of action to the landlord to go to the Civil Court for a declaration that the plaintiffs do not possess any under-proprietary rights.

A lessee cannot set up under-proprietary rights by adverse possession.

The determination of the class of tenancy to which a tenant belongs, is exclusively cognizable by the Revenue Courts. **O. RAM ASRE v. MUHAMMAD ABUL HASAN KHAN**, 2 O. L. J. 241 218

— Nankar, cash.

The fact that certain persons are entitled to a cash nankar, does not mean that they possess an under-proprietary right in any land in the village. **U. P. B. R. Sri RAM KUAR v. HANOMAN SINGH**, 2 O. L. J. 359 373

—, prima facie proof of—Naqsha tasfia lagan, entry in, weight of—Shankalapdar haq adna, heading of, name appearing under, effect of—Rent of under-proprietary holding, slight change in, effect of.

Under-proprietary rights—conold.

An entry in a naqsha tasfia lagan giving a person's name under the heading 'shankalapdar haq adna', is a sufficient prima facie proof of a shankalap under-proprietary right.

The mere fact that there has been a slight change in the rent of certain of the plots held by an under-proprietor, does not affect his under-proprietary rights. **U. P. B. R. LOTAN GOSHAIN v. AJODHYA ESTATE**, 2 O. L. J. 353 425

U. P. Court of Wards Act (III of 1899)

—Personal decree against ward, effect of—Execution—Collector, substitution of, in place of ward.

A ward personally is in the eye of law no body for the purposes of suits brought by or against him and, therefore, a personal decree obtained against him and not against any legal personality representing him is a nullity.

Such a decree cannot be executed by substituting the Collector for the ward. **O. SANKATA PARSHAD v. DEPUTY COMMISSIONER OF KHERI**, 18 O. C. 145 768

ss. 16, 18, 20, applicability of—Mortgagee not notifying his mortgage—Suit on mortgage, if maintainable—Mortgage, if admissible in evidence—Interest after date of notification, if allowable.

Section 20 of the U. P. Court of Wards Act, 1899, applies only to the case of persons who have notified their claims under the provisions of section 16 of the Act but have failed to produce their documents.

Therefore, a mortgagee, who did not notify his claim under section 16 of the U. P. Court of Wards Act, 1899, is entitled to maintain a suit on his mortgage and his mortgage is admissible in evidence, but he will not be allowed interest under section 18 of the Act. **A. ASHRAF ALI v. KALYAN DAS**, 13 A. L. J. 796; 37 A. 585 945

ss. 18, 20 945

U. P. Excise Act (IV of 1910), ss. 60, 70—Magistrate taking cognizance of case on report of Police Officer—Jurisdiction.

Police Officers, being invested with powers under section 10 of the U. P. Excise Act, are Excise Officers and a Magistrate can take cognizance of an offence under section 60 of the United Provinces Excise Act, 1910, on the report of a Police Officer in charge of a Police Station. **A. PRAG v. EMPEROR**, 16 Cr. L. J. 591 143

s. 70 143

U. P. Land Revenue Act (III of 1901), s. 33 (i) 207

s. 233 209

s. 233 (k)—Partition

—Mistake in distribution of plot, correction of—Suit in Civil Court, whether maintainable—Jurisdiction.

Where there has been a partition of a certain mahal by a Revenue Court, resulting in a certain distribution of the lands of that mahal, if any error has been made in connection with this distribution to the prejudice of a particular co-sharer, the remedy of the latter is by way of application to the Revenue Court to correct its own mistake and not a suit in the Civil Court. **A. DALJIT SINGH v. SHAMBHU SINGH**, 13 A. L. J. 779 189

Valuation—Court-fees—Certain valuation arrived at by Court of first instance—Appeal not to be entertained without payment of Court-fee on that valuation—Civil Procedure Code (Act V of 1908), O. VI, r. 17, O. XLI, r. 33—Amendment of plaint by Appellate Court—No amendment should be allowed to the prejudice of defendant.

A Court of Appeal should not entertain an appeal without its being stamped with a Court-fee calculated upon the valuation arrived at by the subordinate Court.

Order XLI, rule 33, is subject to the general principle that no order for amendment of a plaint should be passed where it would deprive a party of a substantial right or privilege or otherwise prejudice a party.

Where but for an amendment a plaintiff's suit should fail and a fresh suit would be barred, the defendant acquires a substantial right and it would be unfair at an appellate stage to order an amendment of the plaint and deprive him of that right. **C. SURENDRA NABAIN SINHA V. HAFIJUR RAHMAN** 379

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Wajib-ul-arz. See CUSTOM.

—, entry in, as proof of custom recorded therein 503

—, entry in, weight of—Attestation by *asamis* and not by *muafidars*, effect of—Local custom—Land held rent-free at pleasure of grantor—Resumption.

A mere entry in a *wajib-ul-arz*, attested by the *asamis* but not by the *muafidars* of the village, that the land is held rent-free by local custom at the pleasure of the grantor, does not, in the absence of any other evidence to that effect, establish the said custom. **U. P. B. R. GANESH PRASAD V. SHEO DATAL**, 2 O. L. J. 370 392

Wakf. See MUHAMMADAN LAW.

Wakf property—Partition proceedings, binding effect of 240

Water-cess. See MADRAS IRRIGATION CESS ACT

— Pre-Settlement *inam*—Collection of water rate by zemindar on behalf of Government—Wrongful exclusion of plaintiff's land from *mamool wet*—Res judicata, principle of—Contract Act (IX of 1872), s. 70.

Where the plaintiffs sued for a declaration in respect of a pre-Settlement *inam* that they were not liable to pay any water cess on the lands in their occupation and for recovering back the water cess levied from them at a penal rate on account of incorrect information given to the Government by the zemindar who made the collection of the water rate on behalf of the Government:

Held, (1) that there was no cause of action against the zemindar on the ground that he was bound to include the plaintiff's land in the area allowed to him water free and that the plaintiffs could not make him liable for any excess rate they had to pay;

Water-cess—conclld.

(2) that in order to get the benefit of section 70 of the Contract Act, the plaintiffs should prove the extent of the benefit derived by the zemindar.

Per Tyabji, J.—The doctrine of *res judicata* is based on the principle that neither the Courts nor the parties should be permitted to be harassed by the same question being repeatedly brought up for adjudication. **M. BOMMADEVARA SATYANARAYANA V. DASIKA SRIRANULU**, (1915) M. W. N. 457; 29 M. L. J. 597 178

Widow. See HINDU LAW.

Widow's estate. See HINDU LAW.

Will. See HINDU LAW.

— Evidence—Intention of testator—Proof—Oral evidence, admissibility of—Amendment of plaint.

Oral evidence of a testator's intention is inadmissible but oral evidence is admissible to prove the surrounding circumstances of the testator and the beneficiaries.

A plaint cannot be allowed to be so amended as to set up a totally different title and cause of action. **M. GADIGEREMULA SUNKI REDDI V. VENGAL REDDI** 391

— Life-estate to son's wife—Gift over to daughters—Death of one daughter—Another daughter born—Construction of Will—Surviving daughter, rights of, to vested remainder.

A testator bequeathed his property in the following words: "If I die, then my son's wife Bai Ganga is the owner of the above-mentioned immoveable and moveable properties.....The said Ganga shall during her life-time spend and use and enjoy out of my property and as to whatever property may have remained over after her decease, her two daughters are the owners thereof." He also stated that his son's conduct not being good he gave him no authority in that Will and made no provision for him. At the date of the Will the testator had two grand-daughters by Ganga one of whom predeceased him but before his death another was born and survived him:

Held (1) that the testator excluded his son from participation in the property dealt with by the Will;

(2) that the son's wife took for life with a power of disposition in her life-time but not by Will;

(3) that the survivor of the son's daughters named in the Will took a vested interest in the whole residue which was both heritable and transferable. **B. MAFATLAL MOTILAL V. KANIALAL TRIKAM-LAL**, 17 Bom. L. R. 705 915

—, Probate of—Creditor, locus standi of, to come in Probate proceeding.

A died on 17th January 1892, leaving a Will dated 28th December 1887. By that Will he left his property to his wife, B, for life, and after her death to his daughter-in-law C, for her life, and after her death the male children that should be born to his son, D, were, on attaining majority, to get the property in absolute right. No executor was definitely appointed by the Will, but the testator gave equal power to his wife and to his daughter-in-law and directed that, in case of death of one of them, the survivor of the two should continue to be in enjoy

III—conold.

ment and possession in the manner stated above. *B* obtained Probate of the Will on 17th May 1894, and retained possession of the property during her life. She died on 11th June 1904. The appellant had obtained a mortgage dated 29th May 1904 and a bond dated 24th November 1905 against *D* and applied to be made a party to the proceedings:

Held, that the appellant had no *locus standi* to come in, as it was only in the event of a Will being put forward possibly to defraud creditors that a creditor would have *locus standi* to come in in Probate proceedings. *C. AKSHAY KUMARI BASU v. PROSONNO KUMARI GHOSH* 538

— Unprobated Will, if defendant can rely upon—
Bequest of property by Hindu father to son—Character of property taken by son—Ancestral or self-acquired—Suit for partition on behalf of minor—Proof of malversation not necessary 272

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Woman, estate of. See HINDU LAW.

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Workman's Breach of Contract Act (XIII of 1859)—Bandsman, if workman.

A musician in a band is not an artificer or labourer and is, therefore, not a workman within the meaning of Act XIII of 1859. *M. ROSARIO QUADROS, In re*, 38 M. 551; 16 Cr. L. J. 629 453

Written statement of co-defendant, admission made in, whether admissible in evidence against another defendant—Ex parte decree—Restoration of suit—Order, if can be questioned in appeal from final decree.

A statement made by a defendant in his written statement is not admissible in evidence against his co-defendant.

An order setting aside an *ex parte* decree is not appealable and as such it cannot be questioned in appeal from the final decree passed after restoration. *A. PURAN MAL v. TARIF*, 13 A. L. J. 1089 2